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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

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

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I. INTRODUCTION

Plaintiffs' Motion for Protective Order has been necessitated by Sony Computer Entertainment America, Inc.'s ("SCEA") request for the production of numerous categories of documents and things at deposition which have little to no correlation to this action. SCEA's Opposition fails to articulate "good cause" or other legal grounds justifying its unprecedented requests for the production of: (1) forensic images of Plaintiffs' personal computers and PlayStation 3 ("PS3") hard drives; (2) all peripherals (e.g. televisions, Blu-ray disks, compact disks, cables, monitors, keyboards etc.) that ever came in contact with Plaintiffs' PS3 consoles; (3) SCEA's representations relating to the PS3 that are not in Plaintiffs' possession, custody or control; (4) Plaintiffs' retention agreements; (5) documents relating to a hacking of Plaintiffs' counsel's website; and (6) "all documents concerning Sony, SCEA, and/or the PS3." *See* SCEA's RFP Nos. 1, 3, 6-8, 14, 27-28, attached as Exh. D to Declaration of Rosemary Rivas Supp. Plfs' Mot. Protective Order ("Rivas Decl."). Similarly, SCEA's attempt to depose non-representative class members is contravened by the relevant legal authority and unjustified under the facts of this case.

SCEA's repeated failure and refusal to narrow the scope of its deposition notices and accompanying production requests, in spite of Plaintiffs' considerable meet and confer efforts, demonstrate that SCEA is abusing the discovery process in a thinly veiled attempt to harass, burden, intimidate and penalize Plaintiffs for filing this lawsuit. Accordingly, the Court should grant Plaintiffs' Motion for Protective Order in order to halt SCEA's unlawful and unjustifiable practice.

II. ARGUMENT

A. SCEA Has Conceded That Document Request No. 1 Seeking Production of "All Documents" is Overbroad, Burdensome, Oppressive and Untenable.

Contrary to SCEA's Opposition, its previous withdrawal of Document Request No. 1 was conditioned upon Plaintiffs' agreement to, "produce documents responsive to the remainder of SCEA's document requests." *See* December 1, 2010 Ott E-mail, attached as Ex. L to Rivas Decl. Having realized the overbroad, oppressiveness and harassing nature of this request seeking "ALL DOCUMENT CONCERNING Sony, SCEA, and/or the PS3" SCEA has now agreed to withdraw this request without conditions. Accordingly, Plaintiffs seek an order confirming that a response to Document Request No. 1 is unnecessary.

B. SCEA Has Failed to Establish Any Basis for its Irrelevant, Burdensome, and Intrusive Request for Forensic Copies of Personal Computer Hard Drives.

SCEA's Opposition does not include a single fact, basis or justification in support of Document Request Nos. 7 and 8, seeking forensic copies and proofs of purchase of all personal computers Plaintiffs purchased, owned or acquired from January 1, 2006 to the present. These requests are irrelevant, oppressive and a harassing attempt to seek the production of private information that has no bearing on this litigation. SCEA has not and cannot deny that Plaintiffs' purchase and use of personal computers is not the subject of this litigation, has no bearing on whether they purchased a PS3, the manner in which Plaintiffs utilized their PS3, the claims and defenses in this case, or any other fact that is even remotely relevant to this case. Furthermore, even if SCEA conceives some theoretical benefit of providing it with unfettered access to Plaintiffs' personal computers, it is outweighed by: (1) the burden and cost of this egregious undertaking; and (2) the infringement of Plaintiffs' right to privacy arising from the personal, financial and business information contained on their personal computers. Therefore, Plaintiffs seek a protective order with respect to Document Request Nos. 7 and 8.

C. SCEA's Demand for Plaintiffs' Peripherals is Unduly Burdensome, Oppressive, and Intended to Harass and Intimidate Plaintiffs.

Although SCEA's Opposition boldly asserts the "undisputed relevancy" of its request for peripherals, it has completely failed to justify this unduly burdensome and oppressive request. The unduly broad and burdensome scope of SCEA's Document Request No. 6 is apparent on its face as it requires the production of:

> "ANY and ALL DOCUMENTS and/or things …CONCERNING ANY data, game, program, operating system, application, file, hard drive, memory storage device, Internet browser, mouse, printer, television, cable, wireless network, hardware, firmware, peripheral, monitor, keyboard, Compact Disc, Digital Versatile Disc, Blu-ray Disc, and/or software code that [Plaintiff] authored, created, used with, connected to, installed on, downloaded to, backed up to, backed up from, imaged and/or uninstalled on each PS3 to be identified and produced in response to Request Number 3 that did not accompany each PS3 at the time of purchase, receipt and/or acquisition."

