James A. Quadra (SBN 131084)
jquadra@calvoclark.com
CALVO FISHER & JACOB, LLP
One Lombard Street, Second Floor
San Francisco, California 94111
Telephone: (415) 374-8370
Facsimile: (415) 374-8373

Rosemary M. Rivas (SBN 209147)
rrivas@finkelsteinthompson.com
FINKELSTEIN THOMPSON LLP
100 Bush Street, Suite 1450
San Francisco, California 94104
Telephone: (415) 398-8700
Facsimile: (415) 398-8704

James Pizzirusso *(pro hac vice)*
jpizzirusso@hausfeldllp.com
HAUSFELD LLP
1700 K. Street NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200
Facsimile: (202) 540-7201

Interim Co-Lead Counsel and Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In Re Sony PS3 "Other OS" Litigation

Case No. CV-10-1811-RS

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL

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

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT

Before April 1, 2010, Defendant Sony Computer Entertainment America LLC ("SCEA") PlayStation3 ("PS3") consoles were capable of performing two sets of functions, in addition to simply playing video games. Consolidated Class Action Complaint, Docket No. 76 ("Complaint") ¶2. First, with the "Other OS" function, users were able to install Linux or other operating systems on the PS3 and use it as a personal computer. Id. Second, users could take advantage of a number of other functions that depended on access to SCEA's unified online gaming service called the PlayStation Network ("PSN"), such as the ability to play on-line games or access on-line content, as well as functions that required up-to-date software updates, such as the ability to play new blu-ray discs (the "On-Line Functions"). Complaint ¶¶ 2, 53. However, on April 1, 2010, SCEA unilaterally released software update Version 3.21 ("Firmware 3.21"), which uniformly rendered every PS3 incapable of running both the Other OS function and the On-Line Functions. Complaint ¶¶ 52-53.

The fundamental issue in this case is whether SCEA's conduct in uniformly and unilaterally downgrading all PS3s violated California common and statutory laws, and the extent to which the value of the Plaintiffs' and their fellow class members' PS3s were uniformly reduced owing to the loss of functionality. How Plaintiffs and class members used their PS3s (such as the specific Linux programs they used, games played or videos watched) is immaterial, just as the particular uses to which consumers put products in any consumer fraud class action is immaterial.

Nonetheless, SCEA has initiated a wide ranging, abusive and harassing discovery fishing expedition, seeking irrelevant discovery, not only of Plaintiffs' PS3s, but of their personal home computers ("PCs") as well.[1] Such "discovery" is intended only to burden and harass Plaintiffs, and given the substantial privacy violation entailed in allowing SCEA unfettered access to

[1]The meetings and conferences between Plaintiffs and SCEA concerning discovery, as well as related communications, is detailed in Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for A Protective Order ("Pl. Mem.") at 2-8.

Plaintiffs' PCs and PS3s, it should not be allowed. Nor should this Court condone SCEA's demand for the privileged retention agreements between Plaintiffs and their counsel, or its frivolous request for discovery concerning an unauthorized posting on the website of Meiselman, Denlea, Packman, Carton & Eberz, P.C. ("MDPCE"). SCEA's tactics appear to be intended to deflect attention from the only conduct truly at issue in the litigation – SCEA's.

Moreover, SCEA's insistence on bringing its laundry list of discovery complaints before this Court was precipitous and premature. Many of the issues raised in SCEA's Memorandum of Points and Authorities in support of its motion to compel ("Def. Mem.") are easily resolved, and many others could have been avoided had SCEA chosen to confer in good faith with Plaintiffs' counsel. Because SCEA's overly broad and intrusive discovery requests have little or no utility in exploring the issues relevant to this litigation and the certification of a class, its motion to compel should be denied in its entirety.

II. BECAUSE SCEA'S DISCOVERY REQUESTS ARE BURDENSOME AND SEEK IRRELEVANT MATERIAL, ITS MOTION SHOULD BE DENIED

A. The Burden And Intrusiveness Of Producing Plaintiffs' PS3s Outweigh Any Marginal Relevance.

SCEA asks this Court to compel production of Plaintiffs' PS3s for inspection, as well as forensic copies of the PS3 hard drives. Def. Mem. at 10-12. SCEA has not met its burden to show such production is reasonably calculated to lead to the discovery of admissible evidence; rather, SCEA merely states in a conclusory fashion that the PS3s are relevant because they may relate to adequacy and typicality for class certification purposes, and because Plaintiffs have put the PS3s and their uses at issue. Def. Mem. at 10-14. To the contrary, there is no need for the physical production of the PS3s: the focus on this litigation is on the Defendant's conduct, to wit, the extent to which SCEA's unauthorized and improper downgrading of all class members' PS3 through Firmware 3.21 harmed the proposed class. The only discovery potentially relevant to Plaintiffs' PS3s relates to whether they actually own PS3s and peripheral devices, and whether they have funds in their PSN accounts that are no longer accessible due to Firmware 3.21. See In re Tobacco II Cases, 46 Cal. 4th 298, 312, 207 P.3d 20, 30 (2009) (the "focus [is]

on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices."). Moreover, the production of either the PS3s themselves or forensic copies of the PS3 hard drives is an impermissible invasion of Plaintiffs' privacy and risks unnecessary damage to the units themselves. Therefore, SCEA's motion to compel the production of the PS3s should be denied.

1. SCEA's Demand For The Production Of Plaintiffs' PS3s And Forensic Copies Of PS3 Hard Drives Is Not Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

SCEA argues in conclusory fashion that inspection of the PS3s and production of copies of the PS3 hard drives is necessary to determine how the PS3s were used and to verify Plaintiffs' claims, and for class certification purposes (namely to assess Plaintiffs' adequacy as class representatives and the extent to which their claims are typical of the class). Def. Mem. at 10-14. However, the physical production of Plaintiffs' PS3s and images of the PS3 hard drives is not material to either the merits of this matter or to class certification.

a) Production Of Plaintiffs' PS3s And A Forensic Copy Of The PS3 Hard Drive Will Not Aid In The Exploration Of Any Material Issue Relating To The Merits Of This Litigation.

SCEA's insistence on the physical production of Plaintiffs' PS3s is misguided.[2] This is not a consumer product case involving a claim that the PS3 is itself defective. Were this such a case, then SCEA's insistence on inspection and production of Plaintiffs' PS3s might be reasonably calculated to lead to the discovery of admissible evidence. Here, however, Plaintiffs do not claim that their PS3s are faulty owing to some defect that might be subject to dispute or discovery. Instead, Plaintiffs claim that the functionality of their PS3s has been intentionally and uniformly impaired by SCEA as a result of the release of Firmware 3.21, (Complaint ¶ 4), a claim that SCEA does not dispute.[3] SCEA can point to no case law for the proposition that a

---

[2] While Plaintiffs' Amended Initial Disclosures list their PS3s as materials they may rely upon, Plaintiffs also explicitly reserved the right to object to SCEA's inspection demand. See Declaration of James A. Quadra ("Quadra Decl."), Exhibit 1 at 9, note 1.

