# EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re SONY PS3 "Other OS" LITIGATION

CASE No. 3:10-CV-01811 RS (EMC)

**STIPULATED PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the Court to

file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL" or ""HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items: extremely sensitive "Confidential Information or Items," disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.8 House Counsel: attorneys who are employees of a party to this action. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.9 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.10 Outside Counsel of Record: attorneys who are not employees of a party to

this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

2.11 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.14 Protected Material: any Disclosure or Discovery Material that is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating

Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

4. DURATION

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. The Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process or to impose unnecessary expenses and burdens on other parties) expose the Designating Party to sanctions.

If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection or do not qualify for the level of protection initially asserted, that Designating Party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of Section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so

designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) for information in documentary form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" to each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

A Party or Non-Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the appropriate legend ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY") to each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Designating Party identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony and specify the level of protection being asserted. When it is impractical to identify separately each portion of testimony that is entitled to protection and it appears that substantial portions of the testimony may qualify for protection, the Designating Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right to have up to 21 days to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted. Only those

portions of the testimony that are appropriately designated for protection within the 21 days shall be covered by the provisions of this Stipulated Protective Order.

Parties shall give the other parties notice if they reasonably expect a deposition, hearing or other proceeding to include Protected Material so that the other parties can ensure that only authorized individuals who have signed the "Acknowledgment and Agreement to Be Bound") (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition shall not in any way affect its designation as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

Transcripts containing Protected Material shall have an obvious legend on the title page that the transcript contains Protected Material, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated as Protected Material and the level of protection being asserted by the Designating Party. The Designating Party shall inform the court reporter of these requirements. Any transcript that is prepared before the expiration of a 21-day period for designation shall be treated during that period as if it had been designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to

make such a motion including the required declaration within 21 days (or 14 days, if applicable) shall automatically waive the confidentiality designation for each challenged designation. In addition, the Challenging Party may file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed by the preceding paragraph.

The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the Designating Party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the court rules on the challenge.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation has been terminated, a Receiving Party must comply with the provisions of Section 13 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as

employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (that is attached hereto as Exhibit A);

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(c) experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(d) the Court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the Court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be

Bound" (Exhibit A);

(b) the Receiving Party's House Counsel and their staff to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

(c) the court and its personnel;

(d) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A); and

(e) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party's permission. The Designating Party shall bear the burden and expense of seeking protection in

that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party's confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

3. make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this Court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the Court. Absent a court order to the contrary, the Non-Party shall

bear the burden and expense of seeking protection in this Court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the Court.

12. MISCELLANOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the Court, then the Receiving Party may file the Protected Material in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the Court.

13. FINAL DISPOSITION. Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2)affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: _____ FINKELSTEIN THOMPSON LLP

By: /s/
Rosemary M. Rivas
*Other OS Plaintiffs' Interim Co-Lead Counsel*

Dated: _____ CALVO FISHER & JACOB LLP

By: /s/
James A. Quadra
*Other OS Plaintiffs' Interim Co-Lead Counsel*

Dated: _____ HAUSFELD LLP

By: /s/
James Pizzirusso (*Pro hac vice*)
*Other OS Plaintiffs' Interim Co-Lead Counsel*

Dated: _____ DLA PIPER LLP (US)

By: /s/
Luanne Sacks
*Counsel for defendant Sony Computer Entertainment America LLC*

_____

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated:

By: _____
Honorable Edward M. Chen
United States Magistrate Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of _____ [insert formal name of the case and the number and initials assigned to it by the court]. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and

acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

[printed name]

Signature: _____

[signature]

# EXHIBIT 2

United States District Court

Northern District of California

Before The Honorable Edward M. Chen

| | | |
|---|---|---|
| Anthony Ventura, et al., Plaintiff, vs. Sony Computer Entertainment, America, Incorporated, Defendant. | ) | No. C10-1811 EMC |



San Francisco, California
Wednesday, February 9, 2011

**Reporter's Transcript Of Proceedings**

**Appearances:**

For Plaintiff:

Finkelstein, Thompson, LLP
100 Bush Street, Suite 1450
San Francisco, California 94104
By: **Rosemary M. Rivas, Esquire**

Calvo Fisher & Jacob, LLP
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By: **James Andrew Quadra, Esquire**

(Appearances continued on next page.)

