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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re SONY PS3 "OTHER OS" LITIGATION

CASE NO. 3:10-CV-01811 RS (EMC)

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

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

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I. INTRODUCTION

In their Motion for Protective Order, which was filed in direct response to SCEA's Motion To Compel, plaintiffs Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker, and Elton Stovell (the "Class Representatives") seek an order from the Court permitting them to withhold production of critical evidence until they see fit to produce it at some later stage of this litigation – evidence the Class Representatives disclosed in their Rule 26 submission directly relevant to their assertions of standing, adequacy, typicality, reliance, causation and damages. This is the element of surprise that the discovery rules are designed to avoid. If producing the evidence in discovery proceedings is too inconvenient for the Class Representatives, as they suggest, then they should be barred from using this very same evidence to advance their claims at some later stage in the proceedings.

Class Representatives also seek improper advisory orders from the Court. Specifically, Class Representatives move for an order prohibiting the reopening of their depositions, notwithstanding that Class Representatives have refused to appear for deposition to date and it is pure supposition on their part that SCEA will seek to re-depose them. Class Representative also move for an order precluding discovery to the individuals named in the predecessor complaints that initiated this consolidated action, but who were not named as plaintiffs in the operative consolidated complaint, despite the fact that SCEA has not served any discovery requests on these individuals. The Court cannot rule on disputes that are not justiciable.

Class Representatives also request that the Court enter an order precluding discovery requests seeking their fee agreements, notwithstanding Ninth Circuit law confirming that such agreements are discoverable absent a showing that they included privileged information. Last, Class Representatives seek an order preventing SCEA from discovering information related to a posting on Class Counsel's website making false representations regarding this action -- which Counsel contends was made by a hacker. SCEA is entitled to discover the source of the alleged hacking, and what individuals, including putative class members, were told about the information in the posting. Furthermore, because the Class Representatives acknowledge that Update 3.21 was released to address hacking of the PlayStation®3 console (the "PS3"), if Class Counsel's

website was hacked, documents related to that posting will be relevant to the need for security against hacking. Of course, if the posting was created by Class Counsel, a Class Representative, or their agents, it will bear directly on the issue of adequacy.

On these bases, SCEA respectfully requests that the Court enter an order denying Class Representatives' Motion for Protective Order.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure ("Rule") 26(b), discovery is permitted in civil actions of "any nonprivileged matter that is relevant to any party's claim or defense...."[1] "Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence.'"[2] "Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute."[3]

Rule 26(c) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ... [by] forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters [.]"[4] "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."[5]

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[1] Fed. R. Civ. P. 26(b)(1).

[2] *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (citation omitted).

[3] *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009) (citations and internal quotation marks omitted); *Nat'l Acad. of Recording Arts & Sciences, Inc. v. On Point Events, LP*, 256 F.R.D. 678, 680 (C.D. Cal. 2009).

[4] Fed. R. Civ. P. 26(c)(1)(D); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) ("After a showing of good cause, the district court may issue any protective order ... 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' including any order prohibiting the requested discovery altogether, limiting the scope of discovery, or fixing the terms of disclosure."), *cert. denied*, 544 U.S. 905 (2005).

[5] *Phillips v. GMC*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); *Rivera*, 364 F.3d at 1063. The present discovery dispute relates to a discovery dispute between the parties regarding numerous matters, which the parties agreed would be subject to a stipulated briefing and hearing schedule. In the interests of efficiency and economy, SCEA references, without repeating, the factual background set forth in its Motion to Compel, filed on December 15, 2010. *See* also SCEA's Motion to Compel (Docket #116), 9:3-10:4.

III. THERE IS NO DISPUTE BEFORE THE COURT REGARDING REQUEST NO. 1.

Class Representatives have moved for a protective order forbidding SCEA from obtaining discovery related to Request Number 1.[6] In a good faith attempt to narrow the parties' differences, SCEA withdrew this request several weeks prior to the filing of Class Representatives' Motion.[7] The Court should not be burdened with a dispute that no longer exists.

IV. THE CLASS REPRESENTATIVES CANNOT CLAIM PREJUDICE OR HARM FROM PRODUCING THEIR PS3S – OR COPIES OF THE HARD DRIVES - FOR INSPECTION

A. The Class Representatives Should Either Produce The PS3s and Related Hardware, Software and Peripherals Requested by SCEA Or Be Precluded From Using Them As Evidence In This Lawsuit

In the Consolidated Class Action Complaint, the Class Representatives allege that they used their PS3s for specific purposes, including for watching Blu-ray discs, browsing the Internet, word processing and playing Linux-specific games.[8] The Class Representatives further allege that Update 3.21, which only some of them downloaded and installed, caused them to be unable to use their PS3s and related software and peripherals under certain circumstances.[9] As set forth in SCEA's Motion To Compel, the Class Representatives listed "Plaintiffs' PS3 Units" in their Rule 26(a)(i)(A)(ii) disclosures as evidence that they may use to support their claims in this lawsuit. When SCEA naturally requested to inspect their PS3 units, however, the Class Representatives – in an about-face manner – asserted that the PS3s are "irrelevant" to their claims, and that it would be "burdensome" to produce them for inspection. The Class Representatives cannot selectively assert evidence as relevant for their own evidentiary purposes but irrelevant for purposes of complying with their discovery obligations.

It would certainly seem logical "that any document the disclosing party says it may use to support its claims or defenses would bear some presumption of sufficient relevance to warrant production, given the low standard of relevance in discovery."[10] Here, SCEA seeks to inspect the

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[6] Motion for Protective Order (Docket #111), 13:8-14:13.
[7] Declaration of Carter Ott ISO Opposition to Motion Compel and Motion for Protective Order ("Ott Opp. Decl."), ¶ 2, Ex. A.
[8] Consolidated Complaint (Docket #76), ¶¶ 10, 12, 14, 16, and 18.
[9] *Id.*, ¶¶ 11, 13, 15, 17, and 19.
[10] 8A Charles Alan Wright, Arthur R. Miller and Richard L. Marcus, Federal Practice and Procedure, § 2053, (3rd ed. 2010) p. 370.

