



DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933
www.dlapiper.com

Carter W. Ott
carter.ott@dlapiper.com
T 415.836.2538
F 415.659.7338

February 14, 2011

Hon. Richard Seeborg
United States District Court, Northern District of California
450 Golden Gate Avenue
Courtroom 3, 17th Floor
San Francisco, CA 94102

**Re: *In re Sony PS3 "Other OS" Litigation*
U.S. District Court, Northern District of California (Case No. C-10-1811 RS (EMC))**

Dear Judge Seeborg:

The purpose of this letter is to respond to Plaintiffs' letter filed with this Court on February 11, 2011. SCEA generally agrees that, in light of a pending decision regarding its Motion to Dismiss and Motion to Strike as well as the parties' recently-resolved discovery dispute, the Court should briefly continue the February 28, 2011 date by which non-expert discovery related to class certification must be completed and a motion for class certification must be filed. However, SCEA does not agree with Plaintiffs that these dates should simply be vacated pending this Court's ruling on SCEA's pleading challenges.

As noted above, the February 28 deadline pertains only to discovery related to class certification. Plaintiffs have provided no explanation as to what additional discovery they need related to this limited issue or why they need an open ended extension of time to complete this discovery. The purpose of the early deadline for class certification is so the parties can achieve an efficient resolution of whether class treatment is even appropriate before expending substantial resources litigating all substantive aspects of this case in discovery.

The Court scheduled the February 28 deadline on September 3, 2010 – over half a year ago. And, to date, the only discovery that Plaintiffs have sought from SCEA are documents. They have not served SCEA with any interrogatories or requests for depositions. They further squandered the time the Court provided them by refusing to appear for their own depositions; refusing to produce for inspection or forensic copying the PlayStation®3 ("PS3") game consoles underlying their claims; blocking SCEA's ability to produce the documents they requested by unreasonably refusing to agree to a stipulated protective order that affords "Highly Confidential" designation; and refusing to produce relevant documents until after SCEA filed its Motion to Compel. Plaintiffs' failure to obtain discovery within the six months the Court afforded them is largely due to their own obstructive acts.

Of course, now they ask that the Court relieve them of any deadline for filing a motion for class certification or concluding non-expert discovery. They premise this request on mischaracterizations of the



Hon. Richard Seeborg
February 14, 2011
Page Two

parties' communications and Judge Chen's recent ruling regarding the parties' discovery motions.¹ Among other things, Plaintiffs' request is based upon a fabricated discovery dispute. Contrary to their allegation, SCEA has never refused to meet and confer. In fact, to support this, Plaintiffs can only point to self-serving statements that they made in email correspondence to SCEA's counsel *after* SCEA declined to accept their proposal for vacating the current discovery and certification dates. Indeed, the very correspondence that they attach and cite in their letter states the opposite:

Obviously, I do not agree with your characterization of these issues. For one, I **am not refusing to meet and confer**. Rather, I am asking that – if you wish to meet and confer – you provide us with a list of items that you would like to discuss so that we can adequately assess when we will have the time to discuss them.

Plaintiffs' 2/11/11 letter, Exhibit A, 2/10/11, 8:03 p.m. Ott email, ¶ 1. This request was appropriate partly because, in the past, Plaintiffs' counsel provided agendas for the parties' meet and confer minutes before they were to talk with SCEA's counsel. Plaintiffs' 2/11/11 letter, Exhibit A, 2/10/11, 8:03 p.m. Ott email, ¶ 1; see, e.g., Exhibit A (attached hereto), 11/15/10, 3:30 p.m. L. Sacks email. It was also appropriate because, as SCEA's counsel explained to Plaintiffs' counsel:

The agenda² that you attached to your email (below), lists many items that we have already discussed, as you admit. It also lists a number of items that I believe that we have resolved. For example, during our discussion on October 28, we asked why you would need metadata in an action regarding false misrepresentations. To date, you have not provided an explanation. Again, please provide us with a list of the items that you believe that we need to discuss (rather than a list of items, some of which we have discuss and others that we have already apparently resolved).

Plaintiffs' 2/11/11 letter, Exhibit A, 2/10/11, 8:03 p.m. Ott email, ¶ 2. Rather than a refusal to meet and confer, this correspondence demonstrates that SCEA is merely asking that Plaintiffs clarify what they would like to discuss. Plaintiffs fabricated this discovery dispute because the primary basis for the first draft of this letter – the pendency of Judge Chen's ruling on the parties' dispute – was mooted by his entry of an order promptly after the hearing. See Exhibit C (attached hereto), Draft Letter Attachment, p. 2.