*Reported By:* *Sahar McVickar, RPR, CSR No. 12963*
*Official Reporter, U.S. District Court*
*For the Northern District of California*

(Computerized Transcription By Eclipse)

**Appearances, (cont'd.):**

For Plaintiff:
Meiselman Denlea Packman
Carton Eberz, PC
1311 Mamaroneck Avenue
White Plains, New York 10605
By: **Douglas Greg Blankinship, Esquire**
**(Appearing telephonically)**

For Defendant:
DLA Piper, LLP
555 Mission Street
San Francisco, California 94105
By: **Luanne R. Sacks, Esquire**
**Carter Winford Ott, Esquire**

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Wednesday, February 9, 2011 10:30 P.M.

PROCEEDINGS

***THE CLERK:*** Calling case C10-1811, Ventura versus Sony Computer Entertainment America, Inc.

Counsel, please state your appearances for the record.

***MR. FIZZIRUSSO:*** James Fizzirusso, Hausfeld LLP, for the plaintiffs.

***THE COURT:*** All right, thank you.

***MS. RIVAS:*** Good morning, Your Honor.

Rosemary Rivas of Finkelstein Thompson, for the plaintiff.

***THE COURT:*** All right, good morning.

***MR. FIZZIRUSSO:*** Good morning, Your Honor.

James Quadra --

***THE COURT:*** All right.

***MS. SACKS:*** Good morning, Your Honor.

Luanne Sacks and Carter Ott, DLA Piper, on behalf of the defendant, Sony Computer Entertainment, America.

***THE COURT:*** Thank you.

And on the telephone?

***MR. BLANKINSHIP:*** *(Telephonically:)*

Good morning, Your Honor. Greg Blankinship for plaintiff, Anthony Ventura, Your Honor.

***THE COURT:*** All right, have a seat.

We've got several sets of motions here. What I want to deal with, first of all, is the overlapping motions, the motion to compel -- well, the motion for -- well, to compel, and the motions with regard to the discovery that is outstanding from Sony to the plaintiffs.

And let me just -- I made kind of a list of the issues, or the items that are in dispute, and the first one, which may be the core one here, is access to the actual PS3s and the hard drives they are in. I would like to hear from Sony what the relevance is, in view of the theory of the case. The theory of the case is that the changes that were implemented by way of the update diminished a value unfairly of the PS3s. And so I'm not sure I understand exactly why it's relevant to know, for instance, on a day-to-day basis, the use, the data. Maybe you can explain that to me.

***MS. SACKS:*** Certainly, Your Honor.

The theory of the case that Your Honor was just referencing, that this is all about just a loss of value, is actually a rather novel change by the plaintiffs. If we go back to their consolidated complaint they have ten causes of action, Your Honor. They plead for damages that go far beyond any alleged loss in value.

Their complaint is replete with their own references to their use of the PS3. They put the use of the PS3 directly in issue. They may now want to back away from that because

they don't want to produce their PS3s, but the fact is, if we go through the allegations of the complaint, loss of use and changes in use are referenced something to the tune of 81 times.

So taking a quick look at the consolidated complaint, Your Honor, if we look specifically, at, for instance, paragraph -- I'll just pull a few out as examples -- paragraph 56, they plead.

"Users that chose to install update 3.21 lost any data stored in the other OS partition." That is one element of their damages that we would explore in connection with the hard drives.

They go on to say they lost whatever data was stored in the partition and they lost access to a partition in the hard drives; again another element of the damages that's pled in the complaint.

Paragraph 58 --

***THE COURT:*** Why can't that be proven forensically? What's the relevance of whether plaintiff A or B or C had actually had that loss, if the allegation is that, as a class the effect of update 3.21 was to have loss of data stored in other OS partitions?

***MS. SACKS:*** When you say, Your Honor, "forensically," I'm not sure what you mean. That is part of the concept here, is that the hard drives would be imaged and

they would be forensically examined.

