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 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 RS (EMC)

**DEFENDANT'S OPPOSITION TO  
 PLAINTIFFS' MOTION TO COMPEL**

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

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**OTHER AUTHORITIES**

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1 **I. INTRODUCTION**

2 In the guise of a “motion to compel” responses from defendant Sony Computer  
3 Entertainment America LLC (“SCEA”) to their First Set Requests for Production of Documents  
4 (“RFPs”), plaintiffs Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker, and Elton  
5 Stovell (the “Class Representatives”) ask the Court to enter the following orders: (1) that a non-  
6 party Japanese corporation – Sony Computer Entertainment Inc. (“SCEI”) – produce documents  
7 responsive to the RFPs because it designed the PlayStation®3 console (the “PS3”) and was  
8 previously the corporate parent of SCEA; (2) that this District’s “standard” model protective  
9 order should be entered by this Court, rather than its “Stipulated Protective Order For Litigation  
10 Involving Patents, Highly Sensitive Confidential Information And/Or Trade Secrets” model order  
11 as proposed by SCEA; and (3) that SCEA produce all documents it has “withheld as confidential”  
12 not more than ten days following this Court’s order.

13 The Class Representatives’ Motion should be denied on each of these three issues. They  
14 have failed to carry their burden to show that SCEA has the requisite control over documents in  
15 SCEI’s possession to warrant an order requiring that SCEI produce the documents sought by the  
16 Class Representatives. Their request for entry of the Court’s “standard” model protective order  
17 ignores completely the highly sensitive, trade secret and potential patent implications of the  
18 documents they demand or that SCEA may offer in its defense. Finally, their request for  
19 production ten days after this Court’s order of documents “withheld as confidential” fails because  
20 the Class Representatives never informed SCEA of their intent to seek such immediate production  
21 in the course of their meet and confer obligations and the request flies in the face of the ongoing  
22 negotiations between the parties regarding electronic document production parameters.

23 On these bases, SCEA respectfully requests that the Court enter an order denying Class  
24 Representatives’ Motion to Compel.<sup>1</sup>

25  
26 <sup>1</sup> The present motion is part of a complex discovery dispute between the parties, which they  
27 agreed would be subject to a stipulated briefing and hearing schedule. In the interests of  
28 efficiency and economy, SCEA references, without repeating, the factual background and the  
recitation of the legal standard set forth in its Motion to Compel, filed on December 15, 2010.  
SCEA’s Motion to Compel (Docket #116), 3:2-9:2.



1 **II. CLASS REPRESENTATIVES HAVE FAILED TO SHOW THAT SCEA**  
2 **CONTROLS DOCUMENTS POSSESSED BY SCEI**

3 **A. Class Representatives Misstate The Factual Background**

4 This dispute regarding SCEA's production of SCEI's documents commenced with Class  
5 Representatives' document demands. Class Representatives demanded that SCEA produce  
6 responsive documents in its control as well as in the control of many of its affiliated entities,  
7 including its "parent" company which Class Representatives contended was SCEI.<sup>2</sup> SCEA  
8 responded, however, that it would only produce documents in its possession, custody, and  
9 control.<sup>3</sup>

10 SCEA has not globally declined to respond to RFPs on the basis that all possible  
11 responsive documents are possessed by SCEI, as Class Representatives assert in their Motion. To  
12 the contrary, SCEA has repeatedly confirmed that it will produce documents responsive to the  
13 RFPs in its possession, custody, or control, including any documents it received from SCEI.<sup>4</sup>  
14 SCEA appropriately objected to Class Representatives' efforts to impose on it the obligation to  
15 obtain and produce documents beyond its control, *i.e.*, SCEI documents not shared with SCEA in  
16 the ordinary course of business, and advised Class Representatives that it had no ability to  
17 demand production of such documents from its former parent.<sup>5</sup>

18 Specifically, on October 29, 2010, the parties met and conferred regarding SCEA's  
19 responses and objections to the RFPs. At no time did SCEA state, as the Class Representatives  
20 assert, that "it did not have documents responsive to Document Request Nos. 5-7, or 10-13."<sup>6</sup> To  
21 the contrary, it agreed to produce those documents responsive to these requests in its possession,  
22 custody, or control:

23 \_\_\_\_\_  
24 <sup>2</sup> Rivas Decl., (Docket #114), Ex. B (Class Reps' RFPs), 3:19-22. It should be noted that, as of  
April 1, 2010, SCEI was no longer SCEA's corporate parent.

25 <sup>3</sup> Rivas Decl., (Docket #114), Ex. C (Responses to Class Reps' RFPs), 4:20-26.

26 <sup>4</sup> Declaration of Luanne Sacks ISO Opposition to Motion Compel and Motion for Protective  
Order ("Sacks Decl."), ¶ 2. In fact, SCEA would have already produced many of these  
27 documents but for Class Representatives' refusal to agree to a protective order that affords  
SCEA's commercially sensitive information adequate protections. *See* Section III, *infra*; *see*  
Class Reps' Motion to Compel (Docket #112), 2:15-17.

28 <sup>5</sup> Sacks Decl., ¶ 3.

<sup>6</sup> Sacks Decl., ¶¶ 3-5, Ex. A; Class Reps' Motion to Compel (Docket #112), 3:23-24.

1 **Request for Production No. 5:** All DOCUMENTS, including but not limited  
2 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO YOUR decision to include the OTHER OS feature on the PS3.

3 **Request for Production No. 6:** All DOCUMENTS, including but not limited  
4 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO YOUR decision to disable or remove the OTHER OS feature on the PS3,  
or UPDATE 3.21.

5 **Request for Production No. 7:** All DOCUMENTS, including but not limited  
6 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO consumers' interest in purchasing a video game console with the OTHER  
OS feature.

7 **Request for Production No. 10:** All DOCUMENTS sufficient to determine  
8 the number of PS3 purchasers in the United States or its territories that  
utilized the OTHER OS feature.

9 **Request for Production No. 11:** All DOCUMENTS, including but not limited  
10 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO the utilization or popularity of the OTHER OS feature on the PS3.

11 **Request for Production No. 12:** All DOCUMENTS, including but not limited  
12 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO the reasons for including the OTHER OS feature on the PS3.

13 **Request for Production No. 13:** All DOCUMENTS, including but not limited  
14 to any studies, focus groups, statistics or polls, that REFER OR RELATE  
TO the reasons for disabling the OTHER OS feature on the PS3.<sup>7</sup>

15 In the course of multiple meet and confer discussions, the parties discussed possible terms under  
16 which SCEA would secure SCEI's agreement to voluntarily produce discovery in this case,  
17 including Class Representatives' promise not to sue SCEI if such voluntary discovery was  
18 afforded.<sup>8</sup> Ultimately, SCEA prepared a written stipulation reciting the proposed terms – but in  
19 their pending motion to compel Class Representatives grossly misstate the proposed stipulation  
20 and its import. The Class Representatives threatened to sue SCEI, and then asked if SCEA would  
21 attempt to secure a compromise regarding production of discovery from SCEI to avoid that result.  
22 After consultation with SCEI, SCEA offered to stipulate that SCEI would produce documents and  
23 witnesses in this litigation voluntarily, and not subject to the strictures of the Hague Convention  
24 (which would otherwise apply even if SCEI was a named party) in exchange for Class  
25 Representatives' agreement not to later name SCEI as a defendant.<sup>9</sup> Class Representatives  
26

27 <sup>7</sup> Rivas Decl., (Docket #114), Ex. B (Class Reps' RFPs), 7:19-8:21.