PS3s (and related peripherals and software) to assess the merit and veracity of the allegations in the Consolidated Class Action Complaint, including allegations regarding the Class Representatives' historical use of the PS3s, whether or not Update 3.21 was installed, and the extent, if any, that it impaired prior usage. Such inspection would also be relevant to whether the Class Representatives' claims are typical of the class. Unauthorized use of the PS3s, including use of pirated software or unauthorized peripherals, would also support many defenses available to SCEA and could be relevant to a Class Representatives' adequacy.

In their Motion for Protective Order, the Class Representatives assert that SCEA should accept self-serving testimony from the Class Representatives or selective photographs of their PS3 units and peripherals in lieu of inspection. Such evidence, however, is inadmissible hearsay and does not establish the actual condition and usage of the Class Representatives' PS3s, let alone of the hardware and software used with it.

In its Motion To Compel, SCEA cited several cases where plaintiffs were routinely ordered to produce their hard drives or gaming consoles in similar litigation.[11] In its Motion For Protective Order, the Class Representatives do not cite any contrary authority, and do not attempt to distinguish those cases in any regard.

Given the undisputed relevancy of the PS3s and related products, the only issue is whether such production would be overly burdensome or prejudicial. "In determining whether a request for discovery will be unduly burdensome to the responding party, the court weighs the benefit and burden of the discovery."[12] "This balance requires a court to consider the needs of the case, the amount in controversy, the importance of the issues at stake, the potential for finding relevant material and the importance of the proposed discovery in resolving the issues."[13] Here, the probative value of the evidence available from the Class Representatives' PS3s and related hardware and software – including the data on their PS3 hard drives – manifestly outweighs any burden of bringing these items to their deposition.[14] Notably, no Class Representative submitted

[11] SCEA's Motion to Compel (Docket #116), 10:3-14:4.
[12] *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999) (citing Fed. R. Civ. P. 26(b)(2)).
[13] *Id.*
[14] *See In re Veeco Instr., Inc. Sec. Litig.*, 2007 WL 983987, *1 (S.D.N.Y. April 2, 2007).

a declaration testifying that it would be burdensome to transport his or her PS3 and related software and hardware to deposition. To the contrary, if Class Representatives produced their PS3s as requested, SCEA could make an image of the hard drive and authenticate the unit within a matter of hours at minimal cost, and could most likely do so during his or her deposition. *See* Declaration of Carter Ott ISO Opposition to Motion Compel and Motion for Protective Order ("Ott Opp. Decl."), ¶ 10, Ex. I (Summary of Work).

Class Representatives correctly state that "the right to information under Rule 34(a), '[i]s counterbalanced by a responding party's confidential or privacy interests.'"[15] But, here, Class Representatives only baldly assert that SCEA's demand is "intrusive" because it "violates [their] right to privacy."[16] Nowhere in their motion do Class Representatives explain what kind of information they seek to protect or even what privacy right(s) is allegedly affected. No Class Representative offers a declaration confirming that his or her PS3 hard drive is the repository of information of such an indisputably confidential nature that it should be afforded extraordinary protection against production in litigation. Therefore, neither the Court nor SCEA has any ability to assess Class Representatives' conclusory argument.

In addition, SCEA has offered a stipulated protective order that would address Class Representatives' privacy concerns. Ironically, Class Representatives have refused to agree to it because of the inclusion of a "Highly Confidential" designation -- despite the fact that it would resolve their asserted privacy concerns regarding their PS3 hard drive contents.[17] In any event, Class Representatives fail to explain why the stipulated protective order SCEA has offered is inadequate to afford sufficient protection for any supposedly "private" data stored on their hard drives. More troubling is the lack of any explanation by Class Representatives for their refusal to produce information based on their supposed "privacy" rights when they are demanding

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[15] Class Reps' Motion for Protective Order (Docket #111), 15:7-10 (citing *Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 446 (D. Conn. 2010)).
[16] Class Reps' Motion for Protective Order (Docket #111), 19:4-5.
[17] *See* Class Reps' Motion for Protective Order (Docket #111), 15:14-16 (citing *Playboy Enterprises*, 60 F. Supp. 2d at 1055 ("Further, [the producing party's] attorney-client privilege and privacy concerns will be protected by the protective order…."); also citing *Coburn v. PN II, Inc.*, 2008 WL 879746, *3 (D. Nev. March 28, 2008) (same); *see also* SCEA's Opposition to Motion to Compel.

production of equally "private" information from SCEA. Apparently, Class Representatives' position is that SCEA must produce documents containing its trade secret and other confidential, commercially sensitive information – and without any appropriate limits on its further dissemination – but they need not produce what is potentially the most probative data regarding their use of their PS3s.

Finally, contrary to Class Representatives' exaggerated assertion, SCEA does not seek production of "all of [their] records."[18] Instead, SCEA seeks only those documents that relate to PS3 use, reliance on asserted misrepresentations, consequent injury, and other issues relevant to certification that Class Representatives and the other named plaintiffs placed at issue though their pleadings.[19] Thus, Class Representatives gain nothing by their effort to equate SCEA's pending requests to those issued by a plaintiff against Ford seeking access to all databases containing "customer contacts" and "contacts by dealers, personnel, and other sources" which a district court rejected in *In re Ford Motor Co.*[20]

Class Representatives' reliance on *Ameriwood Industries, Inc.*; *Playboy Enterprises, Inc.*; *Coburn*; and *Antioch* is also misplaced. It is not the specific content of the documents stored on Class Representatives' PS3 hard drives that is relevant here, but, rather, the data on the hard drives (including stored documents and related metadata) is relevant to show the Class Representatives PS3 usage. This evidence will bear directly on Class Representatives' allegations regarding the extent and nature of their PS3 use, the materiality of the Other OS feature, the scope of injury they sustained, if any, and their alleged typicality.[21]

Nevertheless, if the Court is somehow persuaded that it is too oppressive and burdensome for the Class Representatives to produce their PS3 units and related hardware and software in ordinary course discovery, it should also enter an order under Rule 37(c) precluding the Class Representatives from offering any such evidence at subsequent stages of the litigation.

