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11 **UNITED STATES DISTRICT COURT**
12
13 **NORTHERN DISTRICT OF CALIFORNIA**

14
15 In Re Sony PS3 "Other OS" Litigation

Case No. CV-10-1811-RS

**REPLY MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION TO COMPEL**

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

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1 **I. INTRODUCTION**

2 Plaintiffs respectfully request that the Court compel Defendant Sony Computer
3 Entertainment America, LLC (“SCEA”) to produce two categories of documents: 1) Documents
4 that may be in the physical possession of SCEA’s former parent, but in SCEA’s “constructive”
5 control; and 2) any purportedly “confidential” documents pursuant to this District’s Stipulated
6 Protective Order for Standard Litigation.

7 SCEA is attempting to hide documents in Asia that are crucial to this case. Plaintiffs
8 have established that SCEA has control of relevant documents that are in the possession of its
9 former parent corporation, Sony Computer Entertainment, Inc. (“SCEI”).¹ The documents are
10 directly related to business responsibilities that SCEI delegated solely to its subsidiary SCEA;
11 thus, they are constructively controlled by SCEA – particularly given that SCEA acted as SCEI’s
12 agent in the marketing and sales of the PS3 in North America. Moreover, SCEA has
13 affirmatively demonstrated its ability to readily access these documents. Indeed, SCEA and
14 SCEI collaborated and jointly proposed to Plaintiffs a compromise to produce a limited number
15 of documents in SCEI’s possession in exchange for Plaintiffs’ agreement to forever forego their
16 rights to name SCEI as a defendant – a proposal Plaintiffs could not accept. SCEA cannot on the
17 one hand coordinate with SCEI to produce these documents and then contend that it has no
18 access to them.

19 Of particular importance to the claims at issue in this case, SCEA contends that the
20 reason it disabled the “Other OS” feature was for “security” purposes and that it was authorized
21 to do so under the Terms of Service (“TOS”) that comes with a PS3 -- an assertion which
22 Plaintiffs vigorously dispute. During a series of meet and confers, however, SCEA maintained

23
24 ¹ SCEA asserts that SCEI is no longer its parent as of April 1, 2010 yet offers no further
25 information about its corporate structure. SCEA’s Opp’n to Plaintiffs’ Mot. to Compel (Docket
26 No. 124) at 2 & n.2 (“MTC Opp.”). As Plaintiffs understand, prior to April 1, 2010 (during the
27 time relevant to Plaintiffs’ Complaint when the decision was made to add the “Other OS” feature
28 to PS3 units and subsequently remove it through Update 3.21), SCEA was a wholly owned
subsidiary of SCEI. After a corporate restructuring, SCEA became a subsidiary of Sony
Corporation of America, as did SCEI. *See, e.g.,* Ott Decl. (Docket No. 130), Ex. F (*SCEA v.*
Hotz et al. Complaint ¶¶ 18-20). SCEA does not assert that this shift has any bearing on this
motion.

1 that it did not believe it possessed documents concerning this issue since SCEI (and not SCEA)
2 made the decision to include, market, and then disable this feature. Plaintiffs need documents in
3 SCEI's possession (to which SCEA has access and control) related to the Other OS feature to
4 address SCEA's core "security" defense in this case. Alternatively, if SCEA refuses to produce
5 these documents, it should be prohibited from making any argument about its purported
6 justification for why the "Other OS" feature was disabled.

7 Additionally, SCEA has offered no justification for the imposition of the more onerous
8 requirements laid out in the Northern District's stipulated "Patent" protective order. Nearly
9 every consumer fraud class action involves internal documents that a defendant could seek to
10 characterize as "highly sensitive" trade secrets as the cases deal with the internal marketing and
11 promotional materials related to a defendant's products. That is why most stipulated protective
12 orders allow for "confidential" designations. SCEA has not met its burden to justify a higher
13 level of protection with "highly confidential" designations, which would also allow SCEA to
14 preview and pre-approve all of Plaintiffs' experts. Plaintiffs have not requested source code or
15 commercially sensitive formulas. SCEA's proposed early expert disclosures and arduous
16 requirements prejudice Plaintiffs and allow SCEA to improperly interfere with Plaintiffs'
17 litigation of this case.