28 <sup>8</sup> Sacks Decl., ¶¶ 6-7.

<sup>9</sup> Sacks Decl., ¶¶ 6-8.

1 rejected this proposal<sup>10</sup> and instead of making good on their threat to sue SCEI (which would  
2 have presented the complicated discovery protocols applicable to a Japanese corporation) they  
3 filed the pending motion to compel contending that SCEA’s proffered compromise constitutes an  
4 admission of its control of SCEI’s documents and information.

5 **B. Relevant Legal Standard**

6 A party’s obligation to produce documents requested by an adversary is limited by Rule  
7 34 “to those documents that ‘are in the possession, custody or control of the party upon whom the  
8 request is served....’”<sup>11</sup> Here, the Class Representatives seek documents they concede are in the  
9 possession of SCEI, which they contend is the parent of SCEA.<sup>12</sup> However, the parent subsidiary  
10 relationship is insufficient to demonstrate the requisite control over requested documents: “[a]  
11 subsidiary will be deemed to have possession, custody or control of documents held by its parent  
12 company only in certain circumstances.”<sup>13</sup>

13 “The party seeking production of the documents bears the burden of proving that the  
14 opposing party has such control.”<sup>14</sup> And, “[t]he determination of whether [SCEA] has ‘control’  
15 over the documents sought by [the Class Representatives] is a ‘very fact specific’ inquiry.”<sup>15</sup>  
16 “While ‘the particular *form* of the corporate relationship does not govern whether a party controls

17 \_\_\_\_\_  
18 <sup>10</sup> Sacks Decl., ¶ 8, Ex. B.

19 <sup>11</sup> *LG Display Co., Ltd. v. Chi Mei Opto. Corp.*, 2009 WL 223585, \*3 (S.D. Cal. Jan. 28, 2009).  
20 “Control is defined as the legal right to obtain documents upon demand.” *U.S. v. Int’l Union of*  
21 *Petroleum and Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989); *Tessera, Inc. v.*  
22 *Micron Tech.*, 2006 WL 733498, \*5 (N.D. Cal. March 22, 2006). Because the definition of  
23 “control,” in Rule 34 and 45, is the same, the court may consider case law interpreting  
24 “possession, custody, or control” in cases regarding Rule 34 as well as Rule 45. *In re Subpoena*  
25 *To Huawei Tech. Co. Ltd.*, 720 F. Supp. 2d 969, 977 fn. 10 (N.D. Ill. June 2, 2010); *see also*  
26 *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 141 fn. 2 (E.D.N.Y. 2009) (the meaning of “control”  
27 is the same under Rules 34 and 45).

28 <sup>12</sup> Class Reps’ Motion to Compel (Docket #112), 5:15-9:2. Making argument and resolution  
regarding its motion more difficult, Class Representatives either fail or are unable to explain  
which documents they seek from SCEI. Presumably, they seek, at least, every document  
responsive to their requests in SCEI’s possession, custody, and control. *See* Rivas Decl. (Docket  
#114), Ex. B.

<sup>13</sup> *LG Display Co.*, 2009 WL 223585, at \*3 (citing *In re Uranium Antitrust Litig.*, 480 F. Supp.  
1138, 1152-53 (N.D. Ill. 1979)).

<sup>14</sup> *Int’l Union of Petrol.*, 870 F.2d at 1452; *Tessera*, 2006 WL 733498, at \*5.

<sup>15</sup> *Pitney Bowes, Inc. v. Kern Int’l, Inc.*, 239 F.R.D. 62, 66 (D. Conn. 2006) (quoting *Playboy*  
*Entm’t Group, Inc. v. U.S.*, No. Civ. A. 96-94-JJF, 1997 WL 873550, \*3 (D. Del. Dec. 11, 1997));  
*see also Davanzia, S.L. v. Laserscope, Inc.*, 2008 WL 509435, \*\*1-2 (N.D. Cal. Feb. 22, 2008);  
*Tessera*, 2006 WL 733498, at \*\*4-5.

1 documents,’ (citation omitted) the ‘nature of the transactional relationship between the subsidiary  
2 and parent...is pivotal.’”<sup>16</sup> “[I]n parent/subsidiary situations, the determination of control turns  
3 upon whether the intracorporate relationship establishes some legal right, authority *or* ability to  
4 obtain the requested documents on demand.”<sup>17</sup> “Whether a domestic subsidiary has control over  
5 documents in the possession of a foreign parent is a question that courts resolve by examining the  
6 ‘closeness of the relationship between the parties.’”<sup>18</sup> “The critical inquiry is whether the  
7 subsidiary can ‘exercise custody and control over the documents’ requested.”<sup>19</sup>

8 **C. Class Representatives Have Not Established That SCEA Has Constructive**  
9 **Control Over SCEI Documents**

10 **1. SCEA’s Business Activities Do Not Demonstrate Constructive Control**  
11 **Over SCEI Documents**

12 Class Representatives assert that “it is only logical” that SCEA would have constructive  
13 control over SCEI’s documents because SCEA is “the party responsible for the marketing and  
14 sales in North America of the PS3 units that SCEI designs and produces.”<sup>20</sup> This argument has  
15 been rejected consistently. Indeed, the case law cited by the Class Representatives illustrates and  
16 confirms SCEA’s position, *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918  
(S.D.N.Y. 1984).<sup>21</sup>

17 In *Cooper Industries*, the wholly-owned subsidiary was the distributor and servicer of its  
18 parent company’s airplanes in the United States, and the subpoenaed documents were service  
19 manuals and blueprints related to those airplanes.<sup>22</sup> Because the subpoenaed documents  
20 “relate[d] to the planes that [the subsidiary] work[ed] with every day,” the district court found it

21 <sup>16</sup> *Pitney Bowes*, 239 F.R.D. at 66 (quoting *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127,  
22 131 (D. Del. 1986) and *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 467 (D.  
23 Mass. 1993)); *Zenith Elec. LLC v. Vizio, Inc.*, 2009 WL 3094889, \*1 (S.D.N.Y. Sept. 25, 2009)  
24 (“In deciding whether a [] domestic corporation can be compelled to produce documents held by  
a foreign affiliate, a court must ‘consider the nature of the relationship between the corporation  
and its affiliate.’”) (quoting *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 WL 14007, \*3  
(S.D.N.Y. Jan. 11, 1999)).