***THE COURT:*** I guess my question is why these hard drives as opposed to -- why can't that be determined without regard to any specific plaintiff's hard drives?

***MS. SACKS:*** Well, the problem, Your Honor, is that we have tremendous variations among the alleged use of the PS3s just with regard to the five named class representatives.

Then they also allege other injuries related to use on the absent class members. The plaintiffs here, as the class representatives, have to come forward with the evidence to prove up their claims. They have to show, for instance, as they plead in paragraph 59 of the complaint that they lost money because of the purchase of an online subscription called "Core"; how are we supposed to verify that if we can't get the access to their hard drives?

They claim they were damaged in prepaid Netflix subscriptions; again, how do we test the veracity of that allegation?

***THE COURT:*** Is there a more specific allegation that says a particular plaintiff paid X and lost X? Because right now, this is just users, generally, sort of generically. Are there specific allegations in here that said Mr. Ventura or Mr. Huber or Baker, or any of them -- well, I guess the introductory paragraphs, what you would point to.

***MS. SACKS:*** Yes, Your Honor, and in addition to

that, they also plead in their complaint that they are going to have to purchase pertinent computers to replace their PS3s. That is in paragraph 1 -- sorry, 159. So if they have -- or are alleging that these usage issues caused them damages, then we certainly have the opportunity to test that.

In addition, Your Honor, it's important to note that some of the named plaintiffs claim that they used the PS3, in effect, as truly a personal computer. They did not only Internet browsing with it, but they created games. They use it for e-mail access.

Other of the named plaintiffs either never even installed the Linux on the other operating system, never used it whatsoever, or used it just to do things they could have done with a native operating system.

So again, this all goes to issues of typicality and commonality. The plaintiffs have yet to tell us what their theory of damages is. If we look at their amended initial disclosures, they say, Your Honor, that they can't yet compute what their damages are. Well, if they can't compute, then how can we?

And isn't their damage going to necessarily turn on things like materiality and reliance and whether, in fact, they were, quote/unquote, "damaged" as a consequence of the removal of the other operating system, Linux?

So when they plead that they are going to testify,

as they do in their amended initial disclosures, they say they are going to give evidence about their use, they are going to give evidence about their installation. They put it in their initial disclosures, Your Honor, they identified their PS3s as evidenced in their initial disclosures.

How can they, on one hand, offer them --

**(Simultaneous colloquy.)**

***MS. SACKS:*** -- and yet prevent Sony from conducting discovery about it? Are they going to come in and testify at all about --

***THE COURT:*** So their personal PS3s are identified in the initial disclosures?

***MS. SACKS:*** Yes, Your Honor.

Excuse me one second, please.

***THE COURT:*** Um-hmm.

**(Retrieving paperwork from Counsel table.)**

***MS. SACKS:*** In the initial disclosures, the plaintiffs said specifically with regard to each of the named plaintiffs that they would each testify about the use, the installation. And they each identified their PS3s.

In fact, the PS3 is the subject of the lawsuit; how can they withhold the product that is the subject of the lawsuit from inspection? If the plaintiffs have some concern about the material that is on that hard drive, they have the obligation to specifically identify what information that is

and seek protection for it.

We have never said that we absolutely want unfettered access to everything, what we have said is if you think there is something confidential on there, you have the onus, you have the burden to come seek protection for it. You can't just blanketly say, we are not going to produce anything.

***THE COURT:*** What's wrong with the proposal to have -- putting aside the cost allocation, what is wrong with a proposal to have a neutral forensic expert make a determination that Linux was installed, using that function, whether certain files exists, and those can be identified, and the dates of the installation?

***MS. SACKS:*** Your Honor, that still doesn't show us what the actual damage was. Although the plaintiffs have again tried to say, oh, this is just a simple case, it's just a false advertising case, it's not, Your Honor. It's a case that has computer fraud act claims in it. It's a case that has trespass claims in it. It has breach of warranty claims in it.

So why are we not entitled to find out, what, in fact, each of the named plaintiffs' alleged damages is?