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[18] Class Reps' Motion for Protective Order (Docket #111), 15:4-7.
[19] SCEA Motion to Compel (Docket #116), 14:15-17:2.
[20] *See* Class Reps' Motion for Protective Order (Docket #111), 15:14-17; 345 F.3d 1315, 1316 (11th Cir. 2003).
[21] Class Reps' Motion for Protective Order (Docket #111), 15:6-7, 15:17-16:2.

B. The Court Should Order Class Representatives To Alternatively Produce Forensic Copies Of Their PS3s And PC Hard Drives And Bear the Cost Thereof

Any alleged cost, burden or expense to the Class Representatives from producing an image of their PS3 hard drives is self-inflicted. SCEA reminded the Class Representatives of their duty to preserve the condition of the PS3s for use as evidence in this case shortly after this litigation commenced, but the Class Representatives declined explicitly to do so. Class Representatives have apparently continued to use their PS3s without regard to their obligations to preserve relevant evidence. This issue was highlighted in the parties' Joint Case Management Statement and Rule 26(f) Report:

> The parties have discussed and agreed to preserve documents and electronic data relevant to the issues in this case. However, the parties have also identified an issue regarding the extent of Plaintiffs' obligation to preserve their PS3 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.
>
> Plaintiffs assert that the requirement that they preserve evidence does not trigger a duty to stop using their PS3s, and Plaintiffs should be permitted to continue to use those functions that they can still access on the PS3s, if they so choose.[22]

In a subsequent meet and confer, the Class Representatives suggested that the hard drives be imaged, but by a third party selected by Class Representatives and at SCEA's sole cost and expense. SCEA should not have to pay for the Class Representatives' continued use of their PS3s.

Furthermore, the imaging procedure proposed by Class Representatives is unacceptable because it strips the evidence of its quantitative and qualitative nature. Class Representatives proposed that they use a "neutral and mutually agreeable computer expert" to "inspect the PS3 hard drives and prepare a report, at SCEA's expense, that sets forth (1) whether Linux was installed and the date of installation; and (2) whether the following types of files exist, or not, on the hard drives: video game files, movie files, music files, word processing files, email files or

[22] Joint Case Management Statement and Rule 26(f) Report (Docket #86), 3:16-4:3.

other Linux software related files."[23] This offer affords SCEA none of the extremely probative value that an analysis of the actual hard drive content would. Specifically, an analysis of the hard drives would provide SCEA with a qualitative and quantitative picture of Class Representatives' daily use of their PS3s. Class Representatives' offer, however, only affords SCEA a "Yes" or "No," as to whether certain software was installed, without any true portrayal of whether it was ever used and with what frequency and in what contexts. If, for example, one of the Class Representatives used the machine in violation of the warranty, such information would be absent from the report. If one of the Class Representatives was using the Other OS function to hack the PS3 and thus play pirated games, SCEA would be unable to discern such illegal usage from the proffered report. And whether various game, movie and music files existed on the PS3 hard drive would be of little aid to SCEA in determining if those files had been obtained through use of the Other OS feature rather than through the PS3 native operating system.

Class Representatives also assert that any cost for forensic imaging of their PS3 hard drives should be shifted entirely to SCEA.[24] There is a presumption that "the responding party must bear the expense of complying with discovery requests."[25] However, under Rule 26(c), a district court may issue an order protecting the responding party from undue burden or expense by "conditioning discovery on the requesting party's payment of the costs of discovery."[26]

The normal and reasonable costs incurred in translating electronic data into a form usable by the discovering party are borne by the responding party in the absence of a showing of extraordinary hardship: "If the total cost of the requested discovery is not substantial, then there is no cause to deviate from the presumption that the responding party will bear the expense."[27]

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[23] Class Reps' Motion for Protective Order (Docket #111), 16:11-17. Ott Opp. Decl., ¶ 2, Ex. A (Rivas 11/18/10 email).

[24] Class Reps' Motion for Protective Order (Docket #111), 16:18-18:2.

[25] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

[26] *Id.* ("the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense.'"); *see also Zubulake v. UBS Warburg* ("*Zubulake III*"), 216 F.R.D. 280, 283 (S.D.N.Y. 2003).

[27] *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 431 (S.D.N.Y. 2002); *Zubulake v. UBS Warburg LLC* ("*Zubulake I*"), 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003) (protective order shifting cost "will issue only when the burden is extreme").

Such an order may be granted only on the motion of the responding party and "for good cause shown,"[28] and "the responding party has the burden of proof on a motion for cost-shifting."[29]

There is no need to consider the *Zubulake* factors cited by Class Representatives because they are only employed when the documents sought are not readily accessible, which necessarily entails whether the cost of obtaining the data is burdensome.[30] Here, it will take two to three hours at a total estimated cost of $2,500 to $3,750 to image each Class Representative's PS3 hard drive. Accordingly, it cannot be said that the data sought is inaccessible or that it would be unduly costly to obtain these documents.