18 **II. ARGUMENT**

19 **A. Plaintiffs Have Established That SCEA Has Control Over and Should**
20 **Produce SCEI's Documents**

21 **1. SCEA's Business Responsibilities Demonstrate Constructive Control**
22 **Over SCEI's Documents**

23 SCEA correctly recognizes that to establish a subsidiary's constructive control over a
24 parent's documents, "there must be a nexus between the [documents sought] and [the party's]
25 relationship with its parent [company], taking into account, among other things, [the party's]
26 business responsibilities." SCEA's Opp'n to Mot. to Compel (Docket No. 116) ("MTC Opp."),
27 at 6:6-9 (quoting *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir. 2005)
28 ("ASAT")). Plaintiffs have shown this nexus. While SCEI was responsible for designing and

1 manufacturing the PS3, SCEA was responsible for marketing, distributing, updating and
2 servicing PS3s in the United States. Rivas Decl. ¶ 11 (Docket No. 114). Of particular
3 importance to the issues in this case, SCEI made the decision to include and later disable the
4 “Other OS” feature; however, it was SCEA – and not SCEI – who transmitted Firmware Update
5 3.21 to class members, which disabled the “Other OS” feature. *Id.*; SCEA’s Mot. to Dismiss
6 (Docket No. 97) (“MTD”) at 1:24-27. Further, SCEA provided consumers with the TOS and
7 other licensing agreements which it contends allowed its parent the ability to remove this feature.
8 *See* MTD at 2:5. Thus, documents pertaining to the “Other OS” feature in SCEI’s possession
9 (and, in particular, any documents related to SCEI’s decision to include and then later disable the
10 Other OS feature through Update 3.21) are directly related to the duties that SCEI assigned to
11 SCEA. This close business relationship demonstrates a significant nexus between the documents
12 sought (those related to the “Other OS” feature and Update 3.21) and SCEA’s relationship with
13 its former parent.

14 SCEA has not cited a single fact to refute this evidence. Despite attaching four separate
15 declarations, including one from a SCEA representative from another case, none of these
16 declarations address the ability (or lack thereof) of SCEA to obtain documents from SCEI.
17 SCEA has not asserted that SCEI will not grant it access to documents related to the “Other OS”
18 feature. Instead, SCEA “has submitted nothing more than conclusory statements to show that
19 these documents are not in its custody or control.” *Cooper Indus., Inc. v. British Aerospace, Inc.*,
20 102 F.R.D. 918, 920 (S.D.N.Y. 1984). As Plaintiffs demonstrated in their moving papers,
21 “[d]ocuments and records that a corporation requires in the normal course of its business are
22 presumed to be in its control unless the corporation proves otherwise.” *Id.* at 920. Absent any
23 evidence to the contrary, this Court should find that SCEA has constructive control of these
24 documents.

25 SCEA’s attempts to distinguish the cases cited in support of Plaintiffs’ moving papers are
26 unavailing. In *Choice-Intersil*, a case decided in this District, the Court found that a wholly
27 owned subsidiary that marketed its parent’s products and had the ability to obtain documents