[3] Not only did SCEA announce that Firmware 3.21 would either prevent the use of the Other OS feature or the On-Line features, Complaint ¶ 53, but SCEA repeatedly describes that action

consumer must actually prove that they used a consumer product in a particular way to recover for fraud in relation to that product.

Therefore, the only relevance that Plaintiffs' particular PS3s might have is to show Plaintiffs' ownership of the PS3s for standing purposes. That each Plaintiff owns a PS3 has been adequately demonstrated by the photographs produced by Plaintiffs showing that they do, in fact, own PS3s.[4] Declaration of Carter Ott In Support of Defendant's Motion To Compel ("Ott Decl."), Exhibits JJ—LL, NN; Quadra Decl., Exhibit 2. Moreover, the photographs include the PS3 serial numbers, thus allowing SCEA to confirm the authenticity of the photographs. Id. SCEA will also have the opportunity to confirm Plaintiffs' ownership through deposition testimony.

Such proof is more than sufficient; nevertheless, in the interests of cooperation, Plaintiffs addressed Defendant's stated interest in Plaintiffs' use of their PS3s by offering to allow an independent and mutually agreeable forensic consultant to examine their PS3s to confirm whether Plaintiffs installed Linux on their PS3s, and whether the Plaintiffs' PS3 hard drives contained gaming, video, music, movie, word processing or any Linux-related files. Carter Ott Decl. ¶ 24, Exhibit E. To the extent Plaintiffs' use of the Other OS function is at issue, and it is not, then Plaintiffs' offer to allow inspection by a neutral expert is the best option as it protects Plaintiffs' privacy rights and reduces the risk of damage to Plaintiffs' PS3s while still allowing SCEA the opportunity to attain the discovery it claims is necessary.

SCEA's rejection of this reasonable compromise demonstrates that its demand for inspection and testing of the PS3s is nothing more than pretext for a harassing fishing expedition, perhaps because SCEA hopes that its cumulative unreasonable demands will convince some or all of the Plaintiffs to drop their claims. This Court need not condone such

---

as being necessary for security reasons. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 6. However, as explained in the Complaint, ¶ 63, Firmware 3.21 was in fact released to protect SCEA's interests at the expense of its customers.

[4] The same analysis applies with respect to peripheral devices.

requests for unfettered discovery. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004) (affirming denial of motion to compel and holding that "[d]istrict courts need not condone the use of discovery to engage in fishing expeditions . . . [and they may] invoke the Federal Rules of Civil Procedure when necessary to prevent [defendants] from using the discovery process to engage in wholesale searches for evidence that might serve to limit its damages for its wrongful conduct."). See also A. Wright, A. Miller and M. Kane, 7B Federal Practice & Procedure § 1796.1, (3d ed. 2010) ("The court also must protect the named representatives from potentially harassing discovery."). Thus, SCEA's argument that production of the PS3s and PCs "will show how they were used, when, and with what frequency relative to [the PS3]," Def. Mem. at 12, is of no moment.

Plaintiffs claim they bought their PS3s in part because they wanted the ability to use an operating system such as Linux, and their claim for damages accrued on April 1, 2010 when SCEA disabled that function or forced users to forgo the On-line Features. Complaint ¶¶ 4-5, 8, 54. How extensively any Plaintiffs may have used the Other OS function is irrelevant; consumers who never used the Other OS function, suffered the same damage as an expert Linux programmer, as all PS3 owners are now in possession of a game console that was unfairly and unilaterally altered by Defendant, and thus is not capable of performing its advertised functions. SCEA offers no case law, nor could it, for the proposition that consumers who have products that do not perform as advertised suffer different levels of damages depending on their levels of use, nor that a consumer is left without relief when the consumer's property is damaged by either a third party or a manufacturer. This Court or a jury can assign a value to the uniformly downgraded PS3s, and inquiries into the level of PS3 use will not be required. The fact of damage can be established on a common basis where "the common proof adequately demonstrates some damage to each individual." In re Live Concert Antitrust Litig., 247 F.R.D. 98, 136 (C.D. Cal. 2007) (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977) ("[I]t has been commonly recognized that the necessity for calculation of damages on an

individual basis should not preclude class determination when the common issues which determine liability predominate").

In re Mercedes-Benz Tele Aid Contract Litig., 257 F.R.D. 46 (D.N.J. 2009) is particularly instructive. There, consumers brought a class action asserting claims for unjust enrichment and violations of state consumer protection law based upon allegations that Mercedes-Benz failed to disclose the impending obsolescence of the analog network on which its vehicles' emergency response systems depended. The Mercedes-Benz Court found that the only evidence necessary for both a class certification determination and damages calculations was the common proof related to the loss in expectation value:

> The amount of Plaintiffs' "ascertainable loss," which will serve as the basis for quantifying damages at trial, is easily calculated using common proof. Simply put, the sum of each class member's loss is the amount necessary to fulfill his or her expectation of a functioning Tele Aid system. For those class members who did not purchase a digital upgrade, the ascertainable loss will be the cost of such an upgrade plus compensation for the time period between the end of 2007 and any eventual judgment, during which service was unavailable. With respect to Plaintiffs who purchased an upgrade to digital equipment, the amount paid for that modification represents the total ascertainable loss. After each class member's total ascertainable loss is calculated, damages of three times that sum will be awarded pursuant to the NJCFA's treble damages requirement.

Id. at 73-74. Similarly here, Plaintiffs' damages can be measured by common proof, namely the difference in value of the PS3 prior to and after April 1, 2010 when Firmware 3.21 downgraded the system, as well as any PSN "wallet" amounts rendered unusable. Moreover, Plaintiffs have proffered adequate discovery on the question of peripheral devices by producing photographs of such peripheral devices; SCEA has articulated no basis for any of this discovery, much less for the production of the actual devices themselves.

Given the lack of relevance to Plaintiffs' physical PS3s or their hard drives, it is not surprising that all of the cases cited by SCEA are inapposite, including Coles v. Nyko Technologies, Inc., 247 F.R.D. 589 (C.D. Cal. 2007), upon which SCEA heavily relies. That case was a standard product defect case; the issue was whether a peripheral device actually cooled the Xbox, which was prone to overheating. Id. at 591. Holliday v. Extex, 237 F.R.D. 425

(D. Haw. 2006). Whether the named plaintiff's device actually worked or not was not only a contested matter at the heart of that litigation, but it was also necessary to resolve whether the named plaintiff had a personal stake in the litigation. Id. at 592-93. In contrast here, whether Firmware 3.21 disabled the Other OS function is not a contested issue. It is sufficient for both merits and class certification discovery to establish that each Plaintiff actually has a PS3, which Plaintiffs have shown by producing photographs with serial numbers that SCEA can actually verify.

