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February 23, 2011

Hon. Edward M. Chen
United States District Court, Northern District of California
450 Golden Gate Avenue
Courtroom C, 15th 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 Chen:

On February 20, 2011, the Court issued an Order Re Plaintiffs' Motion For Protective Order, Plaintiffs' Motion For Order Compelling Discovery And Entering Standard Stipulated Protective Order, And Defendant's Motion To Compel (Docket #152). As part of that Order, the Court instructed the parties to report "by letter the results of the meet and confer[]" efforts contemplated by that Order. The purpose of this letter is to report on these matters.

I. Production of Plaintiffs' PS3s for Forensic Imaging, and Scheduling Plaintiffs' Depositions and Inspection of Plaintiffs' PS3s

The Court ordered that

[t]he named Plaintiffs [] produce for inspection their PS3s and the PS3s' hard drives. The parties shall meet and confer and agree upon a protocol for the inspection/production. The parties will also agree upon a time line for the production and for ensuing depositions (affording sufficient time for Defendant to inspect and conduct its analysis of each PS3 and it hard drive prior to taking the Plaintiffs' depositions).

Order (Docket #152), 1:21-27.

SCEA's Position

The parties have discussed, and continue to discuss, a protocol for imaging the Plaintiffs' PS3s – a process that is made more complicated than the imaging of a personal computer because of the numerous security measures in place on a PS3 hard drive to preclude hacking. Pursuant to Plaintiffs' request, SCEA is drafting a brief written explanation of these relevant measures.



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During the parties' discussions, Plaintiffs stated – contrary to their prior agreement – that they will not appear for their depositions in San Francisco, California; nor will they bring or ship their PS3s to San Francisco for forensic imaging or inspection. Rather, based on their concern that their PS3s will be damaged in route, Plaintiffs will only appear for deposition and allow forensic imaging and inspection at or near their homes (including, Knoxville, Tennessee and Grand Forks, North Dakota), thereby substantially increasing the cost of this process. Plaintiffs will advise SCEA regarding their final position on the location of the depositions and forensic imaging and inspection of the PS3s once they have received SCEA's written explanation of any additional steps necessary to obtain a forensic copy of the contents of their PS3 hard drives. If the parties cannot resolve this issue, they will need the Court's intervention.

Plaintiffs' Position

Plaintiffs previously agreed to appear for deposition in San Francisco, California if SCEA agreed that Plaintiffs need not produce the PS3s at deposition. Now that the Court has ordered Plaintiffs to produce their PS3s for inspection and at their deposition, Plaintiffs have requested that SCEA image the PS3 hard drives at locations near their homes to minimize the risk of damage to the hard drives. SCEA has indicated that it may or may not be able to do so, and that it requires further input from its client to determine the conditions that will be necessary for obtaining usable images. Plaintiffs are waiting to hear back from SCEA on this issue.

Plaintiffs have also requested (a) the identity of the expert or experts to perform the imaging, so that Plaintiffs can assure themselves of that the expert(s) meet minimum qualifications to handle the evidence in question, (b) an agreement that the expert sign an agreement to be bound by the protective order, (c) an agreement that SCEA is responsible if the PS3s are damaged during the imaging process, (d) information on steps that will be taken to safeguard the original PS3s during the imaging process, and (e) a copy of whatever images SCEA obtains from the original PS3s. SCEA has not yet provided firm responses to these issues.

II. Plaintiffs' Certification of Production

The Court ordered the Plaintiffs to "certify that they have produced all documents responsive to [SCEA's document] requests regarding reliance and purchase and documents requested by Requests Nos. 10-13 and 16-25, including those kept in digital form, in their current possession, custody or control." Order (Docket #152), 2:2-5. To date, Plaintiffs have not provided any certification but intend to do so.



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III. SCEI Documents, and Further Document Production

SCEA's Position

The Court ruled that “[b]ased on the current record, Plaintiffs have not established documents not in the possession of SCEA and solely in the possession of SCEI [, a Japanese corporation and SCEA’s former parent,] are within the possession, custody or control of SCEA within the meaning of Rule 34.” Order (Docket #152), 2:11-18. But the Court ruled that “Plaintiffs may conduct limited focused discovery on this matter. The parties shall meet and confer and agree upon a discovery plan on this issue” and that SCEA shall “also request SCEI to produce documents in SCEI’s possession which are responsive to Plaintiffs’ document requests.” *Id.* The parties are discussing a potential compromise regarding a narrowed request for documents from SCEI that if reached, and if SCEI agrees to provide documents, would also resolve the need for foundational discovery regarding the relationship between SCEA and SCEI.

The Court also ordered that SCEA “produce those responsive documents it does have in its possession.” *Id.* As part of the parties’ meet and confer, SCEA proposed the use of keywords for the purpose of its review and production of emails obtained from a group of custodians, and Plaintiffs stated that they would propose additional keywords, and are expected to do so in the near future.

Plaintiffs’ Position

The Court ordered as follows:

Based on the current record, Plaintiffs have not established documents not in the possession of SCEA and solely in the possession of SCEI are within the possession, custody or control of SCEA within the meaning of Rule 34. However, Plaintiffs may conduct limited focused discovery on this matter. The parties shall meet and confer and agree upon a discovery plan on this issue. In the meanwhile, SCEA shall produce those responsive documents it does have in its possession. It shall also request SCEI to produce documents in SCEI’s possession which are responsive to Plaintiffs’ document requests. That request and SCEI’s response thereto shall be discoverable as part of the limited discovery ordered herein.

On February 18, 2011, Plaintiffs agreed to narrow the scope of the requests for documents to SCEI. Plaintiffs expect SCEA to make a request for the documents to SCEI, and to produce to Plaintiffs both the request and SCEI’s response, per the Court’s order. If SCEI does not agree to production, Plaintiffs will require further discovery on this matter, including a Rule 30(b)(6) deposition.



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SCEA has not yet produced any additional responsive documents in its possession. The parties are meeting and conferring regarding the format of production, metadata to be included, custodians to be searched, and keywords to be used for the first round of production. At this point in time, SCEA has only agreed to search for documents using four search words and a limited list of custodians whose records SCEA says it will search. Plaintiffs will provide SCEA with additional proposed search words. In terms of a list of custodians, the parties are continuing to discuss this issue. Plaintiffs have requested that SCEA provide them with an organizational chart or directory identifying SCEA's officers, directors and employees and their titles and are awaiting SCEA's response as to whether it can provide something to this effect.

IV. Stipulated Protective Order

The Court ordered the parties to "meet and confer and agree upon a stipulated protective order that contains a provision for highly confidential documents for attorneys' eyes only" but that does not "contain the procedures suggested by SCEA applicable to source code and expert witness disclosures." Order (Docket #152), 2:19-21. Plaintiffs provided SCEA with a draft protective order on February 16, 2011. SCEA provided edits to the draft protective order yesterday. The parties will meet and confer to attempt to reach agreement.

Very truly yours,

DLA Piper LLP (US)

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