¹ As an example, Judge Chen did not recently order that SCEA produce documents in the exclusive possession of its former parent, a Japanese company called Sony Computer Electronics Inc. ("SCEI"). In fact, he concluded Plaintiffs had not satisfied their burden. Docket #152, 2:11-13.

² Plaintiffs' Counsel's failed to attach a copy of this three-page single-spaced agenda, which is obviously central to the correspondence that they cite. For the Court's convenience, this agenda is attached hereto as Exhibit B.



Hon. Richard Seeborg
February 14, 2011
Page Three

The parties have already commenced discussions regarding the few matters Judge Chen ruled that they meet and confer and develop protocols to cover, including production and imaging of Plaintiffs' PS3s. See Docket #152. Resolving these issues will not require a large amount of time. In addition, SCEA will shortly provide Plaintiffs' counsel with a list of proposed keywords to use in identifying a group of emails for review and production, and will shortly after commence a rolling production of such documents as well as others.

Accordingly, while SCEA believes that a brief extension of time for discovery related to class certification and for filing a class certification motion is warranted, SCEA does not agree with Plaintiffs' proposal that the previously ordered deadlines simply be vacated.

Respectfully submitted,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'C. Ott', written over a horizontal line.

Carter W. Ott
Associate

Admitted to practice in California

WEST\223172681.1

EXHIBIT A

Ott, Carter

From: Sacks, Luanne
Sent: Monday, November 15, 2010 3:30 PM
To: James Quadra; Rebecca Coll
Cc: 'James Pizzirusso' (jpizzirusso@hausfeldllp.com); Rosemary M. Rivas (RRivas@finkelsteinthompson.com); Warshaw, Daniel L. (dwarshaw@pswplaw.com); Ott, Carter
Subject: RE: Sony Other OS
Follow Up Flag: Follow up
Flag Status: Red

Jim

I might have helped if you had sent this more than 2 minutes before our call is to start. We will address these issues accordingly.

Lu

From: James Quadra [mailto:jquadra@calvoclarck.com]
Sent: Monday, November 15, 2010 3:28 PM
To: Sacks, Luanne; Rebecca Coll
Cc: 'James Pizzirusso' (jpizzirusso@hausfeldllp.com); Rosemary M. Rivas (RRivas@finkelsteinthompson.com); Warshaw, Daniel L. (dwarshaw@pswplaw.com); Ott, Carter
Subject: RE: Sony Other OS

Lu

In addition to the deposition issues, we'd like to address the following during the call today so that we can put these issues before the if we don't reach agreement:

- ESI issues – i.e., list of keywords being used for document search; organizational charts for purposes of identifying appropriate custodians
- Discovery from SCEI (SCEA's parent); tolling
- Follow-up on Request Nos. 16-17, 20-22, 28-29
- Date for document production
- Scope of protective order

Thanks

Jim

From: Sacks, Luanne [mailto:Luanne.Sacks@dlapiper.com]
Sent: Monday, November 15, 2010 12:50 PM
To: Rebecca Coll
Cc: James Quadra; 'James Pizzirusso' (jpizzirusso@hausfeldllp.com); Rosemary M. Rivas (RRivas@finkelsteinthompson.com); Warshaw, Daniel L. (dwarshaw@pswplaw.com); Ott, Carter
Subject: RE: Sony Other OS

Carter and I are available at 3:30. we can use my dial in 888 472 4293 passcode 8362555

From: Rebecca Coll [mailto:rcoll@calvoclarck.com]
Sent: Monday, November 15, 2010 10:45 AM
To: Sacks, Luanne
Cc: James Quadra; 'James Pizzirusso' (jpizzirusso@hausfeldllp.com); Rosemary M. Rivas (RRivas@finkelsteinthompson.com); Warshaw, Daniel L. (dwarshaw@pswplaw.com); Ott, Carter
Subject: Sony Other OS

Luanne-

Following up on your conversation with Jim on Friday, are you available to speak today at 3:30?

Becca Coll
Calvo & Clark, LLP
One Lombard Street
San Francisco, CA 94111
T: 415-374-8370

Please consider the environment before printing this email.

