Ventura v. Sony Computer Entertainment America Inc Doc. 140

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

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

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 RESPONSE TO ADDENDUM BRIEF IN OPPOSITION TO MOTION TO COMPEL

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

Dockets.Justia.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

Defendant Sony Computer Entertainment America LLC ("SCEA") respectfully submits this response to the addendum brief (Docket #133) the named plaintiffs (the "Class Representatives") submitted with their opposition to SCEA's Motion to Compel.

I. DISCOVERY RELATED TO THE FALSE WEBSITE POSTING IS RELEVANT

Aside from the procedural flaws related to their submission of an addendum brief, set forth in SCEA's Reply in support of its Motion to Compel, the arguments in Class Representatives' addendum brief fail on several grounds. Class Representatives characterize the false posting on Mr. Ventura's counsel's website as a "common" occurrence,[1] yet fail to identify a single similar occurrence in a class action litigation. Moreover, the unique circumstances of the posting – supposedly made without the law firm's knowledge or authorization – strongly suggests its author may be a member of the community of hackers attacking the PS3's security.[2] The relevance of the posting and its origin is further demonstrated by the fact that (1) Update 3.21, the subject of this litigation, was issued as a security measure due to hacking; (2) the posting was directed at this litigation and misled the public; and (3) there are renewed hacking efforts directed not only at the PS3, but specifically at Update 3.21.

Class Representatives cite to only one case – which is wholly inapposite – to justify their refusal to produce this relevant evidence.[3] The defendant in that case subpoenaed the plaintiff's counsel to produce all documents concerning any "civil or criminal investigations," "civil lawsuits," "bar or ethical investigations, complaint, action or sanctions," or efforts to terminate retainer agreements on the theory that these documents would demonstrate whether counsel was

/////

/////

[1] Class Reps' Addendum Opp. to Motion to Compel (Docket #133), 1:10

[2] Class Representatives represent that the posting was made by an "as-yet-to-be identified person or persons" who "gained unauthorized access to" Mr. Ventura's attorneys website. Class Reps' Addendum Opp. to Motion to Compel (Docket #133), 1:7-8. Neither SCEA nor the Court is able to ascertain if this is true because Mr. Ventura's counsel refuses to produce any documents related to the posting.

[3] Nothing in the section of *Newberg on Class Actions* that Class Representatives rely on indicates that the discovery SCEA seeks is irrelevant. In fact, it only makes broad statements regarding discovery as to class counsel's adequacy.

able to prosecute the action.[4] The court quashed the subpoena on relevancy grounds after finding that the ability to prosecute had already been amply demonstrated.[5]

A. Communications Regarding The Posting Are Relevant And Not Privileged

The posting and communications related to it are also pertinent because they bear on the public's understanding of this litigation.[6] On its face, the posting materially misstated the status and outcome of this litigation and bordered on defamation.[7] Any communications prompted by this erroneous publication, particularly any that caused further confusion regarding the case, or any attempt to use the false posting as a means of securing additional litigants, would obviously bear on adequacy of representation.[8] This concern is well-founded in light of the Class Representatives' continued mischaracterizations of the content of the posting itself: at least four times in their opposition they assert the posting described the lawsuit as "settled,"[9] when in fact it unequivocally said SCEA lost by default.[10] Even worse, Class Representatives contend the posting does "not refer to the litigation in any meaningful sense" – what could be more meaningful than whether a defendant defaulted and was ordered to pay damages as a result? And their reliance on *Lopez v. Tyson Foods*, is equally disingenuous. The Court said only that Nebraska's Wage Payment Act (Nebraska Revised Statutes sections 48-1288 to 48-1232) does not inherently require an individual inquiry regarding class members' claims that would *per se* preclude class certification.[11]