1 from its parent also had constructive control of such documents. *See Choice-Intersil*
2 *Microsystems v. Agere Sys., Inc.*, 224 F.R.D. 471 (N.D. Cal. 2004). A nearly identical scenario
3 is presented here: SCEA was a wholly owned subsidiary of SCEI; SCEA marketed SCEI's
4 products (including the PS3); and SCEA has demonstrated the ability to access the relevant
5 documents in SCEI's possession. Likewise, as in *Cooper Indus.* – a case upon which SCEA also
6 relies – the documents that Plaintiffs seek are all related to the PS3s that SCEA markets,
7 distributes, updates, and services “every day.” *Cooper Indus.*, 102 F.R.D. at 919.
8 The other cases that SCEA cites are inapposite. In *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, for
9 example, the plaintiff tried to acquire documents from a parent company pertaining to the
10 prosecution and licensing of patents that had never been assigned to the defendant from the
11 defendant's parent. The court found that the defendant did not have the requisite control over
12 documents in the parent's possession because the record “failed to provide any context or
13 explanation for why [the defendant] would have access to or even need documents relating to a
14 patent it has not been assigned.” 411 F.3d 245, 255 (D.C. Cir. 2005) (“ASAT”). Thus, in *ASAT*,
15 the documents sought from the parent were unrelated to the subsidiary's tasks. *Id.* Similarly, in
16 *Tessera, Inc. v. Micron Tech., Inc.*, the documents at issue “were not obtained . . . in the ordinary
17 course of business.” No. C06-80024MISC-JW (PVT), 2006 WL 733498, at *6 (N.D. Cal. Mar.
18 22, 2006). In contrast, SCEI's decisions to include and then disable the “Other OS” feature are
19 directly related to SCEA's responsibility to market, update, and service the PS3 through
20 firmware updates under the TOS and other agreements which SCEA contends apply. Since
21 SCEA argues that the disabling of the “Other OS” feature was justified to address security
22 concerns, “it is inconceivable that [SCEA] would not have access to these documents and the
23 ability to obtain them for its usual business.” *Cooper Indus.*, 102 F.R.D. at 919-20 (internal
24 citations and footnotes omitted).

25 Likewise, in *Pitney Bowes, Inc. v. Kern Int'l, Inc.*, 239 F.R.D. 62 (D. Conn. 2006)
26 (“*Pitney*”), the parent corporation and its subsidiary had an attenuated relationship unlike that of
27 SCEI and SCEA. In *Pitney*, in addition to distributing equipment and software manufactured by
28

1 the parent corporation, the subsidiary also distributed products of five other competing
2 companies. *Id.* at 67. Further, the record reflected that on one occasion, the parent refused the
3 subsidiary’s request to obtain product design drawings because disclosure “would unnecessarily
4 risk the core of [the parent’s] business.” *Id.* at 68. Based on these specific facts, the court
5 determined that the subsidiary lacked constructive control of design drawings that were in the
6 possession of the parent corporation. Thus, *Pitney* is distinguishable on two levels. First, there
7 is no evidence that SCEA deals with any other product other than those manufactured by SCEI
8 or other Sony entities. Second, SCEA never asserted that SCEI has ever denied a request for
9 information or documents regarding the PS3 or the “Other OS” feature. By contrast, as
10 discussed below, SCEA was able to obtain and was willing to produce documents on demand
11 from SCEI. In sum, the determining facts in *ASAT*, *Tessera*, and *Pitney* are not applicable to the
12 case at bar.

13 **2. Plaintiffs Have Shown That SCEA Has The Requisite Access To SCEI**
14 **Documents.**

15 SCEA’s ability to contact SCEI to determine the existence of documents and jointly
16 coordinate a proposed compromise to produce the documents in SCEI’s possession indicates that
17 SCEA has the requisite access to and control of the documents at issue. In its Opposition to
18 Plaintiffs’ Motion to Compel, SCEA admits on two separate occasions that it consulted with
19 SCEI and offered to stipulate that SCEA would produce SCEI documents and witnesses if
20 Plaintiffs agreed to never name SCEI as a defendant.² In the first instance, SCEA states that this
21 proposal was made “after consultation with SCEI.” In the second instance, SCEA states that
22 “SCEI and SCEA presented [the] potential compromise” to Plaintiffs. MTC Opp. at 3:22-25,
23 8:18-21 (emphasis added).

24 The fact that SCEA contacted SCEI to determine the existence of such documents and
25 jointly coordinate a compromise to *produce* (and not just *request*) the documents indicates that

26 ² Despite this admission, SCEA later tried to deny SCEI’s joint collaboration in the compromise
27 by stating that “at all times, SCEA offered only to *ask* SCEI if it would be willing to produce
28 responsive documents.” MTC Opp. at 8:23-9:6. Even SCEA admits, however, that it offered to
“request *and produce*” the relevant documents in SCEI’s possession. *Id.* at 9 (emphasis added).