The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please reply to the sender and destroy all copies of the message. To contact us directly, send to postmaster@dlapiper.com. Thank you.

EXHIBIT B

In re Sony PS3 "Other OS" Litigation

AGENDA-E-DISCOVERY (ESI) MEET & CONFER

I. Preservation and Retention

- a. What steps have been taken, and when, to preserve ESI?
- b. What types of relevant ESI and other information are being preserved?
 - i. Hard copies of information?
 - ii. Emails?
 - iii. Databases?
 - iv. Information stored by custodians?
 1. on desktops
 2. on company laptops?
 3. on personal computers and devices?
 - v. Information stored on networks
 - vi. Information stored on backup media
 1. what type of media?
 2. how is it archived?
 - vii. Additional ESI types?
 1. voice mail
 2. instant messages
- c. What if any, additional steps will be taken to preserve ESI?
- d. What third parties' information must be preserved?
 - i. Have they been notified?
- e. What data retention policies and practices apply to relevant ESI?
- f. Is relevant metadata being preserved?

II. Custodians

- a. Who are the appropriate custodians?
- b. What parameters were used to select custodians?
- c. What provisions will be made to account for later-identified custodians?
- d. What provisions will be made for custodians who are later determined not to be key players?
- e. Do regulatory prohibitions or privacy laws affect the identification or production of custodians' records?
- f. Do any of the custodians use personal email accounts to create, receive, or store relevant ESI?
- g. How do the parties address file-share issues?

III. System Architecture and Protocols

- a. Who are the persons most knowledgeable about ESI systems?
- b. What relevant systems are scheduled for replacement or disposal?
- c. What are the backup protocols and policies?
- d. What DMS is used?
- e. What archival systems are used?

- f. What file naming conventions are used?
- g. Are there protocols that govern overwriting, reformatting, erasure or retirement of backup media?
- h. Are emails appearing in an employee's Inbox Folder, Sent Mail Folder, Delete/Trash Folder or Personal Folders created by the employee stored on
 - i. Employee's hard drive?
 - ii. A company email server?
 - iii. A server maintained by a third party ASP?
- i. Do employees use Instant Messaging?
- j. Are Instant Messaging transcripts stored after the termination of an IM session?
- k. Does the organization maintain at least one complete, non-incremental backup of each relevant email for each month during the relevant time frame?
- l. Does the organization back up employees' desktop and laptop hard drives? If so, what is the protocol?
- m. As a matter of organization policy, are employees' desktop and laptop hard drives erased or reformatted before such hard drives are re-deployed, destroyed, or removed from routine usage? If so what is the policy?
- n. Does the organization permit, prohibit or otherwise regulate employee use of computers not owned by the organization to create, receive, store, or transmit work related documents or communications?

IV. Applications

- a. What are the current and legacy email, work processing, data, and other business applications used to create or store relevant ESI?
- b. Are any proprietary applications implicated?

V. Search and Collection

- a. What search technology and techniques will be used to identify responsive or privileged ESI?
- b. Can the parties agree on key words and other culling and filtering protocols? Will alternative search techniques (*e.g.* concept-based or clustering) be used?
- c. What protocol will be used to reach agreement on search issues?
- d. What sampling or other testing procedures are contemplated?
- e. Do parties contemplate supplement key word or other searches?
- f. How will the contents of databases be discovered and produced?

VI. Accessibility Issues

- a. What relevant ESI might be inaccessible?
- b. What information will be produced by the party claiming inaccessibility to support that designation?

VII. Vendor Issues

- a. Are the parties willing to consider sharing e-discovery document repositories?

VIII. Privilege Issues and Evidentiary Issues

- a. Procedures for inadvertent production
- b. Quick Peeks?
- c. Clawback agreements?
- d. Rule 502 Issues?
- e. Authentication Issues?

IX. Processing and Production Format Issues

- a. Anticipated volume
- b. Procedure for production of documents kept in paper
 - i. Will paper documents be scanned, at what resolution and with OCR?
- c. Format for production of
 - i. Emails and text documents
 - ii. Spreadsheets
 - iii. Databases
- d. Metadata
- e. Extracted text
- f. Load files
- g. De-duplication issues
- h. How will parties address file naming, discrete identification of native documents and Bates Numbering?
- i. On what media will ESI be delivered? Optical disks? External drives? FTP?