Furthermore, the *Zubulake* factors do not weigh in favor of shifting costs: here, the requests are appropriately tailored to discover relevant information. Class Representatives' PS3 hard drives are likely the best source of evidence regarding their actual use of these computer/gaming consoles.[31] "The more likely it is that the [requested information] contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense."[32] Moreover, the Class Representatives have not submitted any competent evidence of the amount of expenses they reasonably would incur in connection with the document productions at issue in this motion. The declaration they submitted is hearsay. And even if the document were not hearsay, it provides no explanation of "*why*" it would take "three days" to image these hard drives.[33]

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[28] Fed. R. Civ. P. 26(c)

[29] *Zubulake III*, 216 F.R.D. at 283; *Fausto v. Credigy Servs. Corp.*, No. C 07-5658 JW (RS)., 251 F.R.D. 436, 437 (N.D. Cal. 2008).

[30] *See Zubulake III*, 216 F.R.D. at 284 ("[C]ost shifting is potentially appropriate only when inaccessible data is sought."); *Zubulake I*, 217 F.R.D. at 318 (In the context of discovery of electronic documents, "whether production of [such] documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production)."); *Morgenstern v. Int'l Alliance of Theatrical Stage Employees, Local 16*, 2006 WL 2385233, *5 (N.D. Cal. Aug. 17, 2006) ("Cost-shifting should only be considered when discovery imposes an 'undue burden or expense' that outweighs the likely benefit of the discovery.") (quoting Fed. R. Civ. P. 26(b)-(c)); *Quinby v. WestLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006) ("cost shifting is appropriate only where electronic discovery imposes an undue burden or expense.").

[31] *See* SCEA's Motion to Compel (Docket #116), 10:5-14:14.

[32] *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001); *OpenTV v. Liberate Tech.*, No. C 02-0655 JSW(MEJ)., 219 F.R.D. 474, 477-78 (N.D. Cal. Nov. 18, 2003) (same).

[33] *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.*, No. C 04-2266 JW (PVT)., 2010 WL 2035322, *1 (N.D. Cal. May 19, 2010); *See also* SCEA's Evidentiary Objections, submitted herewith.

Playboy Enterprises, Inc., does not assist Class Representatives.[34] The court in that case did not "plac[e] [the] costs" on the requesting party; rather, it withheld its decision pending a declaration from the requesting party regarding "feasibility concerns" and the court noted that "[t]o some degree" the cost should fall on the producing party because "this process has become necessary due to [its] own conduct."[35] The same result should occur here – Class Representatives could have produced their PS3s for hard drive imaging at SCEA's expense during their depositions, but chose not to do so. Thus, the Court should deny Class Representatives' request for cost shifting because they have "not shown that an order shifting costs is warranted under the present circumstances."[36]

C. Additional Information Related To Use Of Their PS3s Is Relevant And Should Be Produced

The Class Representatives' use of their PS3s, including the Other OS feature, is unquestionably one of the central topics in this litigation. In their Initial Disclosures, Class Representatives state that they will rely on a broad set of documents related to their use.[37] SCEA thereafter requested that the Class Representatives produce documents, in specific categories, that evidences their use of their PS3s as well as any hacking or "jailbreaking" of the PS3.[38] In response, Class Representatives produced only a handful of documents, many of which appear on their face to have little to no connection to their actual PS3 usage.[39]

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[34] Class Reps' Motion for Protective Order (Docket #111), 17:24-18:1.
[35] 60 F. Supp. 2d at 1054.
[36] *Advanced Microtherm, Inc.*, 2010 WL 2035322, at *1; *Morgenstern*, 2006 WL 2385233, at *5 (denying request for cost-shifting; "the potential value of such information outweighs this cost."); *see Xpedior Creditor Trust v. Credit Suisse First Boston, Inc.*, 309 F. Supp. 2d 459, 467 (S.D.N.Y. 2003).
[37] SCEA Motion to Compel (Docket #116), 17:6-8.
[38] SCEA Motion to Compel (Docket #116), 17:11-24 and 19:2-4.
[39] SCEA Motion to Compel (Docket #116), 17:25-19:11. Ms. Rivas grossly over generalizes, and thereby mischaracterizes, Class Representatives' production to date. For example, she states that Class Representatives have produced "[c]opies of complaint letters sent to the Better Business Bureau and the Federal Trade Commission." Rivas Decl. (Docket #114), 6:13-14. In fact, no complaint letter has been produced. Class Representatives have only produced correspondence related to the complaints filed with the BBB and FTC. SCEA's Motion to Compel (Docket #116), 17:25-18:21. Ms. Rivas' declaration (Docket #114) contains many incorrect generalizations, and it would be too much to address them all. Accordingly, SCEA will address only the most material.

Class Representatives now seek an order from the Court allowing them to abstain from producing anything they used with their PS3s - *i.e.*, any software or hardware, including any "games," "movies," "CDs," "cables," "keyboards," game controllers and other peripheral devices – despite their claim for consequential damages related to loss of use of this software and accessories.[40] Class Representatives offer only one reason for why they will not produce these things before or at their depositions: the "risk of damaging their property during shipment or transit."[41] But Class Representative fail to specifically describe what things they would produce, but for this risk; what particular risk of "damage" these things face; or why they are unable to properly ship or pack these items to minimize the risk of damage. For example, if Mr. Ventura, who resides in Santa Clara, California, only used "cables" and a game controller with his PS3, there is no legitimate basis for his failure to carefully transfer that property to San Francisco for production at his deposition. And of course, nothing argued by Class Representatives justifies their failure to bring software, i.e., CDs, DVDs and Blu-Ray discs purchased for use with their PS3s.