SCEA also proffers cases in which there was a question of spoliation or withholding of documents without proper objection.[5] These cases are distinguishable both because there is no issue of spoliation or withholding of documents for which there is not a proper objection in this matter, and because the central issue in these cases did not involve the computer in question, as here, but rather a computer that might store documents relevant to some other matter. See Bryant v. Mattel, Inc., No. 04-09049, 2007 WL 5416681, at *4 (C.D. Cal. Jan. 26, 2007) (noting that "financial documents are so heavily redacted they are useless; faxed documents are missing fax header information . . . e-mails and other electronic documents that are known to exist have not been produced."); Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F. Supp. 2d 159 (D. Conn. 2010) (noting "the possibility that the hard drive had been intentionally spoliated"); Anz Advanced Technologies, LLC v. Bush Hog, LLC, No. 09-00228, 2010 WL 3699917, at *3 (S.D. Ala. Sept. 9, 2010) (noting "the admitted alteration of a document and lack of forthrightness concerning the timing and circumstances of that document alteration."); Stratienko v. Chattanooga-Hamilton County Hosp. Auth., No. 07-258, 2009 WL 2168717, at *4 (E.D. Tenn.

---

[5] Yancey is thus inapposite because there the defendant failed to object to the production of hard drives. Yancey v. Gen. Motors Corp., No. 05-2079, 2006 WL 2045894, at *3 (N.D. Ohio July 20, 2006) ("Furthermore, a review of the record reveals that the Defendants did not raise these arguments before the Magistrate at the hearing."). Bronsink v. Allied Prop. & Casualty Insurance Company, No. 09-751, 2010 WL 2342538 (W.D. Wash. June 8, 2010), an opinion that did not address a motion to compel, is unhelpful as it does not provide any explanation for why the plaintiffs there were required to produce their computers. Id. at *5. Moreover, it appears that the plaintiffs at least initially agreed to produce their computers on the "condition[] . . that they be permitted to withhold any documents which they considered privileged." Id.

July 16, 2009) ("after Dr. Twiest's retirement, his hard drive was reimaged, rendering any information on it unavailable.").

Nor is SCEA's citation to cases involving illegal music sharing availing. There, the courts ordered production of hard drives because they were from the computers defendants used to illegally share music, and thus their production was appropriate as the instrument of the alleged misconduct. In contrast, SCEA is the party accused of misconduct, and the question is not how the PS3s were used but rather the effect SCEA's misconduct had on the value of the PS3. These cases are also distinguished because they involved spoliation concerns. See Arista Records, L.L.C. v. Tschirhart, 241 F.R.D. 462, 463 and 465 (W.D. Tex. 2006) ("Defendant has strenuously denied throughout this lawsuit that she violated plaintiffs' copyrights. The best proof of whether she did so would be to examine her computer's hard drive which would show, among other things, the existence of any P2P file-sharing programs and the presence of plaintiffs' copyrighted sound recordings."); see also Atl. Recording Corp. v. Howell, No. 06-02076, 2008 WL 4080008, at *1 (D. Ariz. Aug. 29, 2008) ("Howell has repeatedly destroyed evidence central to the factual allegations in this case.")

b) Production Of Plaintiffs' PS3s And A Forensic Copy Of The PS3 Hard Drive Will Not Aid In The Exploration Of Any Material Issue Relating To Class Certification.

This Court should reject SCEA's claim that its inspection of PS3s is necessary to test the adequacy of Plaintiffs as class representatives. SCEA argues, without citation to legal authority, that "if one or more of the Class representatives used their PS3s in an unauthorized fashion (*i.e.*, in violation of copyright laws), that would bear directly on their adequacy to proceed as a representative of the putative class." Def. Mem. at 14. However, discovery concerning potential uses of the PS3 by Plaintiffs is irrelevant – the issue is whether SCEA could properly downgrade Plaintiffs' PS3s when it found it convenient to do so and without providing class members with any remedy to restore the loss of functionality. See Del Campo v. Am. Corrective Counseling Services, Inc., No. 01-21151, 2008 WL 2038047, at *4 (N.D. Cal. May 12, 2008), at *4 ("Generally, unsavory character or credibility problems will not justify a finding

of inadequacy unless related to the issues in the litigation."); see also Cruz v. Dollar Tree Stores, Inc., 07-2050 SC, 2009 WL 1458032 (N.D. Cal. May 26, 2009) (finding allegations that employee engaged in misconduct were insufficient to show conflict of interest with other class member, or that employee would not "prosecute the action vigorously on behalf of the class.").

SCEA incorrectly argues that analysis of the PS3s themselves will "demonstrate the extent to which Class Representatives' use of their PS3 and the Other OS feature is typical of each other and the putative class." Def. Mem. at 12. However, merely because one consumer used a PS3 more than another, or for different purposes, does not change the uniform damage SCEA imposed on its customers when it prevented PS3s from being capable of running both an Other OS and the On-Line features. The claim of the Plaintiffs, as with the entire class, is that Firmware 3.21 uniformly devalued their PS3s, claims for which variations in use are irrelevant. The mere fact of ownership of a product that does not perform as advertised, or that SCEA unilaterally altered the functionality of the personal property of class members, is sufficient for a typicality analysis, and the extent to which each class member actually used the product is immaterial. See Marcus v. BMW of N. Am., LLC, No. 08-5859, 2010 WL 4853308, at *4 (D.N.J. Nov. 19, 2010) ("Inasmuch as both [the plaintiff] and the rest of the class members will seek to prove that the defendants failed to disclose their products' deficiencies, Marcus has carried his burden.").

SCEA also argues that a forensic copy of the PS3 "will provide a means of testing the veracity of Plaintiffs' allegations and their deposition testimony regarding their use of the PS3, particularly in lieu of other PCs." Def. Mem. at 12. In other words, SCEA wants to fish around in Plaintiffs' personal computers and their PS3s to find "dirt" they can use to discredit the messenger because it has no arguments against the message. This Court need not countenance such a fishing expedition. See Rivera., 364 F.3d at 1072.

2. The Production of Forensic Copies of the PS3 Hard Drives Would Violate Plaintiffs' Privacy

Any marginal relevance of images of Plaintiffs' PS3 hard drives is substantially outweighed by Plaintiffs' privacy rights. As the Advisory Committee Note to Rule 34 points

out, "[i]nspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy." Fed. R. Civ. P. 34(a)(1) advisory committee's note (2006). The Note also stresses that "[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems." Id.