25 <sup>17</sup> *Pitney Bowes*, 239 F.R.D. at 67 (quoting *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*,  
138 F.R.D. 438, 442 (D.N.J. 1991)).

26 <sup>18</sup> *In re Subpoena To Huawei Tech. Co. Ltd.*, 720 F. Supp. 2d at 976 (quoting *Stella v. LVMH*  
*Perfumes and Cosmetics USA*, 2009 WL 780890, \*2 (N.D. Ill. March 23, 2009)).

27 <sup>19</sup> *Zenith Elec. LLC*, 2009 WL 3094889, at \*1 (quoting *Hunter Douglas*, 1999 WL 14007, at \*3).

28 <sup>20</sup> Class Reps’ Motion to Compel (Docket #112), 7:5-8 and 7:19-8:6, and 6:6-7.

<sup>21</sup> Class Reps’ Motion to Compel (Docket #112), 7:19-8:6).

<sup>22</sup> 102 F.R.D. at 919.

1 “inconceivable that [the subsidiary] would not have access to these documents and the ability to  
2 obtain them for its usual business.”<sup>23</sup> Other courts have made clear that the result in *Cooper*  
3 *Industries* regarding the subsidiary’s control of its parent’s documents as a result of its  
4 distribution/service role is the exception, not the rule: “it would be ‘impracticable’ to hold that  
5 ‘all wholly owned subsidiaries engaged in sales and servicing’ were ‘controlling their parent  
6 company’s documents.’”<sup>24</sup> “Rather, ‘there must be a nexus between the [documents sought] and  
7 [the party’s] relationship with its parent companies, taking into account, among other things, [the  
8 party’s] business responsibilities.’”<sup>25</sup>

9 The Class Representatives’ arguments sound remarkably like those made in *U.S. Int’l*  
10 *Trade Commission v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir. 2005), *i.e.*, that the defendant’s  
11 “principle activities” were the sales and marketing of the parent’s product.<sup>26</sup> The District of  
12 Columbia Circuit Court concluded that was not enough:

13 [t]he record only vaguely indicates that [defendant’s] ‘principle activities’ are  
14 ‘sales, marketing and customer services,’ and it does not provide any context or  
15 explanation for why [defendant] would have access to or even need documents  
16 relating to [the matter underlying the lawsuit]. Simply because the [defendant]  
share[s] some documents during the ordinary course of business is insufficient to  
deem [it] has having control over the documents underlying [the matter at  
issue].<sup>27</sup>

17 That court’s holding is equally applicable here: “It is quite conceivable that [SCEA] does not  
18 have routine access to these documents because they do not seem to relate directly to its principal  
19 activities.”<sup>28</sup> Thus, “merely being a ‘sales and service’ subsidiary does not establish the  
20 subsidiary’s control over documents and information in the parent’s possession.”<sup>29</sup>

21 Similarly, in *Pitney Bowes*, the defendant was “a wholly owned subsidiary” of the source  
22 of the documents and “operat[ed] as the exclusive seller of [the parent corporation’s] products in  
23

24 <sup>23</sup> *Id.* at 919-20.

25 <sup>24</sup> *Pitney Bowes*, 239 F.R.D. at 67 (quoting *United States Int’l Trade Comm. v. ASAT, Inc.*, 411  
F.3d 245, 255) (D.D.C. 2005)).

26 <sup>25</sup> *Id.* at 67 (quoting *ASAT, Inc.*, 411 F.3d 245, 255) (D.D.C. 2005)).

27 <sup>26</sup> *ASAT, Inc.*, 411 F.3d at 255.

28 <sup>27</sup> *Id.* (citing *Camden*, 138 F.R.D. at 442).

29 <sup>28</sup> *Id.*

30 <sup>29</sup> *Id.* (citing *In the Matter of Certain Optical Disk Controller Chips & Chipsets & Prods.*  
*Containing Same*, 2004 WL 2311060 (U.S.I.T.C. Oct. 5, 2004)).

1 the United States.”<sup>30</sup> The plaintiff claimed the defendant had received documents from its parent,  
2 including technical drawings, for use in its litigation defense and to respond to customer  
3 inquiries.<sup>31</sup> But the court concluded that the plaintiff had “failed to satisfy its burden of  
4 establishing that the documents are in the ‘control’ of [the defendant], as plaintiff has not offered  
5 evidence that these documents are necessary to the business of [the defendant] or that the  
6 requested documents are produced in the normal course of its business.”<sup>32</sup>

7 Indeed, Class Representatives’ assertion – that SCEA must necessarily have access to all  
8 of SCEI’s documents simply because their businesses relate to the same product – is mere  
9 speculation and unsupported by the law.<sup>33</sup> “[Class Representatives] provide no similar basis as to  
10 why it would be inconceivable for [SCEA] to lack control over the ‘design schematics and other  
11 core technical documents’ when [SCEA] ‘appears to be more like a marketing and distributing  
12 entity.’”<sup>34</sup>

13 In *Tessera*, this Court rejected a similar assertion of control by a subsidiary.<sup>35</sup> The  
14 *Tessera* court acknowledged that the “Korean parent company own[ed] 96.7 percent of the  
15 [defendant] U.S. subsidiary,” the two companies were part of a “global sales, marketing and  
16 distribution network” and had “undertaken joint efforts in research and development” regarding  
17 the matters at issue in the litigation, and the companies had “overlapping directors and share[d]  
18 counsel.” Nonetheless, it concluded that the plaintiffs had failed to make any “specific showing  
19 that [the U.S. subsidiary had] the legal right to obtain any” of the documents demanded.<sup>36</sup> As the  
20 *Tessera* court explained, “[c]ontrol must be firmly placed in reality, not in an esoteric concept  
21 such as ‘inherent relationship.’”<sup>37</sup>

22 \_\_\_\_\_  
23 <sup>30</sup> 239 F.R.D. at 67.

24 <sup>31</sup> *Id.* at 68.

25 <sup>32</sup> *Id.* at 69.

26 <sup>33</sup> *See ASAT, Inc.*, 411 F.3d at 255-56 (“this conclusion stands for the untenable position that any  
27 subsidiary whose business life may be threatened has the ability to control its parent’s documents,  
28 and it appears to be based on pure speculation without support in the record.”).

29 <sup>34</sup> *Glenz v. Sharp Elec. Corp.*, 2010 WL 2758729, \*3 (D.N.J. July 12, 2010); *see also Linde*, 262  
30 F.R.D. at 142 (“There is no evidence to indicate that the documents sought ‘flow[ed] freely’  
31 between subsidiary and parent.”) (quoting *Hunter Douglas*, 1999 WL 14007, at \*3).

32 <sup>35</sup> No. C06-80024MISC-JW (PVT), 2006 WL 733498 (N.D. Cal. March 22, 2006).

33 <sup>36</sup> *Id.* at \*6.

34 <sup>37</sup> *Id.* (quoting *Int’l Union of Petrol.*, 870 F.2d at 1453-54).