Class Representatives also contend that they have produced photographs of all of the peripherals they have used with the Other OS feature, and that these "should be sufficient."[42] Of course, SCEA need not accept Class Representatives' inadmissible hearsay – it is entitled to inspect all items that Class Representatives intend to present in support of their consequential damages claims. Moreover, each of these photographs is poor and darkly lit, making it difficult to determine the identity of these things. In addition, there is no way to assess from the photographs their condition or whether they function at all with the PS3. For example, Mr. Ventura's photograph appears to depict a SEGA controller, which ordinarily would not function with a PS3 console. To the extent he claims that he purchased that controller for use with the PS3 this would appear to be false. To the extent he may have altered that controller to use with the PS3, it would be a violation of his warranty, thereby making him not typical of other class members and inadequate as a class representative. Rather than using Class Representatives'

[40] *See, e.g.*, Consolidated Complaint (Docket #76), 19:2-22:5.
[41] Class Reps' Motion for Protective Order (Docket #111), 18:9-11.
[42] Class Reps' Motion for Protective Order (Docket #111), 18:7-9.

inaccurate, poorly lit, and incomplete photographs of the things they allegedly used with their PS3s, SCEA is entitled to inspect the actual items at deposition and question Class Representatives about how they used them.

V. CLASS REPRESENTATIVES CANNOT REFUSE TO PRODUCE TO SCEA DOCUMENTS THAT THEY MAY LATER USE TO ESTABLISH RELIANCE

In their Initial Disclosures, the Class Representatives state that they intend to use documents that they purportedly relied upon in purchasing their PS3s, including "[s]creen shots from the SCEA website regarding the PS3" and "[d]ocuments regarding the 'Other OS' function and the operation, installation and use of Linux on the PS3."[43] Class Representatives, however, failed to produce these documents with their disclosure statement. Accordingly, SCEA issued Request No. 14 seeking production of such documents.[44]

Class Representatives promised to produce documents responsive to Request No. 14, but later qualified the scope of their intended production.[45] They explained that they would produce responsive documents only if currently possessed by them in hard copy --- i.e., they would not conduct any electronic search including the contents of the hard drives of their PCs and PS3s, for responsive documents. Incredibly, Class Representatives announced in the same breath that they reserved their rights to perform such searches and obtain such documents for use at a later stage of the litigation.[46] And they made this assertion, i.e., that they "do not have the requisite control of the documents" notwithstanding that they listed such documents in their Rule 26 disclosures. Apparently Class Representatives have made no effort to search their PCs for responsive documents, nor have they bothered to visit the same webpages they supposedly reviewed in making their purchase decisions. It is for this reason that SCEA requested a copy of their PC hard drives.

Contrary to Class Representatives' assertion, SCEA did not demand that the Class Representatives "produce any documents which they have seen in any magazine or on the

[43] Ott Decl. (Docket #117), ¶ 32, Ex. PP (Amended Initial Disclosures), 9:4-21.
[44] SCEA's Motion to Compel (Docket #116), 14:15-17:2.
[45] Ott Decl. (Docket #117), ¶ 17, Exs. T-X.
[46] Ott Decl. (Docket #117), ¶¶ 22 and 25, Exs. CC and FF.

Internet."[47] Rather, SCEA only offered as a compromise – for the purpose of Class Representatives' depositions – that they produce any Internet document that they contend they relied upon in buying a PS3.[48] Obviously, because they reference these documents in their initial disclosures and failed to produce them upon demand by SCEA, Class Representatives cannot expect to later offer them in this litigation to SCEA's detriment.

Clearly, Class Representatives' position and demand for a protective order is contrary to the rules of discovery and disclosure. The Class Representatives must produce any documents now that they intend to rely upon as evidence, particularly in advance of their depositions. Should they fail to do so, they should be barred from presenting any such discovery in subsequent stages of the litigation.

Finally, Class Representatives cite numerous cases holding that a party is not required to produce documents beyond its possession, custody or control. None of those cases, however, are apposite here, where a party refuses to produce documents it has listed in its initial disclosures, which it concedes are accessible to it, and still seeks the right to later obtain and rely upon such documents as evidence supporting its claims.

VI. A BLANKET ORDER PROHIBITING REOPENING CLASS REPRESENTATIVES' DEPOSITIONS IS IMPROPER AND PREMATURE

This discovery dispute arises, in part, from Class Counsel's refusal to produce the Class Representatives for deposition until after the Court resolves all discovery disputes related to SCEA's document demands.[49] The Class Representatives now seek an advisory opinion from the Court that their depositions should never be reopened.

Rule 30(a) requires leave of court to reopen a deposition.[50] Such leave "shall be granted to the extent consistent with the principles stated in Rule 26(b)(2)."[51] Thus, the Court has considerable discretion to make a determination which is fair and equitable under all the relevant

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[47] Class Reps' Motion for Protective Order (Docket #111), 19:15-17.
[48] Ott Decl. (Docket #117), ¶ 22, Ex. CC (11/12/10 12:52 p.m. email).
[49] SCEA Motion to Compel (Docket #116), 7:8-9:2.
[50] Fed. R. Civ. P. 30(a)(2)(A)(ii).
[51] *Zamora v. D'Arrigo Bro. Co. of California*, No. C04-00047 JW (HRL), 2006 WL 3227870, *1 (N.D. Cal. Nov. 7, 2006).

circumstances.[52] Courts routinely permit a deposition to be reopened on various grounds, many of which are not known until during or after the deposition, including where the court finds the witness was inhibited from providing full information at the first deposition or that the deponent frustrated a fair examination or unreasonably prolonged the examination; the deponent made extensive changes to the transcript following the deposition; new information comes to light after the deposition; and/or documents are produced after the deposition.[53]

By its Motion for Protective Order, Class Representatives now ask the Court to rule – without the ability to make any such findings – that there are *no grounds* on which it may conclude that it should reopen their depositions, regardless of the timing and adequacy of Class Representatives' document production or their conduct in deposition. Clearly, the Court cannot enter such an order without an adequate basis. Neither SCEA nor the Court can establish or determine whether there is good cause or not to reopen those depositions until those grounds are present.[54] Notably, Class Representatives have failed to cite any case law authorizing the order

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[52] *See generally Innomed Labs v. Alza Corp.*, 211 F.R.D. 237, 239 (S.D.N.Y. 2002).