It is difficult to imagine any reason why the consumer Plaintiffs alleging an unlawful update to their PS3 consoles should produce their big screen television; printer; keyboard; mouse; monitor; entire

DVD, videogame, music and Blu-ray collections; and countless other items that are tangentially connected to a PS3 at deposition. Plaintiffs' peripherals are not central to this litigation, have little or no evidentiary value, and constitute an overbroad and extremely burdensome demand with an evidentiary value that is questionable at best. As such, any conceivable relevance of this discovery is outweighed by the tremendous burden that would be required to transport these items to a deposition.

In a good faith effort to fully comply with their discovery obligations and resolve any dispute between the parties, Plaintiffs produced pictures of peripherals used on their PS3. Plaintiffs' production provides SCEA with an opportunity to seek testimony regarding these items and complete Plaintiffs' depositions without requiring the unduly burdensome production of these items. Contrary to SCEA's arguments these pictures are not "inadmissible hearsay" because they cannot constitute an out of court "statement." *See* Fed. R. Evid. 801(a). Furthermore, while Plaintiffs dispute SCEA's unsubstantiated contention that these photographs are "poor and darkly lit" (an assertion that was made for the first time in SCEA's Opposition), any legitimate issues as to the quality of these photographs can be worked out between the parties. Finally, SCEA has failed to assert how they would be able to conduct any testing, assessment or examination of these peripherals in the middle of a deposition or what the established protocols would be to avoid burden and cost to Plaintiffs or the destruction of their property.

In sum, SCEA's request for the production of Plaintiffs' peripherals at deposition constitute nothing more than a thinly veiled attempt to harass, intimidate and inconvenience Plaintiffs with an unduly burdensome discovery request. Accordingly, Plaintiffs respectfully request a protective order with respect to Document Request No. 6.

D. SCEA's Demand for Production of Plaintiffs' PS3s and Copies of PS3 Hard Drives is Unduly Broad, Burdensome, and Violates Plaintiffs' Privacy Rights.

1. SCEA's Demand for Production of Plaintiffs' PS3 Consoles at Deposition is Unnecessary and Unduly Burdensome.

Defendant's Document Request No. 3 seeking the production of "Any and All PS3s that [Plaintiffs] purchased, received, or otherwise acquired" *at their deposition* is similarly unnecessary and does not possess any evidentiary value or purpose that outweighs the burdensome, harassing or oppressive nature of the request. In a futile attempt to justify this request, SCEA initially claimed that

Plaintiffs needed to produce their PS3s "so that relevant information on the exterior of the consoles can be obtained on the record and so that the consoles are authenticated by your clients." *See* Nov. 10, 2010 Ott E-mail, attached as Ex. I to Rivas Decl. In response to this request, Plaintiffs have produced recent photographs of the exterior of their PS3 consoles including their PS3 serial numbers, which can be utilized to authenticate and examine Plaintiffs regarding their PS3s.

Apparently recognizing the sufficiency of this production, SCEA now claims that, "if Class Representatives produced their PS3s as requested, SCEA could make an image of the hard drive and authenticate the unit within a matter of hours at minimal cost, and could most likely do so during his or her deposition." *See* SCEA Opp'n at 5:2-5:4 (Docket No. 125). Even setting aside the fact that SCEA's new justification is not supported by any evidence, unduly burdensome and violates Plaintiffs' right to privacy (*see* Section IV (B)-(C), *infra*), it begs the question as to what advantage will be obtained by testing Plaintiffs' PS3 during their deposition?