1           These decisions also confirm that Class Representatives’ reliance on *Camden Iron* is  
2 misplaced and factually inapposite.<sup>38</sup> The *Camden Iron* plaintiff demonstrated that the defendant  
3 had “easy and customary access to the [parent corporation’s] documents involving th[e]  
4 transaction” at issue, that it had “the ability to obtain such documents from [the parent  
5 corporation] for its usual business needs,” and that the defendant and parent “acted in th[e]  
6 transaction [at issue] ‘as one.’” Specifically, the defendant actively worked with the parent in the  
7 negotiations related to the underlying transaction, exchanged documents in the course of those  
8 negotiations and in the “normal course of business” with the parent, and shared profits related to  
9 the transaction with the parent.<sup>39</sup>

10                           **2.     Class Representatives Have Failed To Show That SCEA Has**  
11                           **Unfettered Access To SCEI Documents**

12           Because they have no actual evidence of SCEA’s supposed control over SCEI’s  
13 documents, the Class Representatives have conjured up every possible theory without regard to  
14 whether it could be factually supported. Indeed, the Class Representatives go so far as to point to  
15 the terms of SCEA’s proposed stipulation that they rejected and thus was never presented to or  
16 entered by the Court, as supposed confirmation of SCEA’s control over SCEI’s documents.<sup>40</sup>  
17 Specifically, in response to a threat by Class Representatives to name SCEI as a defendant in this  
18 litigation, SCEI and SCEA presented a potential compromise: SCEI would produce relevant  
19 documents and corporate deposition testimony without requiring the Class Representatives to  
20 proceed under the terms of the Hague Convention. In exchange, the Class Representatives would  
21 agree not to sue SCEI in this litigation.<sup>41</sup>

22           Class Representatives now offer this proposed compromise – which they objected – as  
23 supposed evidence of SCEA’s right to demand production of documents from SCEI. To the  
24 contrary, at all times, SCEA offered only to ask SCEI if it would be willing to produce responsive

25 <sup>38</sup> 138 F.R.D. 438 (D.N.J. 1991); Class Reps’ Motion to Compel (Docket #112), 6:9-13.

26 <sup>39</sup> *Id.* at 443-44; *See also Japan Halon Co., Ltd. v. Great Lakes Chemical Corp.*, 155 F.R.D 626,  
27 628 (N.D. Ind. 1993) (district court found that the plaintiff had provided “five pages” of  
28 “deposition testimony that evidences” the “extreme closeness” of the defendant and its parent that  
justified an order compelling production).

<sup>40</sup> Class Reps’ Motion to Compel (Docket #112), 6:25-27 (citing Rivas Decl., Ex. M) and 6:4-6.

<sup>41</sup> *See* Section II(A), *supra*.

1 documents and an appropriate number of Rule 30(b)(6) witness(es) in exchange for Class  
2 Representatives' agreement not to name SCEI as a party in this action.<sup>42</sup> The language SCEA  
3 proposed for the parties' stipulation, which Class Counsel submitted in filing their discovery  
4 motions, makes this clear: "SCEA agrees that it will request and produce relevant documents in  
5 SCEI's possession, custody, or control responsive to [Class Representatives'] First Set Of  
6 Requests For Production Of Documents...."<sup>43</sup>

7 Furthermore, Class Representatives' argument has been rejected by the Southern District  
8 of New York in *Zenith Elec. LLC* when the plaintiff sought to compel production of documents  
9 from the defendant's non-party parent company based on a similar failed offer to compromise.<sup>44</sup>  
10 The district court denied the motion after concluding that this offer was "insufficient" as evidence  
11 of the requisite control.<sup>45</sup> The Court's holding is readily applicable here: "[m]ore specifically to  
12 the instant inquiry, however, [Class Representatives] ha[ve] produced no evidence that [SCEI]  
13 gives [SCEA] access to *its* documents, and specifically no evidence that [SCEI] would give  
14 [SCEA] any access to the documents requested . . ."<sup>46</sup>

15 Class Representatives "[have] not satisfied [their] burden of establishing that the  
16 documents are in the 'control' of [SCEA], as [they have] not offered evidence that these  
17 documents are necessary to the business of [SCEA] or that the requested documents are produced  
18 in the normal course of its business."<sup>47</sup> "Because [Class Representatives have] not demonstrated  
19 [SCEA's] 'ability to easily obtain [the requested documents] when it [is] in their interest to do  
20 so,' this factor does not weigh in favor of production of these documents from [SCEI]."<sup>48</sup> Thus,  
21 based on apposite controlling case law, Class Representatives have failed to carry their burden to  
22 require production by SCEA of SCEI's documents.<sup>49</sup>

23 <sup>42</sup> See Section II(A), *supra*.

24 <sup>43</sup> Rivas Decl. (Docket #114), Ex. M (emphasis added).

24 <sup>44</sup> 2009 WL 3094889, at \*2.

25 <sup>45</sup> *Id.* (citing *Honda Lease Trust v. Middlesex Mut. Assurance Co.*, 2008 WL 3285242, \*2 (D.  
Conn. Aug. 7, 2008)).

26 <sup>46</sup> *In re Subpoena To Huawei Tech. Co. Ltd.*, 720 F. Supp. 2d at 977; *ASAT, Inc.*, 411 F.3d at 255  
(same).

27 <sup>47</sup> *Pitney Bowes*, 239 F.R.D. at 69 (citing *Glaxo Inc. v. Boehringer Ingelheim Corp.*, 40 U.S.P.Q.  
2d 1848, 1850).

28 <sup>48</sup> *Id.*; see also *In re Subpoena To Huawei Tech. Co. Ltd.*, 720 F. Supp. 2d at 977.

<sup>49</sup> *Tessera*, 2006 WL 733498, at \*6.



1                                   **3.     Class Representatives’ Assertion that SCEA Acted as SCEI’s Agent in**  
2                                   **the Relevant “Transaction” Does Not Assist Them**

3                   Class Representatives also contend that “SCEA was acting as the ‘agent’ of SCEI in the  
4 transaction giving rise to the lawsuit: the sale of a PS3 unit and subsequent removal of a core,  
5 advertised feature” and thus must produce SCEI’s documents.<sup>50</sup> But they offer no evidence to  
6 support this allegation and the controlling case law discussed above demands much more than a  
7 mere allegation of agency relationship.<sup>51</sup> Class Representatives’ argument is, in essence, the  
8 same as the one the Northern District of Illinois rejected in *Stella*. As in that case, Class  
9 Representatives argue only that SCEA “has the legal right to obtain [SCEI’s] documents ‘[g]iven  
10 the relationship of the parties and the fact that [SCEA] is a wholly owned subsidiary.’”<sup>52</sup> Here, as  
11 in that case, Class Representatives have failed to satisfy their burden of demonstrating  
12 constructive control.<sup>53</sup> Class Representatives’ reliance on *In re Citric Acid Litigation* is  
13 particularly apt here: “Because [SCEA] does not have legal control over [SCEI’s] documents,  
14 [Class Representatives] cannot compel [SCEA] to produce those documents.”<sup>54</sup>

15                   This lack of evidence puts Class Representatives reliance on *Choice-Intersil* in stark  
16 contrast.<sup>55</sup> The *Choice-Intersil* court concluded, based on “testimony offered by [plaintiff] at oral  
17 argument,” that the defendant was a “wholly-owned subsidiary” of the plaintiff; the subsidiary  
18 would have marketed the product at issue, but for a change in market conditions; the defendant  
19 and its parent “share[d] databases dealing with a variety of documents [and] records”; and, “upon

20                   /////

21                   /////

22                   <sup>50</sup> Class Reps’ Motion to Compel (Docket #112), 6:3-4, 6:24-25.