1 SCEA has sufficient access and control over these documents. *See Gorton v. Bick*, No. 1:05-CV-
2 00354, 2010 WL 3825696, at *10 (E.D. Cal. Sept. 28, 2010) (“Defendant’s argument that he has
3 no possession, custody, or control over responsive documents is undermined by Defense
4 counsel’s ability to contact the SCC litigation office to determine whether such documents do
5 exist.”). Contrary to SCEA’s assertion, *Zenith Elec. LLC v. Vizio, Inc.* supports Plaintiffs’
6 argument here. There, the court recognized that “if the relationship between the subsidiary and
7 its parent is such that the subsidiary can obtain documents from its foreign parent to assist itself
8 in litigation, it must produce them for discovery purposes.” *Zenith Elec. LLC v. Vizio, Inc.*,
9 Misc. No. M8-85, 2009 WL 3094889, at *1 (S.D.N.Y. Sept. 25, 2009). SCEA’s collaboration
10 with SCEI is evidence that SCEI is willing and able to assist SCEA in this litigation. Moreover,
11 for SCEA to assert that the reason for the disabling of the “Other OS” feature was for purported
12 securities reasons, it has to have access to the SCEI documents that supposedly supported this
13 assertion. The fact that SCEI’s conditional proposal to produce documents may have been
14 partially motivated by a desire to avoid litigation does not diminish Plaintiffs’ argument.

15 **3. Plaintiffs Have Established Sufficient Facts To Show That SCEA Was**
16 **Acting As SCEI’s Agent.**

17 A subsidiary is its parent’s agent if the subsidiary “performs services that are sufficiently
18 important to the foreign corporation that if it did not have a representative to perform them, the
19 corporation’s own officials would undertake to perform substantially similar services.” *Doe v.*
20 *Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001). As one district court in this Circuit has
21 explained, “where a Japanese parent company was engaged in the manufacture of watches, its
22 subsidiaries that acted as its sole sales agents in America ‘were almost by definition . . . doing for
23 their parent what their parent would otherwise have to do on its own.’” *In re Western States*
24 *Wholesale Natural Gas Antitrust Litig.*, MDL 1566, 2009 WL 455639, at *10 (D. Nev. Feb. 23,
25 2009) (quoting *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322, 1342 (E.D.N.Y.
26 1981). SCEA cannot reasonably dispute that it was acting as SCEI’s agent here.

27 While SCEI designs and manufactures the PS3, SCEA is the sole marketer, distributor,
28 and servicer of the PS3 in the United States. Their principal-agent relationship is apparent with

1 regard to the key issue in this case: the disabling of the “Other OS” feature. While SCEI made
2 the decision to include and then later disable the “Other OS” feature, SCEA was the party that
3 affirmatively disabled the Other OS feature by transmitting Firmware Update 3.21 to the class
4 members pursuant to the TOS. Rivas Decl. ¶ 11 (Docket No. 114); MTD at 1:24-27. SCEA has
5 never asserted that it had the authority to unilaterally disable any features of North American
6 PS3s without SCEI approval.

7 Contrary to SCEA’s assertion, the facts supporting Plaintiffs’ agency argument here are
8 quite different from those in *Stella v. LVMH Perfumes and Cosmetics USA, Inc.*, No. 07-CV-
9 6509, 2009 WL 780890, at *2-3 (N.D. Ill. Mar. 23, 2009) (“*Stella*”). In *Stella*, the plaintiff
10 “merely allege[d] that [the defendants were] wholly controlled subsidiaries of [the parent]” and
11 failed to provide the court “with sufficient information to discern the relationship between [the
12 parent] and the various entities.” *Id.* at *2. As a result, “plaintiff [did] not meet her burden to
13 show a close coordination between [the parent] . . . or any other affiliate.” *Id.* Unlike in *Stella*,
14 Plaintiffs here have detailed a close, coordinated relationship between SCEI and its wholly
15 owned subsidiary SCEA, particularly with regard to firmware updates and the “Other OS”
16 feature. As such, SCEA should produce relevant documents that may be in the possession of
17 SCEI.