As Plaintiffs pointed out to SCEA during their meet and confer discussions, performing an analysis of the PS3s either during or after Plaintiffs' deposition would deprive the parties of the ability to analyze this information and would require multiple depositions of Plaintiffs. *See* Nov. 12, 2010 Quadra E-mail, attached as Ex. I to Rivas Decl. This would increase litigation costs and would unduly burden Plaintiffs by exposing them to multiple depositions. Under such circumstances, SCEA's insistence upon multiple depositions of Plaintiffs would not be justified and should be denied by the Court. *See Presidio Components, Inc. v. American Tech. Ceramics Corp.*, No. 08cv335 IEG (NLS), 2009 U.S. Dist. LEXIS 25562, at *14 (S.D. Cal. Mar. 25, 2009); Fed. R. Civ. P. 26(b)(2).

No procedural, substantive or evidentiary advantages would result from the production of Plaintiffs' PS3 consoles *at their deposition*. Moreover, the burden of requiring such a production and risk of damage to Plaintiffs' PS3 consoles outweigh the benefits of such a production. Therefore, Plaintiffs should not be required to produce their PS3 consoles at their deposition.

2. SCEA's Request for Production of Forensic Copies of Plaintiffs' PS3 Hard Drives is Unnecessary, Burdensome, and Unduly Infringes Upon Plaintiffs' Right to Privacy.

Recognizing that its request for the production of Plaintiffs' PS3 would deprive Plaintiffs of the ability to use their product, SCEA now wants Plaintiffs to pay for forensic copies of their PS3. As

SCEA concedes in its Opposition, the creation of the forensic copy of Plaintiffs' PS3 hard drives will costs thousands of dollars and provide SCEA with unfettered access to all video game files, movie files, music files, word processing files, email files and Plaintiffs' personal, financial and private information. *See* SCEA Opp'n at 9:3-9:8. Indeed, the only purpose of SCEA's request for forensic copies of Plaintiffs' PS3 is so that they can peruse through Plaintiffs' private files to conduct a fishing expedition.[1]

SCEA has repeatedly refused Plaintiffs' request to narrow this demand and has insisted on obtaining unfettered access to Plaintiffs' PS3 consoles without providing any legal or factual justification for doing so. *See* Nov. 12, 2010 Sacks E-mail, attached as Exhibit I to Rivas Decl. On the other hand, Plaintiffs have cited a number of cases which have held that a defendant cannot have unfettered and unprecedented access to a plaintiff's entire hard drive or electronic database. *See Genworth Financial Wealth Mgmt., Inc. v. McMullan*, 267 F.R.D. 443, 446 (D. Conn. 2010); *Ameriwood Industries, Inc. v. Liberman*, No. 4:06 CV 524-DJS, 2007 WL 685623, at *2 (E.D. Mo. Feb. 23, 2007); *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050, 1154-55 (S.D. Cal. 1999). Each of these aforementioned cases support Plaintiffs' position that SCEA's right to discovery must be balanced against the costs and burden of the request, the relevance of the information and Plaintiffs' privacy interests in the information requested. *See id.*

In an effort to compromise with SCEA, Plaintiffs have proposed a protocol to allow a mutually agreeable computer expert to examine the PS3 hard drives and prepare a report that identifies: (1) whether Linux or another operating system was installed on the PS3 using the "Other OS" function; (2) whether certain types of files exist on the hard drives, i.e. music, movie, word processing, email, video games other Linux software related files, and (3) the dates of installation.

Plaintiffs' proposed protocol is reasonable and sufficient because it provides SCEA information regarding Plaintiffs' use of the "Other OS" feature, while reducing the cost and burden of the requests and protecting Plaintiffs' privacy interest. Therefore, Plaintiffs respectfully request that the Court grant their protective order with respect to Document Request No. 3.

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[1] SCEA claims that it should be entitled to sift through Plaintiffs' PS3 systems searching for evidence of conduct that would support its defenses. SCEA did not raise this issue during the meet and confer process, and does not articulate exactly what information it would seek, why such evidence would support its defenses, or why a third party forensic expert could not report on that information as well.

3. The Costs of Any Forensic Discovery Regarding PS3 Hard Drives should be borne by SCEA.

As set forth above, SCEA's request for forensic copies and the electronic examination of Plaintiffs' PS3 hard drives has little or no evidentiary value and is outweighed by the costs, burden and invasion of Plaintiffs' privacy interest. Therefore, SCEA's request for copies of the PS3 hard drives should be denied. However, if the Court determines otherwise, the cost of any such electronic testing should be borne by SCEA. *See Zubulake v. UBS LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (setting forth the seven-part test Courts use to determine whether costs of production should be shifted to the responding party).