/////

/////

---

[4] *Stock v. Integrated Health Plan, Inc.*, 241 F.R.D. 618, 620-24 (S.D. Ill. 2007).
[5] *Id.* at 624-25.
[6] *See* SCEA's Motion to Compel (Docket #116), 23:9-24:20; SCEA's Opp. to Motion for Protective Order (Docket #125), 18:11-21:4.
[7] *See* SCEA's Motion to Compel (Docket #116), 23:14-16.
[8] In addition, contrary to Class Representatives' baseless theory, evidence related to Class Counsel's adequacy, including related to their communications with putative class members, is relevant whether or not it took place before or after the filing of this lawsuit. Class Reps' Addendum Opp. to Motion to Compel (Docket # 133), 2:22-24.
[9] Class Reps' Addendum Opp. to Motion to Compel (Docket # 133), 1:8, 2:21, and 2:22 and 3:11-12
[10] *See* SCEA's Motion to Compel (Docket #116), 23:14-16 ("[b]ecause [SCEA] failed to defend it's intentions in court….").
[11] 2008 WL 3485289, *11-12 (D. Neb. Aug. 7, 2008).

Class Representatives blanket assertion that "[e]ach of those communications, and their response…was in essence a request for legal advice" lacks any factual or legal support.[12] They offer nothing to demonstrate that a privilege would attach.[13] To the contrary, Mr. Ventura's counsel advised anyone contacting it that such communications were not privileged or part of any attorney client relationship.[14]

In addition, *Tien v. Superior Court* will not allow Class Representative to shield the requested communications from disclosure.[15] In *Tien*, the defendant sought production of the identities and contact information of the putative class members, in a wage-and-hour class action, who contacted plaintiff's counsel as a result of the parties' mailing of a neutral letter informing the class of the litigation.[16] Thus the context of the case renders it is inapposite, but indeed the factors the *Tien* court concluded weighed against disclosure support compelled production here. *Tien* was an employment case, which creates a "sensitive context" for publication of putative class members' names to the defendant due to their ongoing relationship and obvious concerns of retaliation – indeed, several class members had explicitly asked plaintiff's counsel not to reveal their contacts.[17] More importantly, *Tien* turned on the fact that the defendant-employer had the identity of all putative class members as a result of their employment relationship, and could obtain relevant information from class members directly, and as their employer, possessed relevant facts regarding their pay, number of hours worked, and meal and rest breaks. Thus withholding a list of those class members who had contacted plaintiff's counsel would not have a

---

[12] Class Reps' Addendum Opp. to Motion to Compel (Docket #133), 3:9-24.

[13] *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam) ("[t]he party asserting the privilege bears the burden of establishing that the privilege was not waived."); *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981); Fed. R. Civ. P. 26(b)(5)(A)(ii) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must…(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."); *Smith v. Cafe Asia*, 256 F.R.D. 247, 250 (D. D.C. 2009) (serving privilege log is "universally accepted mean[s] of asserting privileges in discovery in the federal courts").

[14] SCEA's Motion to Compel (Docket #116), 24:12-20.

[15] 139 Cal. App. 4th 528 (2006).

[16] 139 Cal. App. 4th at 532-33.

[17] *Id.* at 533-34 and 541.

"significant impact" on the action.[18] In contrast, the false posting on counsel's website was effectively broadcast to the world, was a supposed incidence of the very hacking that SCEA is trying to thwart, SCEA has no other means of determining the scope and effect of the false publication and resulting confusion among putative class members, and there is a very real and significant possibility that it could cause confusion with regard to future court-approved notices distributed to the class.

II. CONCLUSION

Based on the foregoing, as well as the arguments set forth in its Motion to Strike and Reply in support of that motion, defendant Sony Computer Entertainment America LLC respectfully requests that the Court enter an order compelling the Class Representatives to produce the documents and things requested and appear for deposition.

Dated: January 26, 2011

DLA PIPER LLP (US)

By: /s/ Luanne Sacks
LUANNE SACKS
Attorneys for Defendant

SONY COMPUTER ENTERTAINMENT AMERICA LLC

[18] *Id.* at 540.