This protection from disclosure of private information is heightened by the California Constitution, which creates a privilege for private information. California Constitution, Article 1, Section 1.[6] Where discovery is marginally relevant, at best, and can be attained through other sources, California's constitutional right to privacy precludes discovery. See McArdle v. AT & T Mobility LLC, No. 09-1117, 2010 WL 1532334, at * 2 (N.D. Cal. Apr. 16, 2010) ("However, the right of privacy in Article 1, Section 1 of the California Constitution "protects an individual's reasonable expectation of privacy against a serious invasion. Thus, courts must balance the right of privacy asserted against the need for discovery."). When the right of privacy is involved, "the party seeking discovery must demonstrate a compelling need for discovery, and that compelling need must be so strong as to outweigh the privacy right when these two competing interests are carefully balanced." Lantz v. Superior Court, 28 Cal.App.4th 1839, 1853-54 (1994). Compelled discovery within the realm of the right of privacy "cannot be justified solely on the ground that it may lead to relevant information." Britt v. Superior Court, 20 Cal .3d 844, 856 (1978). "Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'" Lantz, 28 Cal.App.4th at 1854 (citations omitted). Discovery concerning personal computers should therefore be narrowly tailored to protect Plaintiffs' privacy interests.

Courts typically reject overreaching requests for the production of entire PC hard drives, particularly in the absence of any claim of spoliation and given the invasive nature of such

---

[6] California's state privilege laws, including California's constitutional right to privacy, should be applied. *See Feldman v. Allstate Ins. Co*., 322 F.3d 660, 667 (9th Cir. 2003); *see also* Fed. R. Evid. 501.

discovery. See, e.g., Mas v. Cumuklus Media, inc., No. 10-1396, 2010 WL 4916402, at *3 (N.D. Cal. Nov. 22, 2010) (Where party will produce documents from hard drive, no cause to produce hard drive itself to defendant); John B. v. M.D. Goetz, 531 F.3d 448, 460 (6th Cir. 2008) (granting mandamus relief from order requiring production of hard drive where "[t]he district court's compelled forensic imaging orders here fail to account properly for the significant privacy and confidentiality concerns present in this case" and noting that "courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature."); Cantrell v. Cameron, 195 P.3d 659, 661 (Colo. 2008) (holding that "the trial court declined to incorporate any restrictions in its order, simply directing Cameron to produce the laptop for inspection. The trial court neglected to apply the Martinelli balancing test and made no findings on how disclosure might occur in a manner least intrusive to Cameron's privacy interests."); Benton v. Dlorah, Inc., No. 06-2488, 2007 WL 2225946, at *2 (D. Kan. Aug. 1, 2007) (denying request for mirror image of hard drive where "Defendants have not sustained their burden to show that Plaintiff has in fact failed to comply with their requests for production, that Plaintiff's hard drive contains any additional information subject to discovery, that Plaintiff has spoliated evidence, or that sanctions should be awarded. The Court will not assume that Plaintiff is lying or that she has been discredited in her responses to the requests for production."); Fennel v. First Step Design, Ltd., 83 F.3d 526, 532-33 (1st Cir. 1996) (affirming denial of request for hard drive); Balfour Beatty Rail, Inc. v. Vaccarello, No. 06-551, 2007 WL 169628, at *3 (M.D. Fla. Jan. 18, 2007) (denying request for defendants' hard drives and characterizing request as "fishing expedition"); Hedenburg v. Aramark Am. Food Servs., No. 06-5267, 2007 WL 162716, at *2 (W.D. Wash. Jan. 17, 2007) (denying inspection of plaintiff's home computer because the computer files did not "go to the heart of the case").

In this case, Plaintiffs, other than Mr. Stovell, used the Other OS function as a personal computer, and there may be personal and confidential material stored therein. Compl. at 4-8. Individuals may maintain multiple private information on personal computers, including

correspondence with friends and family members, confidential business information, photographs, journals, and so on. Moreover, outside of using the PS3 as a personal computer, what games Plaintiffs played, how often they played games, etc., is private information. Plaintiffs should not be forced to turn over the equivalent of a personal computer for perusal by a corporate defendant as the price of stepping forward to protect the rights of consumers, nor should they be forced to even turn over their game-playing histories. Production of a copy of the hard drive would be an impermissible invasion of Plaintiffs' privacy. Because producing Plaintiffs' PS3s hard drives will cause an impermissible violation of their privacy, this Court should not compel their production.

3. The Production Of Plaintiffs' PS3s For Inspection Would Be Burdensome.

SCEA also claims entitlement to inspect the original PS3 devices. Any marginal relevance to the production of Plaintiffs' PS3s or the imaging of their PS3 hard drives is outweighed by the burden of such a production. There is an inherent risk of damage involved in the packaging and transportation of the PS3s. As set forth below, SCEA has offered no legitimate explanation for why photographs cannot be used to demonstrate that Plaintiffs possess PS3s.

4. Plaintiffs' Production Of Photographs And Their Offer To Allow A Neutral Forensics Expert To Examine The PS3s Is A Less Intrusive And More Than Adequate Means Of Discovery.

Contrary to SCEA's insistence on the production of the physical PS3s, Plaintiffs' production of photographs of the PS3s and peripheral devices, coupled with their offer to allow a neutral forensic examination of the PS3 and Plaintiffs' deposition testimony, are more than sufficient to satisfy SCEA's need for discovery concerning the Plaintiffs' PS3s while at the same time protecting their privacy interests.[7]

---

[7] On December 1, 2010, Plaintiffs produced photographs of Mr. Herz' PS3, including the serial number (Herz 0000005), as well as of Mr. Huber's PS3, including the serial number (Huber 0000012). Quadra. Decl., Exhibit 3; Ott Decl. Exhibits JJ, KK. On January 11, 2011, Plaintiffs supplemented Mr. Herz' production of additional photos of his PS3 (Herz 0000227-228).