Here, the *Zubulake* factors weigh in favor of SCEA covering the costs of any electronic testing and copying. In particular, SCEA has not provided any legitimate basis for its unduly broad and burdensome request for forensic copies of the PS3 hard drives. SCEA's request is also not central to the issues in this litigation, is not likely to produce any relevant information, would not provide any benefit to SCEA or Plaintiffs, and has not been narrowly tailored to result in the discovery of relevant information. *See id*. SCEA has admitted that each forensic copy it seeks will costs thousands of dollars, and exponentially exceeds the total costs of a $399 PS3 console, and will place Plaintiffs under undue financial pressure. Finally, SCEA has failed and refused to abide by Plaintiffs' repeated requests to narrowly tailor its requests to the scope of this lawsuit. *See* Rivas Decl. ¶¶ 15-19.

As set forth in Plaintiffs' moving papers, each of these factors favors the shifting of costs to SCEA for the burdensome and unnecessary electronic discovery sought from Plaintiffs. *See* Plfs' Mem. Supp. Mot. Protective Order at 17:6-18:2 (Docket No. 111); *see also Zubulake*, 217 F.R.D. at 322. Accordingly, Plaintiffs respectfully request an order requiring SCEA to pay any and all costs arising from any forensic scan or other electronic examination of Plaintiffs' PS3 console.

E. Plaintiffs Have Not Refused to Produce, and Have in Fact Produced, Documents Regarding Reliance.

SCEA misleads the Court by arguing that Plaintiffs have refused to produce documents that they may subsequently introduce that establish reliance on their purchase of the PS3. SCEA Opp'n at 12:4-13:10. SCEA is wrong. Contrary to SCEA's assertions, Plaintiffs have produced all representations by

SCEA concerning the Other OS in their possession, custody and control. *See* Declaration of James A. Quadra Supp. Plfs' Opp'n Mot. Compel ¶¶ 1-9, Exh. Nos. 1-8. 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 such documents will most likely come from SCEA itself.

SCEA incorrectly argues that Plaintiffs have not satisfied their discovery obligations because they will not agree to perform electronic searches on the Internet. Plaintiffs are not required to do so. Rather, Plaintiffs are only required to produce documents within their possession, custody and control, not to search public databases, websites, or other public locations to locate potentially relevant documents for SCEA. *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.")

SCEA contends that the Court should prohibit Plaintiffs from introducing any "responsive" evidence they may later find on the Internet, or even documents produced by SCEA itself that could have been found on the Internet, should Plaintiffs fail to produce relevant documents in advance of their depositions. SCEA Opp'n at 13:7-10.[2] However, there is no basis in the law to prevent Plaintiffs from continuing to conduct investigations or discovery after their depositions. In accordance with the Federal Rules, Plaintiffs will produce any additional relevant and responsive documents to supplement their responses as they are discovered. *See* Fed. R. Civ. P. 26(e)(1)(A).

Accordingly, the Court should deny SCEA's request to limit Plaintiffs' investigation to evidence Plaintiffs have under their custody and control prior to their depositions.

F. Plaintiffs are Not Requesting a Blanket Order Prohibiting Class Representatives' Depositions.

In its Opposition, SCEA wrongly contends that Plaintiffs are seeking an advisory opinion as to the reopening of depositions. Plaintiffs have never requested that the Court bar SCEA from moving to

[2] Although Plaintiffs requested SCEA's marketing materials and advertisements, SCEA has not yet produced any documents reflecting its advertising on its website.

reopen any of the Plaintiffs' deposition pursuant to Federal Rule of Civil Procedure 30(a)(2)(A)(ii). Instead, Plaintiffs have requested that the Court resolve the discovery disputes set forth herein prior to SCEA's taking of such depositions, to avoid any need for serial depositions. *See* Plfs' Mem. Supp. Mot. Protective Order at 10:22-23; 13:1-5.

Under Federal Rule of Civil Procedure 30(d)(1), the deposition of an individual should be limited to one day, for seven hours, and "good cause" must be shown to justify an order reopening the deposition. *See* Advisory Committee Notes, 2000 Amendments to Rule 30(d)(1); *see also Presidio Components, Inc.*, 2009 U.S. Dist. LEXIS 25562, at *4 (stating that, "[a]bsent a showing of good cause, generally the court will not require a witness to appear for another deposition). Here, there is no good cause to expose Plaintiffs to multiple depositions, because there is no requirement under the Rules that Plaintiffs must complete their discovery and investigations before their depositions take place.