[53] *See Vincent v. Mortman*, 2006 WL 726680, *1 (D. Conn. March 17, 2006) ("courts frequently permit a deposition to be reopened where…new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition"); *Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) (second deposition allowed where it was likely to produce new information not obtainable in the first deposition); *Zamora*, 2006 WL 3227870, at *2 (second deposition allowed to question witness about documents produced after first deposition); *Inyo v. Dept. of Interior*, 2010 WL 5173139, *6 (E.D. Cal. Dec. 13, 2010) (granting motion to reopen deposition; "Defendants should be permitted to conduct additional discovery to address these newly produced exhibits…."); *Flomo v. Bridgestone Americas Holding, Inc.*, 2010 WL 935553, *3 (S.D. Ind. March 10, 2010) (same; "because Plaintiffs belatedly produced the documents, Defendants had no opportunity to cover that ground in [the] original deposition."); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2604565, *1 (N.D. Cal. Aug. 23, 2006)("The Court agrees with defendant that….[plaintiff's] late production effectively prevented defendant from having any meaningful ability to question [the deponent]. Thus, the Court believes that defendants should have the opportunity to reopen [the] deposition."); *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D. Kan. 1996) (production after first deposition of document containing statement by witness warranted second deposition); *Antonino-Garcia v. Shadrin*, 208 F.R.D. 298, 300 (D. Or. 2002) (permitting renewed deposition after deponent refused to answer question and brought along a "supporter" who disrupted the proceedings); *Armstrong v. Hussman Corp.*, 163 F.R.D. 299, 301-03 (E.D. Mo. 1995) (counsel improperly directed witness not to answer and coached witness); *Keck v. Union Bank of Switzerland*, 1997 WL 411931, *2 (S.D.N.Y. July 27, 1997); *Glenwood Farms, Inc. v. Ivey*, 229 F.R.D. 34, 35 (D. Me. 2005).

[54] *See* Fed. R. Civ. P. 26(b)(2)(C)(i); *Keck*, 1997 WL 411931, at *2; *Zamora*, 2006 WL 3227870, at *1; *Inyo*, 2010 WL 5173139, at *6. Class Representatives' request in essence seeks an advisory opinion. In essence, Class Representatives are asking the Court to conclude that there will never be good cause or other basis to reopen their depositions. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to

they seek here – an order to blindly deny any future request to reopen the plaintiff's deposition. Instead, the cases they rely on are in agreement that some basis is necessary to permit, or for that matter disallow, reopening a deposition.[55]

In the end, whether or not these depositions are reopened is predominantly in the control of the Class Representatives and their counsel. For example, if they choose not to produce all documents in their control responsive to SCEA's requests prior to or at their depositions, disrupt the depositions, and/or produce or otherwise rely on previously un-produced documents after their depositions, they run the risk that those depositions may be reopened.[56]

VII. THE UNNAMED PLAINTIFFS ARE NOT ABSENT CLASS MEMBERS, AND ARE THEREFORE SUBJECT TO DISCOVERY UNTIL THEY WITHDRAW

As an initial matter, Class Representatives' motion does not seek a protective order "that prohibits discovery of absent class members."[57] What they seek is an advisory order that prohibits SCEA from obtaining discovery from their co-plaintiffs who have each asserted individual claims against SCEA. These individuals – Sean Bosquett, Frank Bachman, Paul Graham, Paul Vannatta, Todd Densmore, Keith Wright, Jeffrey Harper, Zachary Kummer, and Rick Benavides (the "Unnamed Plaintiffs") – filed complaints initiating nationwide class actions against SCEA and, by Order of the Court, these actions were consolidated into the above-captioned action – for pretrial purposes only – and the plaintiffs were ordered to file a consolidated complaint.[58] Class Counsel made the decision to name only the Class Representatives in their Consolidated Complaint.

This issue is not ripe because, to date, SCEA has not sought any discovery from the Unnamed Plaintiffs. This issue first arose because Class Counsel objected that the Unnamed Plaintiffs must preserve any documents or things related to the actions that *they* commenced, and

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decide questions that cannot affect the rights of litigants in the case before them.'").

[55] *See, e.g., Graebner v. James River Corp.*, No. C-88-1725 DLJ (FSL)., 130 F.R.D. 440, 442 (N.D. Cal. 1989); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002); *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 170 F.R.D. 111, 119 (S.D.N.Y. 1997).

[56] *See Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009) ("purpose of discovery is to remove surprise").

[57] Class Reps' Motion for Protective Order (Docket #111), 23:8-9.

[58] Case Management Order Number 1 (Docket #65).

the claims *they* asserted against SCEA.[59] Class Counsel states in the declaration submitted with their briefs that SCEA's counsel sent a letter outlining "absent class members" preservation obligations.[60] In fact, that letter makes clear that it refers to the Class Representatives, the Unnamed Plaintiffs, and "any individual who has not formally appeared as a plaintiff in the Matter but whom [Class Counsel] contend[s]has retained any firm that is counsel of record in the Matter as his or her attorney…."[61] The Unnamed Plaintiffs have notice of their preservation obligations, and they choose to destroy or spoliate evidence at their own risk.

Furthermore, an order prohibiting discovery from the Unnamed Plaintiffs is inappropriate. These individuals are not "absent class members;" they initiated individual claims against SCEA and therefore had notice that, as a result of those claims SCEA would seek discovery from them. In addition, they have made no attempt to dismiss their individual claims, and therefore have no basis to believe that SCEA should not be entitled to such discovery. According to the Class Representatives, the Court's CMC order absolves the Unnamed Plaintiffs from participating in discovery.[62] But this Order only consolidated the predecessor actions for "pre-trial purposes."[63] In other words, the consolidation is effective only up to class certification. Thus, by the operation of the Order, the underlying complaints will reassume their independent identities in the liability phase, and SCEA must presume that the Unnamed Plaintiffs will resurface in the litigation at that point. The Court has not issued any order requiring bifurcation of discovery as to certification and liability. Consequently, SCEA only has one opportunity to seek discovery from the Unnamed Plaintiffs.