SCEA complains about the quality of the photographs. Def. Mem. at 11-12. However, SCEA's complaints are not ripe as Plaintiffs have not had an opportunity to address all of SCEA's concerns. In fact, Plaintiffs only learned that SCEA has an issue with the quality of the photographs when it filed the instant motion; had SCEA conferred in good faith with Plaintiffs' counsel, it would have learned that Mr. Baker's photographs were forthcoming (and were subsequently produced on January 11, 2011 as Baker 0000157-161)[8] and that Plaintiffs were willing to supplement Mr. Herz' photograph of the rear of the PS3 (which contained the serial number) with the front (and such pictures were subsequently produced on January 11, 2011 as Herz 0000227-228).[9]

The only specific argument SCEA makes in support of its complaint that the photographs are inadequate is that it "has no means of determining from these photos the current physical condition of these consoles, whether they have been tampered with or abused, let alone if they are functional." Def. Mem. at 11. First, whether the PS3s have been damaged, tampered with or physically abused is irrelevant. Even if Plaintiffs used their PS3 in a way SCEA does not approve, and that is a baseless supposition, such use in no way affects Plaintiffs' claim that their PS3 was less functional following the issuance of Firmware 3.21. Plaintiffs' deposition testimony is more than sufficient to show that their PS3s were functional at that time. Second, even if such testimony is insufficient (and it is not), the compromise offered by Plaintiffs whereby a neutral expert would prepare a report on the Plaintiffs' PS3s is more than sufficient. Given the privacy concerns at issue here, the use of a neutral forensic examiner is the least

---

Quadra Decl., Exhibit 4. On December 6, 2010, Plaintiffs produced photographs of Mr. Ventura's PS3, including the serial number (Ventura 0000040-41) and Mr. Stovell's PS3, including the serial number (Stovell 0000189, 192, 196). Quadra. Decl., Exhibit 5; Ott. Decl. Exhibits, NN. On January 11, 2011, Plaintiffs produced photographs of Mr. Baker's PS3, including the serial number. Quadra Decl., Exhibit 6 (Baker 0000159-161).

[8] See Quadra Decl., Exhibit 6.

[9] SCEA has not articulated any reason why Mr. Ventura's photograph of a number of peripheral devices and his PS3, which incidentally cuts of a small portion of the side of the PS3, is inadequate.

intrusive means to attain any potentially relevant materials. See Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 332 (D.D.C. 2008). Therefore, SCEA's demand for Plaintiffs PS3s and a forensic copy of the PS3 hard drive should be rejected as unnecessary and overreaching.

B. The Burden And Invasiveness Of Producing The Hard Drive From Plaintiffs' PCs Outweighs Any Marginal Relevance.

SCEA's request for a forensic copy of Plaintiffs' hard drives, a classic fishing expedition, is frivolous and harassing. SCEA's thin justification for seeking copies of Plaintiffs' personal computer ("PC") hard drives reflects its true purpose. In fact, the only justification SCEA makes for the production of the PC hard drives, apart from the questionable claim that such production is necessary to compare Plaintiffs' use of their PCs with their PS3,[10] is that the PC hard drives "may also contain additional documents responsive to SCEA's other document requests," including any searches performed about the PS3 before purchase. Def. Mem. at 14.

As noted above, SCEA has cited no authority for the proposition that a party must produce forensic copies of hard drives merely because they might contain relevant documents. Rather, the proper course is to request said documents, which SCEA has done, and Plaintiffs have in fact searched their personal computers for, and produced, all documents responsive to requests other than those to which Plaintiffs objected. Mere skepticism that a party has not produced all responsive documents located on a computer does not justify the intrusive and overbroad production of a forensic copy of the entire hard drive. See McCurdy Group v. Am. Biomedical Group, Inc., 9 F. App'x. 822, 831 (10th Cir. 2001) (request for forensic copy denied where defendant "never explained . . . why it should be allowed to conduct a physical inspection of [the plaintiff's] computer hard drive(s). Although [the defendant] was apparently skeptical that [the plaintiff] produced copies of all relevant and nonprivileged documents from the hard drive(s), that reason alone is not sufficient to warrant such a drastic discovery measure."); see

[10] As noted above, the particular uses to which Plaintiffs put their PS3s is irrelevant. It follows that their use of PS3s in relation to their PCs is even more remote to the issues at hand. Moreover, even if such discovery is relevant, and it is not, Plaintiffs' depositions testimony will be more than adequate to explore the extent to which they used their PS3 in relation to their PCs.

also Scotts Co. LLC v. Liberty Mut. Ins. Co., No. 06-899, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (mere suspicion that a party is withholding discovery is insufficient to permit an intrusive on-site examination of a computer system).

SCEA also argues that Plaintiffs' hard drives should be imaged because the computers might have been used to view SCEA's representations concerning the Other OS. Def. Mem. at 14. However, Plaintiffs produced copies of all SCEA representations in their custody or control concerning the Other OS, and Plaintiffs anticipate that SCEA will produce all other representations. Indeed, SCEA is already in possession of any statements or representations it made concerning the Other OS function. Moreover, SCEA can explore the specific representation relied upon by Plaintiffs in their depositions without unnecessarily intruding on their privacy.

Indeed, the fact that SCEA's true purpose in asking for forensic copies of Plaintiffs' entire hard drives is an impermissible fishing expedition is reflected in its failure to seek directed and reasonable discovery concerning Plaintiffs' web browsing. If SCEA is seeking data regarding searches Plaintiffs performed concerning their PS3s prior to purchase several years ago, it could have asked for such data; instead, it insisted on copies of the entire hard drive. Where a party has produced, or will produce, responsive documents on a hard drive, there is "no need for Defendant to obtain a copy of the hard drive of the" personal computer. Mas, supra, 2010 WL 4916402, at *3.

The burden and invasiveness of producing Plaintiffs' PC hard drives far outweighs any marginal relevance they might have and, this Court should not compel their production for the same reasons that the Court should not compel production of the PS3 hard drives.

C. Because Plaintiffs Have Already Produced All Documents In Their Possession, Custody And Control Regarding Reliance And Purchase, There Is No Need To Compel Such Production.

SCEA complains that Plaintiffs have not produced "all documents that [Plaintiffs] relied upon in purchasing, receiving or acquiring any PS3." Def. Mem. at 14-15. SCEA is incorrect. Plaintiffs produced all representations by SCEA concerning the Other OS in their custody and

control, and also produced additional documents on January 11, 2011. To further comply with their obligations under the Federal Rules of Civil Procedure, Plaintiffs will produce any additional responsive documents as they are discovered; however, all such documents will likely come from SCEA itself. SCEA also seeks the "screen shots" referenced in the Plaintiffs' Amended Initial Disclosures. Def. Mem. at 14-15. However, Plaintiffs have produced all such screen shots in their custody and control, including those produced by Mr. Ventura. See Ott Decl. at Exhibit LL (Ventura 000014-39).[11]

SCEA also complains that Plaintiffs did not agree to perform any electronic searches. Def. Mem. at 15. However, Plaintiffs are only required to produce documents within their custody and control, not to search the internet or elsewhere to locate potentially relevant documents for Defendant. Gary Price Studios, Inc. v. Randolph Rose Collection, Inc., No. 03-969, 2006 WL 1378467, at *2 (S.D.N.Y. May 17, 2006) ("The limiting phrase 'possession, custody and control' was included by the drafters of the Rules before the advent of the Internet and websites, and it is questionable whether the drafters would have regarded material available to the public through these electronic marvels as within the 'possession, custody and control' of a particular party."). Moreover, SCEA's representations are necessarily within SCEA's custody and control.