23                   <sup>51</sup> *Stella*, 2009 WL 780890, at \*3; *see also* Cal. Civil Code § 2295 (“agent” defined as “one who  
represents another, called the principal, in dealings with third persons.”).

24                   <sup>52</sup> 2009 WL 780890, at \*2-3.

25                   <sup>53</sup> *Id.* (“Plaintiff does not provide this Court with sufficient information to discern the relationship  
between LVMH and the various entities.”). Class Representatives’ reliance on *United States v.*  
*Faltico* is not compelling as the defendant in that case admitted that the source of the documents  
sought was “controlled entirely” by it. 586 F.2d 1267, 1269-70 (8th Cir. 1978); Class Reps’  
26 Motion to Compel (Docket #112), 7:4-5.

27                   <sup>54</sup> 191 F.3d 1090, 1107-8 (9th Cir. 1999) (sustaining lower court’s ruling “that proof of theoretical  
control is insufficient; a showing of actual control is required.”); Class Reps’ Motion to Compel  
(Docket #112), 6:2.

28                   <sup>55</sup> Class Reps’ Motion to Compel (Docket #112), 7:2-3 and 7:9-18; 224 F.R.D. 471.

1 demand, [the defendant] was able to obtain high-level documents from [its parent]” related to the  
2 underlying litigation.<sup>56</sup> No showing of such a relationship or access has been made here.

3 Class Representatives’ reliance on *Microunity Sys. Engineering Inc. v. Sony Computer*  
4 *Entertainment America Inc.* is just as misplaced.<sup>57</sup> *Microunity* provides no factual or legal  
5 support for the Class Representatives’ arguments because that ruling was not based on any  
6 assertion of constructive control or agency, nor did the court make any of the findings, that must  
7 be made here, related to SCEA’s constructive control over SCEI documents.<sup>58</sup> In fact, the  
8 *Microunity* ruling has nothing to do with production of SCEI documents or SCEA’s constructive  
9 control over those documents – it turned on the location of depositions of SCEA’s Rule 30(b)(6)  
10 witnesses.<sup>59</sup>

### 11 **III. CLASS REPRESENTATIVES’ PROPOSED PROTECTIVE ORDER DOES NOT** 12 **AFFORD SCEA ADEQUATE PROTECTION**

13 This is a class action relating to the most advanced gaming console to date, the product of  
14 decades of strategic design, manufacturing, distribution, and marketing research and  
15 development. Class Representatives allege that they have been injured because they cannot use a  
16 specific, unique software feature (the Other OS operating system) that came with the PS3, but  
17 was not featured on any other gaming console.<sup>60</sup> On this basis, they demand that SCEA produce  
18 its sensitive commercial documents regarding its internal decision-making processes for including  
19 and later disabling the Other OS feature, the Other OS feature’s design and function, and  
20 marketing strategies regarding this feature; as well as regarding the PS3’s distribution, marketing,  
21 and overall software design.<sup>61</sup> SCEA would also necessarily need to produce similar  
22 commercially sensitive documents to support its defense to Class Representatives’ claims.

23 To protect itself from the injury it would incur as a result of disclosure and use of these  
24 documents and information, SCEA provided Class Counsel with a draft stipulated protective

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25 <sup>56</sup> 224 F.R.D. at 472-73; *see also Tessera*, 2006 WL 733498, at \*6 (distinguishing *Choice-*  
26 *Intersil*).

27 <sup>57</sup> Class Reps’ Motion to Compel (Docket #112), 8:7-17.

28 <sup>58</sup> Class Reps’ RJN (Docket #113), Exs. 1-3.

<sup>59</sup> *Id.*

<sup>60</sup> Consolidated Complaint (Docket #76), 1-3, 10-19, 34-55.

<sup>61</sup> R. Rivas Decl. (Docket #114), Ex. B (RFDs).

1 order based on this District’s model Stipulated Protective Order For Litigation Involving Patents,  
2 Highly Sensitive Confidential Information And/Or Trade Secrets. Class Counsel, however,  
3 refuses to agree to two provisions found in this model: the “Highly Confidential” and “Highly  
4 Confidential-Source Code” designations, and the provision requiring notice to a designating party  
5 of a party’s intention to provide documents designated as such to an expert or consultant.<sup>62</sup>  
6 Through their motion, Class Representatives now request that the Court enter a protective order  
7 that does not contain these protections – the District’s “Stipulated Protective Order For Standard  
8 Litigation” – despite the fact that there is nothing “standard” about this litigation or the  
9 documents SCEA has been asked to produce.

10 Class Representatives argue, without any supporting authority, that the District’s  
11 stipulated protective order form advocated by SCEA is available only in patent cases and poses  
12 unacceptable notice requirements regarding expert/consultant recipients of highly sensitive  
13 information. This argument is disingenuous given that Class Counsel recently agreed to use of the  
14 identical stipulated protective order in a related case against SCEA involving a different PS3  
15 firmware update, which protective order was in fact approved by the Court. And it flies in the  
16 face of this Court’s approval of such stipulated protective order terms in many non-patent cases.<sup>63</sup>

17 Class Representatives argue that they must be able to disseminate to their clients any  
18 documents or information SCEA produces in this litigation, but will be restricted from doing so if  
19 SCEA has the ability to designate documents as “Highly Confidential” as defined in the District’s  
20 template protective order. However, it is just such a broad and uncontrolled dissemination to the  
21 Class Representatives and unnamed class members that causes great concern to SCEA. In their  
22 complaints, the Class Representatives and other named plaintiffs acknowledged that “security  
23

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24 <sup>62</sup> Rivas Decl., (Docket #114), Ex. J. According to Class Representatives, their motion seeks  
25 documents from SCEA in response to their requests, and seeks entry of a protective order so that  
26 SCEA can produce those documents. Class Reps’ Motion to Compel (Docket #112), 9:15-17.  
27 But Class Representatives fail to explain which document requests they are moving on or even  
28 what documents they seek, or to describe the status of the parties’ meet and confer. In actuality,  
29 Class Representatives’ Motion to Compel is, with the exception of their arguments regarding  
30 SCEA’s production of SCEI documents, a motion for entry of a protective order.