18 **B. SCEA Has Failed to Meet its Burden to Justify a “Highly Confidential”**
19 **Protective Order**

20 Plaintiffs contend that the District’s standard protective order is appropriate here. As
21 Plaintiffs explained in their moving papers, it is SCEA’s burden to justify the more onerous
22 burdens imposed by their proposed protective order allowing for “highly confidential”
23 designations which drastically limit who may view certain documents and how they may be
24 used. *See, e.g., Phoenix Sol’ns., Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 575 (N.D. Cal.
25 2008) (noting that “[t]he burden of demonstrating the need for protection from discovery is
26 placed on the party seeking a protective order, not on the party opposing the order.”). SCEA has
27 failed to meet this burden.

28 SCEA has not identified any facts or case law that justify its insistence on a stricter

1 protective order containing “highly confidential” designations and restrictions on and pre-
2 approval of who may view certain documents.³ SCEA’s declaration from its Director of
3 Hardware Marketing, John Koller, discusses potential harm that may result from the sharing of
4 SCEA’s trade secrets with *competitors*:

5 The disclosure of this information to SCEA’s *competitors* would
6 harm it commercially and competitively because, as a result of the
7 disclosure, those competitors would obtain the results of SCEA’s
8 substantial research without having to incur the expense, and
9 would also obtain knowledge of SCEA’s business and marketing
10 strategies, allowing them to develop their own strategies based
11 upon this information.

12 Decl. of John Koller (Docket No. 128), ¶ 4 (emphasis added). Plaintiffs are *not* SCEA’s
13 competitors – they are consumers who purchased a SCEA product – and this is not a
14 “competitor” patent case where “highly confidential” designations may be important to protect
15 against the concerns Mr. Koller raises. The standard Northern District of California protective
16 order, which Plaintiffs have proposed be used here, prohibits disclosure of any material
17 designated as “confidential” outside of the litigation. Thus, SCEA is adequately protected.⁴

18 ³ Under SCEA’s proposed Protective Order, before Plaintiffs may show “highly confidential”
19 documents to any expert, they would have to provide SCEA with a written request that:
20 (1) identifies the general categories of HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
21 ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information that the Receiving
22 Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and
23 the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume,
24 (4) identifies the Expert’s current employer(s), (5) identifies each person or entity from whom
25 the Expert has received compensation or funding for work in his or her areas of expertise or to
26 whom the expert has provided professional services, including in connection with a litigation, at
27 any time during the preceding five years, and (6) identifies (by name and number of the case,
28 filing date, and location of court) any litigation in connection with which the Expert has offered
expert testimony, including through a declaration or report or at a deposition or trial, during the
preceding five years. Stipulated Protective Order for Litigation Involving Patents, Highly
Sensitive Confidential Information and/or Trade Secrets at ¶ 7.4(a) (available at
<http://www.cand.uscourts.gov/pages/690>) (“Stipulated Protective Order”). SCEA can then
refuse Plaintiffs’ request necessitating meet and confers or motions practice before the Court. *Id.*
at ¶ 7.4(b), (c).

⁴ Contrary to SCEA’s assertion, “Class Counsel” have not agreed to a “highly-confidential”
protective order in another PS3 case. MTC Opp. at 12:13-15. SCEA’s argument on this point is
false. While one of the Co-Lead Counsel in this case, Rosemary Rivas, is a part of a totally
unrelated case involving the PS3 (*In re Sony PS3 Litigation*, Case No. CV 09-4701 RS), she is
not Interim Lead Counsel in that case and did not negotiate the terms of that Protective Order.

1 SCEA also claims that the PS3 is “the most advanced gaming console to date, the product
2 of decades of strategic design, manufacturing, distribution, and marketing research and
3 development.” MTC Opp. at 11:13-15. This broad assertion by itself, however, also does not
4 justify a highly restrictive protective order normally intended for patent litigation involving
5 complex and highly secretive business information where competitors may be in a position to
6 view one another’s most sensitive business secrets. Instead, SCEA has merely asserted that
7 some “trade secret and other commercially sensitive information” may be produced. *Id.* at 16.
8 But that is not enough. As the Ninth Circuit has recognized, “[b]road allegations of harm,
9 unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”
10 *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