G. The Court Should Issue a Protective Order Prohibiting Discovery of the Non-Representative Class Members.

As a preliminary matter, SCEA maintains that Plaintiffs' motion is "not ripe" because it has not sought discovery from the non-representative class members. SCEA Opp'n at 15:11-23. To the contrary, SCEA has sought to impose burdensome preservation obligations on Plaintiffs' non-representative class members, and has also argued that they are subject to the same discovery obligations as the representative class members. SCEA Opp'n at 17:1-4. Plaintiffs' motion is therefore "ripe" and should be granted in its entirety.

Without citing any legal support, SCEA incorrectly argues that it is entitled to seek discovery of the "unnamed plaintiffs"[3] unless they "withdraw as class representatives." SCEA's contention is both factually and legally wrong. The "unnamed plaintiffs" are not class representatives. Rather, the class representatives are the Plaintiffs named in the consolidated complaint, which does not include the

[3] By "Unnamed Plaintiffs" SCEA means those individuals who initially filed actions against SCEA but who were not named as class-representatives in the now operative consolidated complaint (i.e., Sean Bosquett, Frank Bachman, Paul Graham, Paul Vannatta, Todd Densmore, Keith Wright, Jeffrey Harper, Zachary Kummer, and Rick Benavides). SCEA Opp'n at 15.

"unnamed plaintiffs."[4] SCEA tried to distinguish Plaintiffs' legal authority based upon this misunderstanding and therefore missed the mark. SCEA Opp'n at 16:21-17:4. For example, the court in the *Carbon Dioxide* case (which Plaintiffs cited in their moving papers) held that discovery of the previously named plaintiffs who were not class representatives (like the "unnamed plaintiffs" here) was improper because the defendants could not demonstrate a particularized need for the discovery:

> In the instant case, Defendants seek discovery from Plaintiffs who initially filed actions in this multi-district litigation as named Plaintiffs, but who subsequently were not chosen as representative parties for class purposes. By virtue of not being chosen as class representatives, these Plaintiffs remain as passive class members, on equal footing with all other non-representative class members.
> . . .
> Defendants have not argued that they have a particularized need to obtain information not available from the class representatives. Absent a showing of such particularized need, the Court will not permit general discovery from passive class members.

In Re Carbon Dioxide Indus. Antitrust Litig., 155 F.R.D. 209, 211-12 (M.D. Fla. 1993); *see also Kops v. Lockheed Martin Corporation*, MDL No. 1409, 2003 U.S. Dist. LEXIS 8568, at *3-4 (holding that non-lead named plaintiffs in a class action lawsuit "have no roll (sic) in the litigation apart from being members of the proposed class" and, as such, are "akin to 'absent class members' to whom special rules of discovery apply"); *see also In re Lucent Technologies, Inc. Securities Litig.*, 2002 WL 32815233, at *2 (D.N.J. July 16, 2002) (holding that the "non-lead, non-representative plaintiffs should be treated as passive class members and thus not subject to discovery"); *On the House Syndication, Inc. v. Federal Express Corp.*, 203 F.R.D. 452 (S.D. Cal. 2001). Because SCEA has not and cannot demonstrate any particularized need for discovery from the non-representative class members, SCEA should be prohibited from seeking discovery from them and demanding that they take broad preservation obligations without Court approval. Accordingly, Plaintiffs' motion should be granted.

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[4] The class representatives are Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker, and Elton Stovell. Compl., p. 1. As discussed in Plaintiffs' moving papers, the Court ordered that the consolidated complaint "be deemed the operative complaint, superseding all complaints filed in this action, or any of the actions to be consolidated hereunder or in any related cases." *See* Docket No. 65 at ¶ 11. The Consolidated Complaint is therefore controlling.