<sup>63</sup> See, e.g., Declaration of Carter Ott ISO Opposition to Motion Compel and Motion for  
Protective Order (“Ott Opp. Decl.”), ¶ 4, Ex. C.

1 concerns” resulting from hacking of the PS3 prompted the release of Update 3.21.<sup>64</sup> Soon after  
2 these lawsuits were filed, Mr. Ventura’s counsel’s website reported false statements about the  
3 status of this action which counsel contends were posted by a hacker.<sup>65</sup> In the last month, further  
4 published accounts of how to hack the PS3 were disseminated over the Internet, further treating  
5 SCEA’s intellectual property rights. Declaration of Carter Ott ISO Opposition to Motion Compel  
6 and Motion for Protective Order (“Ott Opp. Decl.”), ¶ 10, Ex. I (“Console Hacking 2010” slides);  
7 ¶ 11, Ex. J (“Console Hacking 2010” transcript).<sup>66</sup> Thus, Class Representatives cannot  
8 demonstrate that the protective order form that SCEA requests is unwarranted.

9 Moreover, Class Representatives literally put the cart before the horse in their arguments  
10 regarding the appropriate scope of the protective order to be entered by this Court: they rely on  
11 cases addressing whether a party appropriately designated a document under the terms of an  
12 existing protective order, which is not an issue presented in the pending motions. In fact, Class  
13 Representatives fail to cite any apposite cases, and instead rely entirely on out of context  
14 statements regarding protection afforded to specific documents produced. For example, *Brown*  
15 *Bag Software v. Symantec Corp.* has nothing to do with a protective order; rather, it is limited to  
16 whether a party’s in-house counsel should be precluded from reviewing the opposing party’s  
17 trade secrets.<sup>67</sup> See also *Medtronic Vascular, Inc. v. Abbott Cardio. Sys., Inc.*, 2007 WL 4169628  
18 (N.D. Cal. Nov. 20, 2007) (court was determining whether designations assigned to specific  
19 documents were appropriate under the existing protective order); *Charles O. Bradley Trust v.*  
20 *Zenith Capital LLC*, 2006 WL 798991 (N.D. Cal. March 24, 2006) (same); *Foltz v. State Farm*  
21 *Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966

22 \_\_\_\_\_  
23 <sup>64</sup> Consolidated Complaint (Docket #76), ¶ 63; Ott Opp. Decl., ¶ 5, Ex. D (Huber Complaint), ¶ 3.

24 <sup>65</sup> SCEA Motion to Compel (Docket #116), 23:9-24:20.

25 <sup>66</sup> See also Ott Opp. Decl., ¶ 7, Ex. F (*SCEA v. Hotz et al.* Complaint), ¶¶ 15(a), 15(b) (“...is a  
26 member of FAIL0VERFLOW, a group of hackers who have conspired and continue to conspire  
27 to engage in unlawful circumvention of the effective technological protection measures (“TPMs”)  
28 in the PS3 System.”), 15(c) (“Additionally, Cantero has used and continues to use github.com, an  
interactive online software sharing community based in San Francisco, California, to post and  
distribute throughout the Internet, including to persons in this district, the code and software tools  
derived from FAIL0VERFLOW’s circumvention of the TPMs in the PS3 System.”), ¶¶ 49-51;  
Ott Opp. Decl., ¶ 9, Ex. H (B. Mogilefsky Decl.), ¶¶ 15-27.

<sup>67</sup> 960 F.2d 1465, 1470-71 (9th Cir. 1992); see *Computer Sciences Corp. v. Computer Associates,*  
*Int’l*, 1999 WL 675446, \*16 fn. 13 (C.D. Cal. Aug. 12, 1999).

1 F.2d 470 (9th Cir. 1992) (court never addressed question of particular designations to be offered  
2 under protective order).<sup>68</sup>

3 “[B]lanket protective orders governing the handling of confidential information  
4 exchanged in discovery are routinely approved by courts in civil cases”<sup>69</sup>:

5 The very first rule set forth in the Federal Rules of Civil Procedure requires courts  
6 to construe and administer the rules ‘to secure the just, speedy, and inexpensive  
7 determination of every action and proceeding.’ (Citation omitted). Blanket  
8 protective orders serve the interests of a ‘just, speedy, and inexpensive’  
9 determination of cases by alleviating the undue cost and delay that would ensue if  
10 courts had to make good cause determinations on a document-by-document basis  
for *all* documents exchanged in discovery that a party wished to protect. As the  
Ninth Circuit has implicitly acknowledged, the use of blanket protective orders  
conserves resources by eliminating the requirement that a party move for a  
protective order every time that party produces documents they contend are  
confidential.<sup>70</sup>

\* \* \* \* \*

11 The use of protective orders is vital to the efficient litigation of every stage of  
12 many intellectual property disputes. If protective orders were not issued to  
13 safeguard the confidentiality of trade secrets and other confidential commercial  
14 information when warranted by the circumstances, litigants would be forced to  
15 choose between fully presenting their claims or defenses (and thereby destroying  
their trade secrets through disclosure to competitors or the public), or foregoing  
their claims or defenses (in order to keep their trade secrets and other sensitive  
information confidential).<sup>71</sup>

16 While blanket protective orders are usually based on a joint request of the parties, the agreement  
17 of all parties is not required so long as certain conditions are met.<sup>72</sup> Those conditions include the  
18 following:

19 First, a party must make some threshold showing of good cause to believe that  
20 discovery will involve confidential or protected information. This may be done on

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21 <sup>68</sup> 331 F.3d 1130-33; 966 F.2d at 471-72 & 476.

22 <sup>69</sup> *Quality Inves. Prop. Santa Clara, LLC v. Serrano Electric, Inc.*, 2010 WL 2889178, \*1 (citing  
*Gillard v. Boulder Valley School Dist.*, 196 F.R.D. 382, 386 (D. Colo. 2000)).

23 <sup>70</sup> *Id.* (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003)  
(noting that use of a blanket protective order was “understandable for the unfiled documents  
given the onerous burden document review entails”).

24 <sup>71</sup> *The Beam Sys., Inc. v. Checkpoint Sys., Inc.*, 1997 WL 364081, \*2 (C.D. Cal. Feb. 6, 1997)  
(citing Uniform Trade Secrets Act, § 5, Comment (“If reasonable assurances of maintenance of  
secrecy cannot be given, meritorious trade secret litigation will be chilled.”)).

25 <sup>72</sup> *Quality Inves. Prop.*, 2010 WL 2889178, at \*1 (citing *Parkway Gallery Furniture, Inc. v.*  
*Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988)). *The Beam*  
26 *Sys., Inc.*, 1997 WL 364081, at \*1 (“When a conflict arises between a right of property and the  
27 right to adequately present a claim or a defense, courts try to balance the competing interests.”;  
“One of the principal tools enabling courts to strike an appropriate balance is a protective order.”)  
28 (relying on Fed. R. Civ. P. 26(c)(7) and *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*,  
219 U.S.P.Q. 37, 38 (D. Del. 1982)).