Class Representatives cite sixteen cases and one commentator regarding depositions of putative class members; however, only seven of these cases relate to depositions of individuals who were first named plaintiffs and then later taken off of the caption.[64] And in these seven cases, the individuals the defendant sought to depose had withdrawn their position as class

[59] Class Reps' Motion for Protective Order (Docket #111), 23:18-21. Rivas Decl. (Docket #114, Ex. A).
[60] Rivas Decl. (Docket # 114), 1:26-28.
[61] *Id.* at Ex. A, p. 1, third paragraph.
[62] Class Reps' Motion for Protective Order (Docket #111), 23:10-22.
[63] Docket #65 at 4.
[64] Class Reps' Motion for Protective Order (Docket #111), 23:8-25:1.

representatives either by their own motion or order of the court. Here, the Unnamed Plaintiffs have not withdrawn their positions as class representatives or as individual litigants in the action. Unless and until they withdraw or are ordered to withdraw as putative class representatives, the Unnamed Plaintiffs are subject to discovery under the applicable rules.

VIII. CLASS REPRESENTATIVES HAVE NOT DEMONSTRATED THAT ANY INFORMATION SET FORTH IN THEIR RETAINER AGREEMENTS ARE PRIVILEGED

Request No. 27 seeks production of all agreements Class Representatives have with their counsel in this litigation, including retainer agreements.[65] As explained in SCEA's Motion to Compel, the retainer agreements are relevant because they demonstrate the scope and definition of the Class Representatives' relationship with their counsel.[66]

In their Motion for Protective Order, the Class Representatives do not contest that these documents are relevant. Instead, they argue only that these documents – which are not part of any privilege log – are protected by the attorney-client privilege.[67] Contrary to their position, however, "the Ninth Circuit has repeatedly held retainer agreements are not protected by the attorney-client privilege or work product doctrine."[68] As one decision cited by Class Representatives states: "the attorney-client privilege ordinarily protects neither a client's identity nor information regarding the fee arrangements reached with the client."[69]

The cases cited by Class Representatives are limited to retainer agreements that contain descriptions of the client's motivations for seeking legal representation or other nondiscoverable information. For example, both *In re Grand Jury Subpoena (Horn)* and *In re Grand Jury*

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[65] SCEA's Motion to Compel (Docket #116), 21:17-22:2.

[66] *Id.*; *see, e.g., Armour v. Network Assoc., Inc.*, 171 F. Supp. 2d 1044, 1048-49 & 1055-56 (N.D. Cal. 2001); *In re Quintus Sec. Litig.*, Nos. C-00-4263 VRW, C-00-3894 (VRW)., 148 F. Supp. 2d 967, 972 (N.D. Cal. 2001); *Bryant v. Mattel, Inc.*, 2007 WL 5430887 (C.D. Cal. June 20, 2007).

[67] Class Reps' Motion for Protective Order (Docket #111), 21:3-22:3.

[68] *Hoot Winc LLC v. RSM McGladrey Fin. Process Outsourcing LLC*, 2009 WL 3857425, *2 (S.D. Cal. Nov. 16, 2009) (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995); *United States v. Blackman*, 72 F.3d 1418, 1424 (9th Cir. 1995)); and *In re Michaelson*, 511 F.2d 882 (9th Cir. 1975)); *Carrizosa v. Stassinos*, No. C 05-2280 RMW (RS), 2006 WL 2529503, *3 (N.D. Cal. Aug. 31, 2006); *Ralls*, 52 F.3d at 225-26; *see also Bryant*, 2007 WL 5430887, at *1 (ordering plaintiff to produce a fee agreement to which it was not a party on the grounds that it was relevant to demonstrate bias and lack of credibility); *In re Google AdWords Litig.*, No. C08-03369 JW (HRL)., 2010 WL 4942516, *3 fn. 4 (N.D. Cal. Nov. 12, 2010) (citing *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir. 1986)).

[69] 976 F.2d 1314, 1317 (9th Cir. 1992).

Subpoena Witness (Salas), involve the specific instance where, in a criminal matter, the client's retainer agreement may contain descriptions of the intended scope of the attorney-client relationship which would necessarily incriminate the client.[70] In fact, the *Horn* court concluded that it would conduct an *in camera* inspection of the retainer agreement in that case to determine whether it contained any privileged information.[71]

Here, Class Representatives have not established – or even suggested – that such potentially privileged information exists in any of their retainer agreements. Moreover, to the extent such information exists, the Court can perform an *in camera* review under *Horn*. Accordingly, Class Representatives have not met their burden of establishing privilege and the Court should deny their motion for protective order relating to Request No. 27.

IX. INFORMATION REGARDING A DEFAMATORY POSTING ON COUNSEL'S WEBSITE IS RELEVANT, AND COMMUNICATIONS CLASS COUNSEL MADE TO THE PUBLIC ABOUT THIS POSTING ARE NOT PRIVILEGED.