H. Plaintiffs' Retention Agreements are Not Discoverable.

In response to Plaintiffs' arguments against production of their engagement agreements, SCEA fails to explain or even cite any legal authority as to how such agreements between Plaintiffs and their legal counsel are relevant. Courts routinely reject requests for retention agreements where defendants merely assert that such documents may be relevant to adequacy.[5] *See, e.g.*, *Baker v. Masco Bulder 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's weak justification for the production of retention agreements is that "such arrangements bear on their and their counsel's ability to adequately represent the class." Yet, Lead counsel have already demonstrated to this Court in their applications for appointment as interim co-lead counsel that they are more than qualified, and are financially able, to litigate this case to completion. *See, e.g.* Declaration of Rosemary Rivas Supp. Plfs' Mot. Order Consolidating Cases ¶ 5 (Docket No. 28); Declaration of Jeffrey L. Carton Supp. Plfs' Mot. Order Consolidating Cases ¶ 11 (Docket No. 33); Declaration of James A. Quadra Supp. Plfs' Mot. Order Consolidating Cases ¶ 10 (Docket No. 34); Declaration of James R. Pizzirusso Supp. Plfs' Mot. Order Consolidating Cases ¶ 12 (Docket No. 47). Retention agreements will not lend any more information relevant to this inquiry.

Moreover, the retention agreements are privileged. In analyzing the issue of privileges, the Court should apply California's state law because Plaintiffs have predominantly raised state law claims in this case. *See* Fed. R. Evid. 501 ["...with respect to an element of a claim or defense as to which State

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[5] As Plaintiffs argued in their Opposition to SCEA's motion to compel, SCEA does not even offer a speculative basis for its claim that the retention agreements are relevant, instead merely proffering the conclusory statement that "the retainer agreements are relevant because they demonstrate the scope and definition of the Class Representatives' relationship with their counsel." *See* Plfs' Opp'n SCEA Mot. Compel at 21:4-22:23.

law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."]; see also *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667 (9th Cir. 2003); *Commercial Union Ins. Co. of America v. Talisman, Inc.*, 69 F.R.D. 490, 491 (E.D. Mo. 1975) (citing Notes of Committee on the Judiciary, House Report No. 93-650) ("The legislative history of Rule 501 indicates that in diversity actions such as the one presently at bar, State created evidentiary privileges may be asserted").

Under California law, engagement agreements are protected under the attorney-client privilege. Cal. Bus. & Prof. Code §6149 ("[a] written fee contract shall be deemed to be a confidential communication ….")

Furthermore, the agreements are privileged under Federal law as well, for the reasons set forth in Plaintiffs' opening brief. *See* Plfs' Mem. Supp. Mot. Protective Order at 21:4-22:3. Contrary to SCEA's arguments, *In re Horn*, 976 F.2d 1314 (9th Cir. 1992), does not support SCEA's arguments. *See* SCEA Opp'n. at 17:18-18:5. *Horn* merely stated that under federal law, the attorney-client privilege does not protect the identity of a client nor the amount of fees he is paying. *In Re Horn*, 976 F.2d at 1317. Here, the identities of the Plaintiffs are already known, and the amount of attorneys' fees, if the case is successful, will be set by the Court pursuant to Rule 23 approval procedures. The overriding message of *Horn* was clear— retainer agreements describing the scope of the attorney-client relationship are privileged, and a demand for such documents constitutes "an unjustified intrusion into the attorney-client relationship." *Id.* at 1317-18.

The legal authority SCEA cites is inapposite. *U.S. v. Blackmun*, 72 F.3d 1418 (9th Cir. 1995), *In re Michaelson*, 511 F.2d 882 (9th Cir. 1975), and *Ralls v. United States*, 52 F.3d 223 (9th Cir. 1995) involved issues of fee-payer identity and fee arrangements. *Hoot Wing, LLC v. RSM McGladrey Financial Process Outsourcing, LLC*, No. 08cv1559 BTM, 2009 WL 3857425 (S.D. Cal. Nov. 16, 2009) is not relevant because it relies on *Ralls* and *Blackmun*. *In re Google Adwords Litigation*, No. C08-03369 JW, 2010 WL 4942516 (N.D. Cal. Nov. 12, 2010) (not for citation) also does not support SCEA's position—there, the court *denied* defendant's motion to compel the engagement letters on the basis of relevancy. Lastly, the decision in *Carrizosa v. Stassinos*, No. C 05-2280 RMW, 2006 WL 2529503 (N.D. Cal. Aug. 31, 2006) did not analyze whether the engagement agreement fell outside the

scope of attorney-client privilege. Moreover, the court was persuaded that the engagement agreement was no longer privileged because the defendant had already produced copies and described the substance of the agreement in his declaration. *Id*. at *3. Finally, none of these cases address Federal Rule of Evidence 501.