X. Additional Issues

- a. Who will serve as ESI liaisons for each party?
- b. Will technical assistants be permitted to communicate directly?
- c. Is there a need for an e-discovery special master?
- d. What is the schedule for addressing e-discovery issues
- e. How much time is required to identify, collect, process, review, redact, and produce ESI?

EXHIBIT C

Ott, Carter

From: Rebecca Coll [rcoll@calvofisher.com]
Sent: Monday, February 07, 2011 4:54 PM
To: Ott, Carter
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne
Subject: RE: Sony Other OS Meet and Confer
Follow Up Flag: Follow up
Flag Status: Completed
Attachments: Letter to Judge Seeborg - Plaintiffs Draft.doc

Carter,

Attached please find a draft letter with Plaintiffs' section. Please fill in your part and send it back to me as soon as possible.

Thanks

Rebecca

From: Ott, Carter [mailto:Carter.Ott@dlapiper.com]
Sent: Friday, February 04, 2011 9:02 AM
To: Rebecca Coll
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne
Subject: RE: Sony Other OS Meet and Confer

Thank you, Rebecca. I think that makes sense. Why don't you draft the letter with your section, and send to us to input ours?



Carter W. Ott
Associate

DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105

T 415-836-2538

F 415-659-7338

M 415-336-9408

carter.ott@dlapiper.com

www.dlapiper.com

From: Rebecca Coll [mailto:rcoll@calvofisher.com]
Sent: Thursday, February 03, 2011 6:23 PM
To: Ott, Carter
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne
Subject: RE: Sony Other OS Meet and Confer

Carter-

2/14/2011

This is a simple issue. The clerk said we should submit a joint letter if possible and I can't imagine why we wouldn't be able to accomplish that, with separate sections stating our positions. If you are nevertheless insisting on submitting separate letters we will proceed as you set forth in your email.

Rebecca

From: Ott, Carter [mailto:Carter.Ott@dlapiper.com]
Sent: Thursday, February 03, 2011 9:28 AM
To: Rebecca Coll
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne
Subject: RE: Sony Other OS Meet and Confer

Rebecca,
Thank you for following up on this. At this time, we believe that the best way to address the issue is via a telephonic conference with Judge Seeborg, after we have submitted letters stating our respective positions. Please provide us with the date on which you propose to file your letter. We will plan on filing our response three days after.

Thank you,
Carter



Carter W. Ott
Associate

DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105

T 415-836-2538

F 415-659-7338

M 415-336-9408

carter.ott@dlapiper.com

www.dlapiper.com

From: Rebecca Coll [mailto:rcoll@calvofisher.com]
Sent: Monday, January 31, 2011 1:57 PM
To: Ott, Carter
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne
Subject: RE: Sony Other OS Meet and Confer

Carter-

Pursuant to our conversation this morning I called Judge Seeborg's clerk and inquired about the Court's preference with respect to conference calls to discuss scheduling matters. She responded that Judge Seeborg prefers that the parties submit a joint letter requesting such a conference call and setting forth our competing positions, or if that is not possible, then competing letters. Judge Seeborg will review the letter(s) and determine whether a conference call is appropriate.

As we discussed, Plaintiffs' position is that the class certification discovery cut-off and motion deadline should be vacated, and a CMC should be set when the Court issues its ruling on SCEA's Motion to Dismiss. You indicated you would get back to me with Sony's position.

2/14/2011

Please let us know whether you will agree to submit a joint letter setting forth our competing positions and requesting a telephone conference with Judge Seeborg. We would like your response by close of business tomorrow.

Finally, in response to your request regarding your administrative motion to seal exhibits, we have no objection.

Thanks

Rebecca Coll

From: Ott, Carter [Carter.Ott@dlapiper.com]
Sent: Thursday, January 27, 2011 6:14 PM
To: Rebecca Coll
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com; Sacks, Luanne; Collins, Joseph
Subject: RE: Sony Other OS Meet and Confer

Rebecca,
We are willing to agree to continue the dates by 60 days. Your proposal for a 120-day extension is based on too many unknowns, for example, the court could issue an order tomorrow regarding our pleading challenges or our magistrate judge could limit discovery per the various motions such that little more than production in response to the pending requests is necessary. If necessary, we can revisit the timing in the future.

