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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

In Re Sony PS3 "Other OS" Litigation

Case No. CV-10-1811-RS

**MDCPE'S MEMORANDUM OF POINTS
 AND AUTHORITIES IN OPPOSITION TO
 DEFENDANT'S MOTION TO COMPEL
 DOCUMENTS RESPONSIVE TO SCEA
 REQUEST FOR PRODUCTION NO. 28**

**MDCPE'S MPA IN OPPOSITION TO DEFENDANT'S MTC DOCUMENTS RESPONSIVE TO SCEA REQUEST
 FOR PRODUCTION NO. 28**

1 **I. PRELIMINARY STATEMENT**

2 Meiselman, Denlea, Packman, Carton & Eberz LLP (“MDPCE”), co-counsel for
3 Plaintiffs, submits this memorandum in opposition to Sony Computer Entertainment America
4 LLC’s (“SCEA”) motion to compel for the limited purpose of opposing SCEA’s Request for
5 Production of Documents No. 28, which requests irrelevant and privileged documents in
6 MDPCE’s possession relating to a false posting that was made on MDCPE’s website last year.

7 On June 6, 2010, an as-yet-to-be identified person or persons gained unauthorized access
8 to MDPCE’s website and posted a statement to the effect that this lawsuit had been settled.
9 SCEA’s Memorandum of Points and Authorities in support of its motion to compel (“Def.
10 Mem.”) at 23. Unfortunately, such events are all too common and difficult to prevent. MDPCE
11 promptly removed the unauthorized statement in less than four hours after it was discovered,
12 and no other unauthorized statements concerning SCEA, this litigation, or any other matter have
13 appeared on the website in the subsequent seven months. Declaration of Carter Ott In Support
14 of Defendant’s Motion To Compel (“Ott Dec.”), Exhibits C and D. Despite the fact that this
15 unfortunate incident was quickly resolved, and that it is completely irrelevant to Plaintiffs’
16 claims or this lawsuit, SCEA requested the production of all communications by MDPCE
17 concerning the unauthorized posting as well as all documents related to MDPCE’s internal
18 investigation of the incident. Def. Mem. at 24. Because this request for irrelevant and
19 privileged documents is improper, this Court should deny SCEA’s motion to compel.

20 **II. SCEA’S MOTION TO COMPEL DOCUMENTS RESPONSIVE TO ITS**
21 **REQUEST FOR PRODUCTION NO. 28 SHOULD BE DENIED BECAUSE**
22 **DOCUMENTS RELATED TO UNAUTHORIZED POSTINGS ON MDPCE’S**
23 **WEBSITE ARE IRRELEVANT AND PRIVILEGED**

24 Documents related to MDPCE’s investigation concerning the unauthorized posting are
25 not relevant to this litigation. SCEA states in a conclusory fashion that such documents are
26 relevant because the “may bear on the issue of adequacy.” Def. Mem. at 24. But SCEA does
27 not, and cannot, explain how the unauthorized posting on a firm’s website in any way impugns
28 their adequacy as counsel. Such an event certainly has no bearing on the skill and experience

1 with which MDPCE or the other law firms involved in this matter will prosecute this action on
2 behalf of the class. Moreover, MDPCE is not co-lead counsel in this matter. See Stipulation
3 And Case Management Order Number 1, ¶ 4 (Docket No. 65). Court’s routinely reject
4 defendants’ attempts such as this one to fish for adverse evidence concerning adequacy. See
5 Stock v. Integrated Health Plan, Inc., 241 F.R.D. 618, 624 (S.D. Ill. 2007) (quashing subpoenas
6 seeking details regarding proposed class counsel where “none of those topics are sufficiently
7 probative of relevant facts to aid the Court in determining whether LLF will adequately
8 represent the proposed class here.”); see also 5 Newberg on Class Actions § 15:30 (4th ed.
9 2002) (“Most courts recognize that far-flung discovery on the adequacy of representation of the
10 plaintiff and class counsel is usually unsuccessful because of the highly questionable relevance
11 of the discovery details sought. Furthermore, such discovery has mischievous effects of large
12 capability of harassment and oppression of the class representatives, as well as serious dilatory
13 effects of deferring court consideration of the merits of the controversy.”).