Again demonstrating the prematurity of the instant motion, SCEA also complains that Plaintiffs have not produced the boxes in which their PS3s were packaged. Def. Mem. at 16. Had SCEA asked, Plaintiffs would have, and will, allow SCEA to inspect the boxes and packages Plaintiffs currently possess or control. As for manuals and other materials accompanying the Plaintiffs' PS3s when they were purchased, Plaintiffs have already produced all such materials in their custody or control. Declaration of Rosemary Rivas, Docket No. 114

[11] In the category of the pot calling the kettle black, SCEA has failed to produce printouts of its marketing materials from its own website. SCEA has refused to produce documents on the basis that there is no protective order in place, but screen shots from its publicly viewable website cannot be confidential or proprietary.

("Rivas Decl.") ¶ 25. And of course, SCEA presumably has a copy of any packaging or manuals included with the sale of PS3s during the class period. Moreover, Plaintiffs have produced copies of any receipts or other proofs of purchase Plaintiffs retained. Id.

SCEA also complains that Plaintiffs have not produced the games or other media they purchased for use with the PS3s, Def. Mem. at 16, but SCEA fails to explain how its request for this material is in any way germane to the instant litigation. What precise games or videos Plaintiffs and class members purchased is in no way relevant to this action or class certification; SCEA advertised the PS3 as being able to both play games and videos and install an Other OS. It is undisputed that the release of Firmware 3.21 either precluded the use of the Other OS or the On-Line Features; the types of games or videos played are irrelevant. Moreover, forcing Plaintiffs to divulge their personal selection of gaming and video material is an unwarranted invasion of Plaintiffs' privacy that has little or no relevance to the instant action.

D. The Court Need Not Order Production Of Documents Regarding Usage Of The PS3.

SCEA complains that Plaintiffs did not produce all documents and things in response to Requests For Production 15[12]. Def. Mem. at 17-18. Request For Production No. 6 seeks all hardware and all software used with Plaintiffs' PS3s, and Request No. 15 seeks all documents, such as spreadsheets and word documents created or used on the PS3s. Ott Decl. Exhibits T-X. However, as discussed above, extensive production of documents and things related to every use to which Plaintiffs put their PS3 is unnecessary to resolve either the merits of this action or whether a class should be certified. In addition, the production of the games, videos and other media Plaintiffs used with their PS3s is an unnecessary and impermissible violation of their

[12] Again demonstrating the prematurity of this motion, SCEA asks this Court to compel Plaintiffs to produce license agreements and terms of use (copies of which SCEA not only has, but has itself produced. See Ott Decl. at 2). Had SCEA asked, Plaintiffs counsel would have informed SCEA that it has already produced all such agreements in its custody and control, including those documents labeled Herz 000007-8 and Ventura 0000014-39. Similarly, Plaintiffs have searched for and identified no documents regarding hacking or jailbreaking of the PS3 in their custody or control in response to Request For Production No. 30 (notwithstanding Plaintiffs objections that SCEA had failed to adequately define these overly broad terms and that requests for such documents are irrelevant).

privacy. Moreover, SCEA seeks the production of every word document on Plaintiffs' PS3s, which could include such personal matters as confidential correspondence or other personal writings; every spreadsheet, which could include personal financial records; and internet browser histories, which are uniquely private. Such overly broad and harassing requests need not be countenanced by this Court. Plaintiffs produced photographs of their peripheral devices, such as keyboard and game controllers, as well as emails and other documents in their custody and control concerning the Other OS function, and that, in conjunction with Plaintiffs' depositions, is more than sufficient discovery concerning the use to which Plaintiffs put their PS3s (particularly as the degree or types of such use is irrelevant to this litigation).

E. SCEA's Contention Requests Are Premature.

SCEA's Requests For Production Nos. 10-13 and 16-25 seek "any and all documents concerning" various allegations in the Complaint. Def. Mem. at 21. To date, Plaintiffs have produced all documents in their custody and control that they relied upon in bringing their complaint, namely the documents cited therein. Quadra Decl., Exhibit 7. Again demonstrating the prematurity of the instant motion, had SCEA asked, Plaintiffs counsel would have so informed SCEA's counsel.

Moreover, it is well settled that it is premature to compel a plaintiff to produce all documents responsive to contention requests such as those propounded by SCEA before discovery is concluded. In asking for all documents concerning Plaintiffs' allegations in the Complaint, SCEA has essentially propounded contention interrogatories in the form of documents requests. Just as courts routinely reject motions to compel responses to premature contention interrogatories, so too should this Court deny SCEA's motion with respect to its contention documents requests, particularly as many of the documents "concerning" the specified allegations in the Complaint are in SCEA's custody and control (and SCEA has only provided Plaintiffs with a small portion of the documents it is obliged to produce).

For example, in In re Convergent Technologies Sec. Litig., 108 F.R.D. 328 (N.D. Cal. 1985), the court held that:

> [T] he wisest course is not to preclude entirely the *early* use of contention interrogatories, but to place a burden of justification on a party who seeks answers to these kinds of questions before substantial documentary or testimonial discovery has been completed. This court will look with considerable skepticism at sets of contention interrogatories, filed early in the pretrial period, that simply track all the allegations in an opponent's pleading. . . . The Court will be especially vigilant in its evaluation of proffered justifications when a complaint is not facially infirm and when defendants appear to have control over or adequate access to much of the evidence relevant to their alleged misconduct.

Id. at 338-39. That SCEA seeks contention discovery in the form of requests for production as opposed to interrogatories does not change this analysis. See In re Bulk Popcorn Antitrust Litig., No. 89-0710, 1990 WL 123750, at * 2 (D. Minn. June 19, 1990) ("Many of defendants' discovery requests are 'contention' requests. Such discovery techniques are not favored.") (citing In re Convergent Technologies,); see also Bonilla v. Trebol Motors Corp., No. 92-1795, 1997 WL 178844, at *65 (D.P.R. Mar. 27, 1997) ("Defendants have decided to invent a new form of discovery-contention requests to produce documents . . . Such a form does not exist under the Federal Rules. Although contention interrogatories are allowed . . . Plaintiffs are generally excused from responding to defendants' contention interrogatories until they had completed a substantial amount of discovery, particularly document inspection.") (rev'd on other grounds).