1 a generalized as opposed to a document-by-document basis. Moreover, even  
2 though a blanket protective order permits all documents to be designated as  
3 confidential, a party must agree to only invoke the designation in good faith.  
4 After receiving documents, the opposing party has the right to contest those  
5 documents which it believes not to be confidential. At this stage, the party seeking  
6 the protection shoulders the burden of proof in justifying retaining the  
7 confidentiality designation. Thus, the burden of proving confidentiality never  
8 shifts from the party asserting that claim-only the burden of raising that issue.<sup>73</sup>

9 “[B]ecause [they] seek[] disclosure of information that would otherwise be confidential, [Class  
10 Representatives] bear[] the burden of establishing a sufficient need for the information which  
11 outweighs the risk of injury to [SCEA].”<sup>74</sup> This risk can only be ameliorated under the current  
12 circumstances by imposition of an appropriately restrictive protective order by this Court.

13 Class Representatives argue that the District’s model stipulated protective order including  
14 “Highly Confidential” and “Highly Confidential-Source Code” designations are intended to apply  
15 only to “intellectual property cases.”<sup>75</sup> But the form’s caption makes clear that this is not the  
16 case: **“Stipulated Protective Order For Litigation Involving Patents, Highly Sensitive  
17 Confidential Information And/Or Trade Secrets.”** In addition, Class Representatives’ argument  
18 is clearly contrary to practice, as courts in this District have utilized these designations in many  
19 different types of cases. *See Hechavarria v. City and County of San Francisco*, 2010 WL  
20 4937314, \*1 (N.D. Cal. Nov. 30, 2010) (use of protective order affording “confidential” and  
21 “highly confidential-attorneys’ eyes only” protections in assault and battery action); *Quality*

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22 <sup>73</sup> *Quality Inves. Prop.*, 2010 WL 2889178, at \*1 (emphasis added) (citing *Parkway Gallery  
23 Furniture, Inc.*, 121 F.R.D. at 268). “The balance struck depends, in part, on the stage of the  
24 proceedings. During the discovery phase, courts possess greater latitude to take reasonable steps  
25 to ensure that the private interest in maintaining the confidentiality of trade secrets or other  
26 sensitive information is not unnecessarily impaired litigation-related disclosure.” *The Beam Sys.,  
27 Inc.*, 1997 WL 364081, at \*1 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35-36 (1984));  
28 *see also Brown Bag*, 960 F.2d at 1470 (“On the one hand, parties seeking discovery are entitled to  
all information ‘reasonably calculated to lead to the discovery of admissible evidence,’  
Fed.R.Civ.P. 26(b)(1) – an intentionally broad mandate. On the other hand, responding parties  
are entitled to protection from ‘undue burden’ in discovery, including protection from misuse of  
trade secrets by competitors. Fed.R.Civ.P. 26(c).”).

<sup>74</sup> *Intel Corp. v. Via Tech., Inc.*, 198 F.R.D. 525, 528 (N.D. Cal. Oct. 11, 2000) (“The party  
seeking a protective order bears the burden of showing good cause for the order to issue.”) (citing  
*Brown Bag*, 960 F.2d at 1470 (motion to modify protective order was denied because the moving  
party “failed to demonstrate how the protective order actually could have or did prejudice its  
case.”) and *A. Hirsh, Inc. v. United States*, 657 F. Supp. 1297, 1303 (C.I.T. 1987).

<sup>75</sup> Class Reps’ Motion to Compel (Docket #112), 9:21-25.

1 *Inves. Prop.*, (use of protective order affording “attorney’s eyes only” protection in action  
2 regarding a contract dispute).<sup>76</sup>

3 Furthermore, the “Highly Confidential” and “Highly Confidential-Source Code”  
4 designations that SCEA seeks are entirely appropriate in this case because, to respond to Class  
5 Representatives’ document demands and produce documents to defend itself, SCEA must  
6 produce trade secret and other confidential commercially sensitive information. *See* Decl. of John  
7 Koller ISO Opposition to Motion to Compel (“Koller Decl.”), ¶ 3. This information is the result  
8 of significant expenditures and, if disclosed to the public, including SCEA’s competitors and  
9 hackers, would cause significant injury. Koller Decl., ¶ 4; *see also* Ott Opp. Decl., ¶ 7, Ex. F  
10 (*SCEA v. Hotz et al. Complaint*), ¶¶ 23, 31, 36, 37, 47, 51, and 52.

11 These designations are therefore appropriate to preclude this harm. In addition, “[t]he  
12 form of order proposed by [SCEA] limits confidentiality designations to information or tangible  
13 things that qualify for protection under the standards developed under Rule 26(c).”<sup>77</sup> And if, after  
14 SCEA has produced these documents, Class Representatives have any concerns about the  
15 designations it has used, the protective order provides them with the ability and procedure to  
16 challenge those designations.<sup>78</sup>

17 Class Representatives also object to SCEA’s inclusion of the District’s proposed provision  
18 that bars disclosure of documents designated as “Highly Confidential” to Class Representatives’  
19 experts and consultants without prior notice.<sup>79</sup> Courts routinely use such a provision to protect

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21 <sup>76</sup> *See also* *Kroll v. Kaiser Foundation Health Plan Long Term Disability Plan*, 2010 WL  
22 1233871, \*1 (N.D. Cal. March 26, 2010) (in a insurance coverage dispute, ruling that concerns  
23 about disclosure of information “may be dealt with by a protective order, limiting the use of the  
24 information for purposes of this litigation only and designating the information ‘Attorney’s Eyes  
25 Only.’”); *Mixt Greens v. Sprout Café*, 2010 WL 2555753, \*2 (N.D. Cal. June 21, 2010) (in a trade  
26 dress infringement and unfair competition action, ruling that refusal to produce financial  
27 documents was not justified because “any privacy concerns could have been addressed by a  
28 protective order limiting the disclosure, *e.g.*, for attorney’s eyes only.”); *See, e.g., Bare  
Escentuals Beauty, Inc. v. Costco Wholesale Corp.*, 2007 WL 4357672, \*1 (S.D. Cal. Dec. 11,  
2007) (action for trademark infringement and unfair competition).

<sup>77</sup> *See Quality Inves. Prop.*, 2010 WL 2889178, at \*2 (“the protective order proposed...ensures  
that the parties are not improperly given ‘carte blanche’ to designate information which is not  
entitled to protection under Rule 26(c).”); Rivas Decl., (Docket #114), Ex. J, Attached Draft  
Protective Order, ¶ 2.2.

<sup>78</sup> *Quality Inves. Prop.*, 2010 WL 2889178, at \*2.

<sup>79</sup> Rivas Decl. (Docket #114), Ex. J, attached proposed protective order, ¶ 7.4(a).