14 Nor is there a good faith basis for SCEA to seek the production of communications
15 between MDPCE and members of the public, including putative class members, concerning this
16 unauthorized post. Such communications from absent class members are irrelevant. SCEA
17 contends that such communications are relevant because “they refer to the litigation [and] bear
18 on the public and putative class members’ understanding of the litigation.” Def. Mem. at 24.
19 However, the mere fact that a document refers to pending litigation does not make it relevant or
20 discoverable. Indeed, the communications in question concern an unauthorized posting
21 regarding a fictional settlement. As such, it does not refer to the litigation in any meaningful
22 sense, but instead refers to a settlement that did not in fact occur. Moreover, because these
23 communications concern events occurring after the filing of the instant action, they do not bear
24 on whether SCEA acted improperly in releasing Firmware 3.21. Therefore, the discovery of
25 such communications is not reasonably calculated to lead to the discovery of admissible
26 evidence.

1 Nor is there any basis for asserting that absent class members’ “understanding of the
2 litigation” is relevant. The purpose of class actions is to maximize judicial economy by
3 selecting representative members of a class for purposes of, among other things, discovery. See
4 Lopez v. Tyson Foods, No. 06-459, 2008 WL 3485289, at * 12 (D. Neb. Aug. 7, 2008) (“Either
5 the plaintiffs’ theory is viable or it is not. Ultimately, the court will not have to hear testimony
6 from each putative class member about their ‘understanding’ of the defendant’s agreement to
7 pay, because no plaintiff makes a separate argument based on unique facts or law on this
8 issue.”).

9 The production of those communications also would violate the privacy rights of those
10 who communicated with MDPCE. Each of those communications, and their response, was in
11 essence a request for legal advice, to wit, the import of, and required response to, the fictional
12 settlement. None of the recipients or senders of these communications has authorized or agreed
13 to their disclosure to a multi-national corporation acting against their interests. The production
14 of those communications is tantamount to disclosing the identity of persons seeking the advice
15 of counsel, which is a violation of those person’s rights to privacy. See Tien v. Superior Court,
16 139 Cal. App. 4th 528, 539, 43 Cal. Rptr. 3d 121, 128 (Cal. Ct. App. 2006) (“Information that is
17 not protected by statutory privilege may nonetheless be shielded from discovery, despite its
18 relevance, where its disclosure would invade an individual’s right of privacy. The right of
19 privacy is an ‘inalienable right’ secured by article I, section 1 of the California Constitution . . .
20 In this case, the privacy rights at issue are those of the class members who contacted plaintiffs’
21 counsel. Case law recognizes that compelling disclosure of the identity of persons who consult
22 with counsel implicates their right of privacy.”) (citations omitted). Indeed, SCEA seeks
23 communications, not just with absent class members, but with anyone concerning the
24 unauthorized posting. See Def. Mem. At 24.

25 Even if the communications between MDPCE and putative class members, or others, is
26 marginally relevant (and it is not), the privacy violation resulting from unauthorized disclosures
27 of such communications would far outweigh any marginal probative value they might have,
28

1 particularly as they involve a vanishingly small percentage of a proposed class that numbers in
2 the millions. Therefore, this Court should not compel the production of documents related to the
3 unauthorized posting on MDPCE's website.

4 **III. CONCLUSION**

5 Based on the foregoing, the Court should deny SCEA's motion to compel relating to
6 SCEA's Request for Production No. 28.

7
8 DATED: January 14, 2011

9 **MEISELMAN, DENLEA, PACKMAN,**
10 **CARTON & EBERZ LLP**

11 By:

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21 I, James A. Quadra, am the ECF User whose identification and password were used to e-
22 file this document. I attest that I have been authorized to e-file this document with the signature
23 indicated by a "conformed" signature (/s/) by Jeffrey Carton.

24 /s/ James A. Quadra