SCEA makes no effort to justify its demand for premature and overly broad contention requests (which merely quote extensive portions of the Complaint and ask for all documents concerning those allegations). Plaintiffs have produced all such documents in their custody and control; for its part, SCEA has produced only a tiny portion of documents requested by Plaintiffs. SCEA's demand for a premature response to its unbounded contention interrogatories should be denied. See In re eBay Seller Antitrust Litig., No. 07-1882, 2008 WL 5212170, at *1 (N.D. Cal. Dec. 11, 2008) ("Discovery may be limited, however, if it can be obtained from another source or the burden or expense of the proposed discovery outweighs its likely benefit. As a result, a court may order that a party does not need to answer a contention interrogatory

until designated discovery is complete or at some later time. Fed.R.Civ.P. 33(a)(2).") (citation omitted); see also City & County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 222 (N.D. Cal. 2003) (determining that plaintiffs need not respond to defendants' broad contention interrogatories at the early stage of litigation).

Because they are premature, and because SCEA possesses most of the documents it seeks in its contention requests, SCEA's demand for a response to its contention requests should be denied or at minimum, postponed until later in the litigation.

F. Plaintiffs' Retention Agreements With Counsel Are Not Discoverable.

Without citation to any legal authority, SCEA asserts that the engagement agreements between Plaintiffs and their counsel are relevant to the question of adequacy. Def. Mem. at 21-22. However, such agreements are protected under the attorney-client privilege. Cal. Bus. & Prof. Code §6149.

In addition, such representation agreements are not relevant to class certification, and courts routinely reject such requests where defendants merely assert that such documents may be relevant to adequacy. See, e.g., Stanich v. Travelers Indem. Co., 259 F.R.D. 294, 322 (N.D. Ohio 2009) ("Most courts, however, find such discovery irrelevant to the issue of class certification, except perhaps to determine whether the named plaintiffs and class counsel have the resources to pursue the class action. . . . Here, Travelers is not challenging the ability of the named plaintiffs or class counsel to finance this litigation. In fact, Travelers has not explained the specific relevance of fee and retainer agreements, but merely seeks them because the agreements potentially contain information supportive of Travelers' inadequacy arguments . . . Travelers has not established that the requested agreements are relevant and discoverable.") (citations omitted); see also Baker v. Masco Builder Cabinet Group, Inc., No. 09-5085, 2010 WL 3862567, at *3 (D.S.D. Sept. 27, 2010) ("Plaintiffs are correct that information regarding fee arrangements generally is irrelevant to the class certification issue."); Mitchell-Tracey v. United Gen. Title Ins. Co., No. 05-1428, 2006 WL 149105, at *1 (D. Md. Jan. 9, 2006) ("Several courts have held that fee arrangements are irrelevant to class certification"); 7 A.

Conte and H. Newberg, *Newberg on Class Actions*, § 22:79 (4th ed. 2005) ("Defendants often request discovery regarding fee arrangements between the plaintiffs and their counsel, but courts usually find such discovery to be irrelevant to the issue of certification.").

Here, SCEA does not even offer a speculative basis for its claim that the retention agreements are relevant, instead merely proffering the conclusory statement that "[t]he requested agreements demonstrate the scope of Class Representatives Relationships with their counsel. SCEA should have the ability to inquire regarding the terms of their fee arrangements, including any contingency fee and cost sharing arrangements, as such arrangement bear on their and their counsel's ability to adequately represent the class." Def. Mem. at 21. SCEA might be implying that Plaintiffs and their counsel lack sufficient funds to prosecute this litigation. However, counsel for Plaintiffs, which now includes nine established litigation firms, have already certified to this Court that they have more than sufficient assets to prosecute this action.[13] Courts routinely reject requests for fee arrangements based on speculation that class representatives and counsel may not be able to cover litigation costs. See, e.g., Piazza v. First Am. Title Ins. Co., No. 06-765, 2007 WL 4287469, at *1 (D. Conn. Dec. 5, 2007) (denying request for production of fee arrangements where "plaintiff's counsel was clear at oral argument that the plaintiff is not herself funding the lawsuit. The defendant does not contend that there is anything improper about counsel funding the class action."); Sanderson v. Winner, 507 F.2d 477, 479-80 (10th Cir. 1974) ("Defendants considered it important to ascertain whether plaintiffs were able to pay all of the costs in the litigation including extensive depositions. We fail to see relevancy in these inquiries particularly with respect to in limine inquiry as to whether a class action is to be allowed. Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation.").

[13] See, e.g., Declaration of Rosemary Rivas ¶ 5 (Docket No. 28); Declaration of Jeffrey I. Carton ¶ 11 (Docket No. 33); Declaration of James Quadra ¶ 10 (Docket No. 34); Declaration of James R. Pizzirusso ¶ 12 (Docket No. 47).

SCEA might also be implying that the fee arrangements will reveal a conflict of interest between Plaintiffs and the class or their counsel. Again, such an implication is pure speculation, and Magistrate Judge Lloyd from this District recently rejected a defendant's request for retainer agreements where the defendant offered only speculation that such documents might reveal a conflict of interest. See In re Google AdWords Litig., No. 08-03369, 2010 WL 4942516, at *5 (N.D. Cal. Nov. 12, 2010) ("The Court does not agree that Google's purely speculative inquiry serves to turn otherwise irrelevant documents into relevant ones . . . Without more, this Court does not believe that the documents requested by Google have any bearing on the certification of the class in this action.").

Moreover, Plaintiffs' depositions will be an adequate opportunity for SCEA to explore whether there are any potential conflicts (there are not). See In re Front Loading Washing Mach. Class Action Litig., No. 08-51, 2010 WL 3025141, at *4 (D.N.J. July 29, 2010) ("[W]hile discovery is broad at the pretrial stage, this Court finds that Defendant failed to demonstrate how the information is relevant or necessary. Even assuming *arguendo* that the retainer agreements are relevant and may lead to admissible evidence, this Court nonetheless finds that disclosure is unwarranted, as Defendant can obtain the discovery by alternative means, such as through the depositions of individual Plaintiffs."); see also 7 A. Conte and H. Newberg, *Newberg on Class Actions*, § 22:79 (4th ed. 2002) ("Discovery on the question of adequate representation is rarely needed or permitted. When plaintiffs are deposed, questions may explore knowledge of the plaintiff with respect to the securities claims alleged, and the general circumstances about whether the plaintiff will adequately represent the class.").

Because there is no basis for discovery of Plaintiffs' retention agreements with counsel, SCEA's demand for their production should be denied.

G. Plaintiffs Have Produced Documents Sufficient To Establish Their Employment Histories.

Without conceding the relevance of their employment histories, each Plaintiff produced a resume or curriculum vitae. Quadra Decl., Exhibit 8. These documents, combined with

Plaintiffs' depositions, are more than sufficient to identify their employment histories. Again, SCEA's insistence on bringing its perceived discovery grievances to this Court's attention was premature and ill-advised.