As set forth in its Motion to Compel, on June 6, 2010, SCEA discovered a defamatory statement regarding the status of this lawsuit on the website of Mr. Ventura's counsel, Meiselman Denlea Packman Carton & Ebertz P.C.[72]

> [b]ecause [SCEA] failed to defend it's intentions in court, the judge decided that [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.[73]

At SCEA's request, this posting was removed, and Mr. Ventura's attorneys informed SCEA that it would conduct an "investigation" about the source of that posting.[74] SCEA later learned that the Meiselman firm had communicated with the general public about this posting and this lawsuit.[75] On this basis, SCEA requested all documents concerning the false posting, including the communications made with the general public; however, Class Representatives refused.[76]

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[70] *See* 976 F.2d 1314, 1317-18 (9th Cir. 1992); 695 F.2d 359, 362 (9th Cir. 1982).
[71] 976 F.2d at 1318.
[72] SCEA Motion to Compel (Docket #116), 23:11-17.
[73] Ott Opp. Decl., ¶ 4, Ex. C (6/6/10, 11:27 a.m. email).
[74] SCEA Motion to Compel (Docket #116), 23:17-22.
[75] SCEA Motion to Compel (Docket #116), 23:17-22.
[76] SCEA Motion to Compel (Docket #116), 24:1-6.

This posting on the website of Class Representatives' counsel raises critical questions regarding both the adequacy of the Class Representatives and one of the Class Representative's counsel. SCEA is entitled to any and all documents regarding counsel's investigation to ensure that the posting was made without the knowledge and consent of the Class Representatives or one of their counsel.

Counsel's representation that the posting was created by a hacker further underscores the relevance of the information sought. Class Representatives concede that Update 3.21 was issued because of security concerns due to hacking of the PS3.[77] The need for protection against hackers – including, on Class Representatives' counsel's website – is clearly relevant in this action. This is particularly true if the Class Representatives' counsel's website was hacked by the same person (or persons) who have published the specific means by which one may hack the PS3. *See, e.g.*, Ott Opp. Decl., ¶ 5, Ex. D (*SCEA v. Hotz et al.* Complaint), ¶¶ 15; Ott Opp. Decl., ¶ 7, Ex. F (Declaration of Bret Mogilefsky), ¶¶ 15-27. SCEA is entitled to know this information, and counsel has an obligation to provide information that could lead to the discovery of the hacker's identity.

In addition, the communications that Class Counsel has had with the general public, including class members, regarding this posting and this lawsuit bear on the public and class members' understanding of this litigation, and is relevant to the adequacy requirement. Before any notices regarding this lawsuit are sent to putative class members, it is critical to know what the Meiselman firm has represented to them regarding the statements posted to its website. If, for example, the putative class members were led to believe that SCEA admitted liability, it could impact SCEA's ability to resolve the litigation at a later stage.

Notably, Class Representatives contend that all of the communications by or with the Meiselman firm regarding its website "would be attorney-work product and attorney-client privileged communications."[78] While that might be true for Mr. Ventura, the actual individual the Meiselman firm represents in this litigation – it does not hold true for other putative class

[77] Consolidated Complaint (Docket #76), ¶ 63; Ott Opp. Decl., ¶ 5, Ex. D (*Huber Complaint*), ¶ 3.
[78] Class Reps' Motion for Protective Order (Docket #111).

members who never engaged the firm as counsel.[79] Significantly, Class Representatives have not presented any facts to support such a claim of privilege.

In fact, the Meiselman website expressly disclaims any attorney-client relationship, that any of its communications constitute legal advice, or that any information sent to the firm will be kept confidential:

> The information contained within the Meiselman, Denlea, Packman, Carton & Eberz P.C. ("Meiselman Denlea" or the "firm") website is intended for informational purposes only, and **should not be construed as legal advice or professional counsel on any subject matter**.... The transmission of the Meiselman Denlea website, in part or in whole, and/or communication with the firm by electronic mail or through the Meiselman Denlea website **does not constitute or create an attorney-client relationship** or impose any obligation on Meiselman Denlea or any of its attorneys. Any information sent to Meiselman Denlea by electronic mail or through the Meiselman Denlea website **is not secure, and is done so on a non-confidential basis**….[80]

Based on the above, the Class Representatives are without any basis to claim that all communications relating to the Meiselman website are privileged.[81]

Class Representatives also contend that the documents sought are not in their possession.[82] To the extent Class Representatives did not receive any communications from the Meiselman firm regarding the website posting, they can simply state that in their formal response to SCEA's request without the necessity of a protective order. The issue, however, is not limited to possession; the documents are within Mr. Ventura's control. The Meiselman firm is and was acting as Mr. Ventura's agent in prosecuting this action. In fact, the only reason that the false

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

[80] Ott Decl. (Docket #117), ¶ 33, Ex. QQ (emphasis added).

[81] *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam) ("[t]he proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived."); *Veeco Instr., Inc. Sec. Litig.*, 2007 WL 724555 *4 (S.D.N.Y. Mar. 9, 2007) ("[t]he party asserting work product protection 'bears the burden of establishing its applicability to the case at hand.'") (quoting *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003)); Fed. R. Civ. P. 26(b)(5)(A)(ii) (Parties withholding documents under a claim of privilege should identify and describe the documents in sufficient detail to "enable other parties to assess the claim.").

[82] Motion for Protective Order (Docket #111), 22:12-23:3.

posting was made on the Meiselman firm's website, and the only reason that documents regarding that false posting exist, is because of the Meiselman firm's role as Mr. Ventura's agent in prosecuting this action. Thus, these documents are in Mr. Ventura's control, and he is obligated to direct the Meiselman firm to produce them.[83]

X. CONCLUSION

Based on the foregoing, defendant Sony Computer Entertainment America LLC respectfully requests that the Court deny Class Representatives' Motion for Protective Order in its entirety.

Dated: January 14, 2011

DLA PIPER LLP (US)

By: /s/ Luanne Sacks
LUANNE SACKS
Attorneys for Defendant
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[83] *See Avocent Redmond Corp. v. Rose Elec.*, 491 F. Supp. 2d 1000, 1010 (W.D. Wash. 2007) (citing *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006) ("Because a client has the right, and the ready ability, to obtain copies of documents gathered or created by its attorneys pursuant to their representation of that client, such documents are clearly within the client's control") and 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Fed. Practice & Procedure § 2210 (2d ed. 1994)).