1 commercially sensitive information from disclosure to individuals or entities that could use it in a  
2 manner that could harm the designating party.<sup>80</sup> This is one of those cases. The documents  
3 SCEA will produce in this litigation include trade secret and other commercially sensitive  
4 documents that are valuable to its competitors and an organized community of hackers; if  
5 disclosed to them, SCEA will suffer substantial competitive and commercial injury. Koller Decl.,  
6 ¶ 4; Ott Opp. Decl., ¶ 7, Ex. F (*SCEA v. Hotz et al.* Complaint), ¶¶ 37, 47, 51 and 52.<sup>81</sup> The risk  
7 that Class Representatives may retain, intentionally or not, a member of this community of  
8 individuals and businesses focused on hacking the PS3 for personal and commercial purposes  
9 also weighs in favor of including a provision that requires prior notice of the individuals to whom  
10 they intend to provide SCEA’s commercially sensitive information.<sup>82</sup> Ott Opp. Decl., ¶ 11, Ex. J  
11 (“Console Hacking 2010” transcript), 4:13-21, 9:17-20 (“So, but the worst part of this is that, the  
12 people who used Other OS are the hackers so by doing this, Sony pissed off the hackers. That’s a  
13 really, really bad idea. In other words, they are so getting hacked now.”), 11:19-24 (“...So it  
14 turns out that you can just copy games to the hard drive, patch LV2 to run them from the hard  
15 drive and LV1 doesn’t care, and the Security SPE doesn’t care so you can break 20% of the  
16 security and copy games which is 100% of what Sony doesn’t want you to do.”); ¶ 10, Ex. I  
17 (“Console Hacking 2010” slides); ¶ 7, Ex. F (*SCEA v. Hotz et al.* Complaint), ¶¶ 2, 15, 31-52,  
18 and 64-69.

19 Class Representatives also seek, in effect, to broaden the class of individuals who can  
20 access SCEA’s “Highly Confidential” documents to all “members of the proposed plaintiff class,”

21 <sup>80</sup> See, e.g., *Newton Research Partners, LP v. Shell Exploration & Prod. Co.*, 2007 WL 4895911,  
22 \*1 (N.D. Tex. Jan. 29, 2007); *Third Wave Tech., Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991,  
1017 (W.D. Wis. 2005); *In re San Juan DePont Plaza Hotel Fire Litig.*, 121 F.R.D. 147, 149 (D.  
23 P.R. 1988); Manual for Complex Litigation (4th 2004), § 11.432; see also *Phoenix Solutions Inc.*  
*v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 579 (N.D. Cal. 2008) (“the fact that [the parties] are  
24 not direct competitors hardly forecloses the inquiry.”).

25 <sup>81</sup> See *The Beam Sys., Inc.*, 1997 WL 364081, at \*2 (“More fundamentally, courts have a  
26 responsibility to ensure that court-required disclosure of trade secrets for purposes of litigation do  
not ‘become by indirection the means of ruining an honest and profitable enterprise.’”) (*quoting*  
*Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del.  
1985)).

27 <sup>82</sup> Furthermore, the Class Representatives reliance on *Miller v. NTN Communications* is similarly  
28 factually inapposite as the documents in that case had apparently already been disclosed to the  
producing party’s competitors and the “likelihood of harm” to the producing party was “remote.”  
1998 U.S. Dist. LEXIS 13753, \*9 (S.D. Cal. 1998).



1 albeit with no stated justification for affording millions of individuals access to this information.<sup>83</sup>  
2 Notably, Class Counsel offers no real justification for the supposed necessity of disseminating  
3 SCEA's documents to millions of potential class members (including the five Class  
4 Representatives). Thus, in light of SCEA's legitimate substantiated security concerns, the Class  
5 Representatives have failed completely in their arguments to limit SCEA's designation of  
6 documents it produces.

7 Furthermore, Class Representatives reliance on *Rambus, Inc. v. Nvidia Corp.*, 2009 WL  
8 982123 (N.D. Cal. April 13, 2009), is woefully misplaced – to the contrary, the Court's holding  
9 supports SCEA's arguments – there the Court entered the very protective order that SCEA has  
10 consistently advocated in this case.<sup>84</sup>

11 Finally, even in cases where a court concludes that the requesting party had not shown  
12 sufficient cause for such a provision, courts have entered a restriction limiting disclosure to  
13 protect the producing party's trade secret and confidential, commercially sensitive information.<sup>85</sup>  
14 Clearly, even if the Court concludes that SCEA has not shown good cause for the notice provision  
15 it seeks, some other form of protection is appropriate.

16 **A. Class Representatives' Demanded Timing For Production Is Inappropriate**

17 Although it is not stated in the actual motion to compel they filed, Class Representatives  
18 ask this Court for an order compelling SCEA to “produce any ‘confidential’ documents it has  
19 been withholding that are responsive to [their RFPs] within 10 business days.”<sup>86</sup> In support of  
20 their request (inadequate as it may be under the local rules) Class Representatives ignore  
21 completely the fact that SCEA has produced over 2,000 pages of documents, including images of  
22 advertisements and other marketing, instruction manuals, safety and support manuals, license  
23 agreements, warranties, terms of service and user agreements.<sup>87</sup>

24 <sup>83</sup> Class Reps' Motion to Compel (Docket #10:6-8), 10:5-6; Rivas Decl., (Docket #114), Ex. J,  
11/23/10, 7:29 p.m., Ott email, Section 7.

25 <sup>84</sup> Ott Opp. Decl., ¶ 6, Ex. E (*Rambus, Inc.* Proposed Protective Order), ¶¶ 2.4 & 7.4.

26 <sup>85</sup> See *Nygren v. Hewlett-Packard Co.*, No. C07-05793-JW (HRL), 2008 WL 2610558, \*1 (N.D.  
27 Cal. July 1, 2008); *Layne Christensen Co. v. Purolite Co.*, --- F.R.D. ---, 2010 WL 3001744, \*10  
(D. Kan. July 28, 2010) (concerns address by prohibiting disclosure to experts or consultants  
employed by defendant's competitors).

28 <sup>86</sup> Docket #112-1, 2:8-9 (emphasis added).

<sup>87</sup> Ott Opp. Decl., ¶ 13.

1 In addition, the parties never met and conferred about any possible demand by Class  
2 Representatives regarding timing of production of all documents demanded for production by  
3 SCEA. To the contrary, the parties agreed that further production would be conducted consistent  
4 with agreed upon keyword terms, and the list of such keyword terms is still under review and  
5 analysis.<sup>88</sup>

6 **IV. CONCLUSION**

7 Based on the foregoing, defendant Sony Computer Entertainment America LLC  
8 respectfully requests that the Court deny Class Representatives' Motion to Compel.

9 Dated: January 14, 2011

10 DLA PIPER LLP (US)

11 By: /s/ Luanne Sacks

12 LUANNE SACKS  
13 Attorneys for Defendant  
14 SONY COMPUTER ENTERTAINMENT  
15 AMERICA LLC

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28 <sup>88</sup> Sacks Decl., ¶ 9.