H. Plaintiffs Have Produced All Communications To Or From Them Related To This Litigation In Their Custody Or Control.

Under the heading of "Communications Relating To This Litigation," SCEA seeks all documents concerning communications Plaintiffs "have made, read, seen, sent, received, viewed, or heard" concerning SCEA, the PS3, and this litigation, including such communications between absent class members and members of the public at large. Request For Prod. 2 and 26. To the extent these requests seek discovery from absent class members, this Court should not compel production, as discussed in Pl. Mem. at 23-25. In fact, this Court need not compel any further production because Plaintiffs have produced all communications made or received by them that is in their custody or control[14] (information Plaintiffs would have gladly shared with SCEA had it conferred in good faith rather than prematurely seeking this Court's intervention). These include communications with the FTC and the BBB, postings on internet chat boards or the like concerning the Other OS, and communications between the Plaintiffs and SCEA and/or SCEA. Ott. Decl., Exhibits JJ-NN. To the extent SCEA is seeking postings by consumers other than Plaintiffs on various websites, such discovery is unwarranted because SCEA has the same access to those websites as Plaintiffs have (and any such postings by consumers other than Plaintiffs referenced in the Complaint are available at the websites listed in the Complaint).

Nor is there a basis for SCEA to seek the "nicknames" Plaintiffs used to communicate on the internet on any topic. Plaintiffs have performed a diligent search to identify any relevant communications they made; requiring Plaintiffs to disclose the name they use to communicate anonymously is an impermissible and unnecessary intrusion on their privacy and freedom of

[14] The Federal Rules of Civil Procedure requirement that a party produce requested documents and things in a party's custody or control does not require the production of all documents "read, seen, sent, received, viewed, or heard." SCEA's Requests For Production No. 2.

speech. See Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts."). Not surprisingly, SCEA cites to no authority for the proposition that discovery of internet nicknames is appropriate, particularly given the marginal relevance any such discovery would have.

Plaintiffs have produced all communications in their custody and control concerning this litigation; therefore, there is no basis for SCEA's motion to compel their production.

I. Documents Related To Unauthorized Postings On MDPCE's Website Are Irrelevant And Privileged.

Plaintiffs refer the Court to their argument in Part III.G of their Motion for a Protective Order, filed on December 15, 2010 (Docket No. 35) and the MDPCE Opposition filed concurrently herewith.

J. The Discovery Disputes Should Be Resolved Prior To Plaintiffs' Deposition.

On October 28, 2010, Plaintiffs timely objected to SCEA's numerous burdensome, harassing and irrelevant discovery requests. See Ott Decl., Exhibits T-X. Notwithstanding these objections, and without much effort to resolve the resulting disputes, SCEA precipitously moved forward with the previously-scheduled Plaintiffs' depositions. When it became clear that, notwithstanding these objections, SCEA not only intended to move forward with the depositions, but that it intended to seek to reopen Plaintiffs' deposition in the event that Plaintiffs were compelled to produce documents in response to requests to which they had objected, Plaintiffs naturally declined to allow SCEA the opportunity to manipulate the discovery process in a way that would allow it two bites at the deposition apple. Rivas Decl. ¶¶

13-14. Plaintiffs also promptly filed a motion for a protective order in accordance with a schedule negotiated with Defendant.[15]

As further discussed in Pl. Mem. at 10-13, SCEA has acted unreasonably and outside the bounds of the Federal Rules of Civil Procedure in attempting to orchestrate means by which it can leverage serial depositions of the Plaintiffs. Federal Rule of Civil Procedure 30(d)(1) provides that depositions should normally be limited to one day, except in exceptional circumstances. Here, several of the Plaintiffs and their counsel do not reside in the Bay Area, and it is a significant burden on them to participate in serial depositions, particularly when it is not necessary. The far more prudent and economical path would be to resolve, with this Court's assistance, the parties' discovery disputes, followed in a timely manner by Plaintiffs' one-time deposition. SCEA offers no compelling response.

III. CONCLUSION

For the reasons cited above, Plaintiffs respectfully request that this Court deny SCEA's motion to compel and Order such other and further relief and the Court deems necessary and just.

DATED: January 14, 2011

CALVO FISHER & JACOB, LLP

/s/

James A. Quadra
Rebecca Coll
One Lombard Street
San Francisco, California 94111
Telephone: 415-374-8370
Facsimile: 415-374-8373

[15] SCEA's complaint that Plaintiffs did not file a protective order in relation to the depositions, Def. Mem. at 24-25, rings hollow in light of the fact that the protective order was filed in conjunction with an agreed upon schedule. See Docket No 120.

Dated: January 14, 2011

FINKELSTEIN THOMPSON LLP

/s/ Rosemary M. Rivas

Rosemary M. Rivas
Tracy Tien
100 Bush Street, Suite 1450
San Francisco, California 94104
Telephone: 415-398-8700
Facsimile: 415-398-8704

Douglas G. Thompson
FINKELSTEIN THOMPSON LLP
1050 30th Street, NW
Washington, DC 20007
Telephone: 202-337-8000
Facsimile: 202-337-8090

Dated: January 14, 2011

HAUSFELD LLP

/s/ James Pizzirusso

James Pizzirusso (*pro hac vice*)
1700 K St., NW, Suite 650
Washington, DC 20006
Telephone: 202-540-7200
Facsimile: 202-540-7201

Michael P. Lehman
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, California 94104
Telephone: 415-633-1908
Facsimile: 415-358-4980

Co-Interim Lead Counsel for Plaintiffs

Bruce L. Simon
PEARSON, SIMON, WARSHAW & PENNY, LLP
44 Montgomery Street, Suite 2450
San Francisco, California 94104
Telephone: 415-433-9000
Facsimile: 415-433-9008

Daniel L. Warshaw
PEARSON, SIMON, WARSHAW & PENNY, LLP

15165 Ventura Boulevard, Suite 400
Sherman Oaks, California 91403
Telephone: 818-788-8300
Facsimile: 818-788-8104

Joseph G. Sauder
Matthew D. Schelkopf
Benjamin F. Johns
CHIMICLES & TIKELIS LLP
361 W. Lancaster Ave.
Haverford, Pennsylvania 19041
Telephone: 610-642-8500
Facsimile: 610-649-3633

Ralph B. Kalfayan
KRAUSE, KALFAYAN, BENNICK & SLAVENS, LLP
625 Broadway, Suite 635
San Diego, California 92101
Telephone: 619-232-0331
Facsimile: 619-232-4019

Jeffrey Carton (*pro hac vice*)
D. Greg Blankinship (*pro hac vice*)
MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ LLP
1311 Mamaroneck Avenue
White Plains, New York 10605
Telephone: 914-517-5055
Facsimile: 914-517-5055

John R. Fabry
BAILEY & GALYEN
18333 Egret Bay Blvd., Suite 444
Houston, Texas 77058
Telephone: 866-715-1529
Facsimile: 281-335-5871

Counsel for Plaintiffs