Thank you,
Carter



Carter W. Ott
Associate

DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105

T 415-836-2538

F 415-659-7338

M 415-336-9408

carter.ott@dlapiper.com

www.dlapiper.com

From: Rebecca Coll [mailto:rcoll@calvofisher.com]
Sent: Tuesday, January 18, 2011 2:33 PM
To: Ott, Carter; Sacks, Luanne
Cc: James Quadra; rrivas@finkelsteinthompson.com; jpizzirusso@hausfeldllp.com
Subject: Sony Other OS Meet and Confer

Luanne and Carter:

As you know, the last date to file a motion for class certification, and the last date to

complete non-expert discovery relating to class certification, is set for February 28, 2011. Given (a) the parties' outstanding discovery disputes, (b) the fact that Sony's document production has been minimal despite our agreement to hold the documents as "attorneys' eyes only" pending a ruling from the Court, and (c) the fact that we have not yet received a ruling on Sony's Motion to Dismiss, these deadlines should be moved. We request that Sony stipulate to an order postponing the foregoing deadlines by 120 days or, in the alternative, vacating the foregoing deadlines and setting a further status conference on a convenient date following the hearing on our discovery motions. Please advise us as to your position as soon as possible.

Becca Coll
Calvo Fisher & Jacob, LLP
One Lombard Street
San Francisco, CA 94111
T: 415-374-8370

The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please reply to the sender and destroy all copies of the message. To contact us directly, send to postmaster@dlapiper.com. Thank you.

The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please reply to the sender and destroy all copies of the message. To contact us directly, send to postmaster@dlapiper.com. Thank you.

The information contained in this email may be confidential and/or legally privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please reply to the sender and destroy all copies of the message. To contact us directly, send to postmaster@dlapiper.com. Thank you.

February __, 2011

VIA HAND DELIVERY

Hon. Richard Seeborg
United States District Court Judge
450 Golden Gate Avenue
Courtroom 3 – 17th Floor
San Francisco, CA 94102

**Re: In Re Sony PS3 “Other OS” Litigation
U.S.D.C. Case No. 3:10-cv-01811-RS**

Dear Judge Seeborg:

The last date to file a motion for class certification, and the last date to complete non-expert discovery relating to class certification, is currently set for February 28, 2011. (Docket No. 94.) The parties request a telephone conference with the Court to discuss modifying that deadline for two reasons.

First, the Court has not yet ruled on Sony’s Motion to Dismiss. It would be premature to file a motion to certify this action until these preliminary pleading issues are resolved.

Second, the parties have multiple outstanding discovery disputes which are scheduled to be addressed at a hearing on February 9 before Magistrate Judge Chen. Once these discovery issues are resolved, the parties require time to conduct discovery pursuant to the Judge’s order.

The parties disagree regarding how the February 28, 2011 date should be modified, and have therefore separately set forth their positions below.

Plaintiffs’ Position

Plaintiffs request that the Court vacate the February 28, 2011 deadlines to complete class certification discovery and file a motion to certify the class. Plaintiffs respectfully request that the Court reset these deadlines at the next Case Management Conference, which Plaintiffs submit should be scheduled after the Court rules on Sony’s Motion to Dismiss. At that time, the parties can set forth their positions about appropriate deadlines.

A short continuance of 60 days will not be adequate time to complete class certification discovery and file a motion to certify the class. Sony has produced only

minimal documents responsive to Plaintiffs' requests, and has produced no documents it considers to be "confidential" (such as widely disseminated advertisements), notwithstanding Plaintiffs' agreement to hold such documents as "Attorneys Eyes Only" until the parties' dispute regarding a protective order can be resolved.

In addition, Sony has objected to Plaintiffs' request that Magistrate Judge Chen order that Sony comply with Plaintiffs' document requests within ten days of the Court's decision on the pending discovery motions, so it is unclear how long Sony will take to produce documents once Magistrate Judge Chen issues an order on the pending discovery motions. Once Sony produces documents, Plaintiffs require time to review the documents and conduct follow up discovery, as well as schedule and take depositions. Finally, there have only been preliminary Rule 26 discussions regarding electronically stored information, and despite Plaintiffs' request, Sony has not yet provided a date when it can conclude those discussions. The parties have not reached agreements about, among other things, appropriate search terms or phrases, custodians, or the format of production.

Defendant's Position

[To be inserted]

Sincerely,

Calvo Fisher & Jacob, LLP

DLA Piper

Rebecca Coll
Co-Lead Counsel for Plaintiffs

Carter W. Ott
Counsel for Defendant