11 SCEA also contends that marketing strategies involving the reasons for including and
12 then later disabling the Other OS function are so commercially sensitive that they justify a
13 “highly confidential” designation. MTC Opp. at 11:13-22. Marketing strategies, however, are not
14 the types of documents which should be protected by “highly confidential” designations. In fact,
15 SCEA’s own proposed protective order, based on the Northern District Model, identifies types of
16 materials that may be worthy of a “highly confidential” designation – *e.g.*, “computer code and
17 associated comments and revision histories, formulas, engineering specifications, or schematics
18 that define or otherwise describe in detail the algorithms or structure of software or hardware
19 designs” Stipulated Patent Protective Order at 3, ¶ 2.9. It does not include marketing plans.
20 Plaintiffs have not sought source code, formulas, and schematics – the types of documents or
21 materials that SCEA identifies in its proposed order as being potentially “highly confidential.” If
22 Plaintiffs do make such requests, they are amenable to meeting and conferring to discuss any
23 additional protections that might be necessary as is laid out in the standard protective order.

24 Finally, SCEA’s attempts to link this issue to alleged “hacking” concerns is a red herring.
25

26 Moreover, Jim Quadra and James Pizzirusso, the other two Co-Lead Counsel in this case, are not
27 involved in that case at all. Regardless, Plaintiffs here are not bound by what other plaintiffs do
28 in other, unrelated cases. Finally, the case SCEA refers to does not involve the types of claims
involved here.

1 See MTC Opp. at 12:17-13:8. SCEA has no basis upon which to assert that the class
2 representatives or Class Counsel have been involved in any of these types of activities or that
3 disclosure of confidential documents to “hackers” might occur.

4 This case is no different from the hundreds of other class actions filed in this District
5 involving fraudulently promoted, mass marketed products. This is not an intellectual property
6 case where Plaintiffs have asked SCEA to divulge secret formulas and source code. The issues
7 in this case generally involve the decision to include and then later disable the “Other OS”
8 feature and SCEA’s related representations about the PS3 and its functions. Since none of
9 SCEA’s competitors are parties to this litigation, there is no risk that a competitor could obtain
10 any of SCEA’s confidential information absent some serious breach of ethical duty – a concern
11 that would also be present under SCEA’s proposed order, but for which SCEA has no basis to be
12 concerned. Under the “standard” protective order, experts and consultants would be restricted
13 from using confidential discovery outside of this litigation. Thus, SCEA has not met its burden
14 for using the “patent – highly confidential” protective order. Plaintiffs respectfully request that
15 the Court order SCEA to produce materials subject to the standard protective order in this
16 District.

17 In an attempt to further delay production, SCEA also now asserts that it should not be
18 ordered to produce these documents because it has not completed its “review and analysis” of
19 key words that it claims are necessary for production.⁵ MTC Opp. at 19:1-5. Plaintiffs have not
20 been presented with any proposed “key word” searches despite requests for SCEA to do so.
21 Such a method of production should be a negotiated process; it is not a unilateral right. And now
22 Plaintiffs’ document requests have been pending for over *five* months. Given the lengthy delay
23 that has already occurred (which will also necessitate a change in the scheduling order), SCEA

24 _____
25 ⁵ SCEA’s suggestion that the parties did not meet and confer on this issue is unavailing. MTC
26 Opp. at 19:1-3. As the declaration of Rosemary Rivas made clear, the parties have been
27 conferring on this issue for some time and Plaintiffs have been requesting that SCEA produce
28 these documents on an “attorney’s eyes only” basis until this issue was decided. Rivas Decl. ¶
12 (Docket No. 114). SCEA never suggested that it could not do so because it was still
reviewing and analyzing its documents, nor should such an argument hold weight now.

1 should produce these materials immediately.

2 **II. CONCLUSION**

3 Based on the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs'
4 Motion to Compel.

5
6 Dated: January 26, 2011

Respectfully Submitted,

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Counsel for Plaintiffs

I, Rosemary M. Rivas, am the ECF user whose ID and password are being used to file this PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL. In compliance with General Order 45, X.B., I hereby attest that James A. Quadra and James Pizzirusso have concurred in this filing.

Dated: January 26, 2011

FINKELSTEIN THOMPSON LLP

/s/ Rosemary M. Rivas
Rosemary M. Rivas

Interim Co-Lead Counsel for Plaintiffs