Thus, the Court should grant Plaintiffs' protective order relating to SCEA's request for engagement agreements.

I. The Court should Deny SCEA's Request for Documents from MDPCE.

The depth to which SCEA sinks to rationalize its discovery requests for all documents related to an unauthorized posting on Meiselman, Denlea, Packman, Carton & Eberz' ("MDPCE") website reaches a new low. Any documents related to this posting are irrelevant to the claims and defenses in this case. Nor are they likely to lead to the discovery of admissible evidence.

First, SCEA asserts that such documents bear on the adequacy of class representatives and counsel.[6] SCEA Opp'n at 19. Yet the only basis for this claim is the speculative, baseless and unprofessional accusation that the posting was made with "the knowledge and consent of the Class Representatives or one of their counsel." *Id.* This is absurd, unseemly and worthy of censure. Neither the Class Representatives nor their counsel would have an incentive to make such a posting.

Second, SCEA argues that an unauthorized website posting is "hacking," and because SCEA publicly justified the release of Update 3.21 based on "hacking" concerns, documents regarding the former are related to the latter. Putting aside the fact that SCEA's "hacking" defense is illogical and lacks merit, SCEA offers no support for its strained logic. Documents related to a law firm's investigation of an unauthorized posting are in no way relevant to gamers' hacking of a PS3 console.

Finally, SCEA claims that its ability to resolve this case might be impaired if MDPCE told the "general public" that "SCEA admitted liability." *Id.* SCEA offers no basis for this defamatory statement, nor should this Court countenance such an unprofessional accusation, nor is there any basis to

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[6] "Most courts recognize that far-flung discovery on the adequacy of representation of the plaintiff and class counsel is usually unsuccessful because of the highly questionable relevance of the discovery details sought." 5 Newberg on Class Actions § 15:30 (4th ed. 2002).

assert that SCEA's "ability to resolve this case" is related in any way to communications between a law firm and potential class members.[7]

Any discovery concerning the unauthorized posting to MDPCE's website is irrelevant to this matter. And, even if it has some marginal relevance (which it does not), the privacy interests of those who contacted MDPCE seeking legal advice far outweighs any attenuated utility such documents might have.[8] Finally, any documents in MDPCE's files relating to its own business are not in the custody or control of any of MDPCE's clients, including the class representatives in this case. Therefore, Plaintiffs' request for a protective order should be granted.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Protective Order.

DATED: January 26, 2011

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[7] SCEA's opposition memorandum reveals its true motive for seeking this discovery. SCEA is involved in litigation against an individual it believes has "hacked" the PS3, Mr. George Hotz (*SCEA v. Hotz, et al.*). SCEA is attempting to misuse the instant litigation to further its discovery in that unrelated matter. As SCEA states, "SCEA is entitled to know [if the Class Representatives' counsel's website was hacked by Hotz], and counsel has an obligation to provide information that could lead to the discovery of the hacker's identity." SCEA Opp'n at 19. Counsel has no such obligation; if SCEA wishes for documents related to another litigation, it should issue a subpoena there.

[8] *See* MDPCE's Mem. Opp. Def's Mot. Compel Docs. Responsive Produc. No. 28 at 3.

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

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PROOF OF SERVICE

I am employed with the law firm of Calvo Fisher & Jacob LLP, located at One Lombard Street, 2nd Floor, San Francisco, California 94111. I am not a party to the within cause. I am over eighteen years of age and I am readily familiar with Calvo Fisher & Jacob's practice for collection and processing of correspondence and documents for delivery and distribution.

On January 26, 2011 I served the party below a copy of:

1. **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

X BY CM/ECF ELECTRONIC SERVICE: Electronically filing the foregoing with the Clerk of the Court using the CM/ECF system sent notification of such filing to the e-mail addresses of the participants listed below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 26, 2011 at San Francisco, California.

Joy A. Valdez	/s/
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Wright v Sony Computer Entertainment America, Inc. et al

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