If I bought a PS3 without ever knowing that it had the possibility of running an alternative running system, how can I say that I've been damaged?

***THE COURT:*** And that would be shown by the proposal, if there was never any attempted installation of Linux or

anything else, or any other program that has now been disabled that would be shown in the forensic report, wouldn't it?

***MS. SACKS:*** Your Honor, I think the difficulty with this is, plaintiffs are trying by their discovery motion to essentially preordain the scope of discovery issues to be presented for certification. We are entitled to find out if these individuals have the requisite commonality, if they are typical of the class they are purporting to represent.

And, in fact, just go to the class definition itself: The class definition includes the word, "personal use"; these things had to have been purchased for personal use. How are we supposed to determine if somebody is in the complaint -- I'm sorry, in the class if we don't have an opportunity to see what, in fact, they were using the PSP3 for?

Some of the underlying plaintiffs, which have now essentially be abandoned in terms of class representation, some of those pled that they made their own games, that they used these things in a professional capacity. Those individuals arguably wouldn't be in the class. But how else are we supposed to test this?

The plaintiffs say, oh, you can ask them about in it in their deposition; Your Honor, I think it's quite incredible to suggest that anyone can come in and actually provide substantive cogent testimony about the content of a hard drive, whether it's for a PC or whether it's for a PS3.

They also claim that they did online research that led them to purchase the PS3, that's one of the other reasons that we have asked about their personal computers. They can't on one hand say, oh, gee, I'm damaged because I paid, whether it was 399, 499, 599 for a PS3, I'm damaged because of a, quote/unquote, "reduction in value," but yet not show us as proof in what way they have actually had a reduction in that value. And that is going to determine -- sorry, that's going to depend on each individual of the five named plaintiffs.

It's basically the equivalent of saying, my car doesn't function, but you can't inspect my car, I just want you to pay me back for it. How are we supposed to determine -- if, in fact, whatever plaintiffs ultimately say they think their loss in value is, how are we supposed to test that? Is it going to be the same for everyone? I would argue not. But one of the only ways we can really determine that is to find out what's on those hard drives.

It is quite incredible, Your Honor --

***THE COURT:*** So give me an example of what you would find that would be relevant to either the merits or class certification on one of the named plaintiffs' PS3 hard drive beyond that which would be revealed by their proposal.

***MS. SACKS:*** Well, certainly one thing we might find is whether or not any of them are engaged in the hacking that we now know was a widespread effort.

Obviously, the people in this class are the people who downloaded, or claim they downloaded the Linux operating system onto their other OS. It is beyond dispute now that there in is an ongoing effort to hack the PS3. In fact, most recently, there was an effort to hack around for update 3.21.

And these people, as members of the class, are engaged in activity that is not only prohibited under Sony's agreements, but is illegal. So if, in fact, some of these very sophisticated users, who are included in the five named plaintiffs, are engaged in the hacking, we certainly have the opportunity to find that out.

***THE COURT:*** What's the legal implication if you were to find that?

***MS. SACKS:*** I'm sorry?

***THE COURT:*** What's the legal implication to this lawsuit?

***MS. SACKS:*** Oh.

First of all, certainly, someone who is engaged in a violation of the terms of service and the licensing agreement would not be an adequate class representative. Also, someone who is engaging in activity that is injurious to Sony Computer that is literally invading its intellectual property rights would not be an adequate representative. And certainly, they wouldn't be common with the rest of the class.

Is everyone going to be damned by the defense that

might be applicable to one of the individuals because of hacking?

***THE COURT:*** Is that a substantive defense?

***MS. SACKS:*** Is that a substantive defense: Yes, Your Honor, it is a substantive defense because the terms of service and the license agreement specifically allow Sony to take action when someone has engaged in improper activity with regard to its intellectual property.

***THE COURT:*** But how is it a substantive defense if the challenges to the overall decision, not an individualized decision, but an overall decision to implement -- update 3.21, how is it a defense?

Does that mean if they actually prevail on a class basis, then an individual would be barred from participating in any class settlement because they hacked? What's the nexus? I'm not sure I understand.

***MS. SACKS:*** Well, part of the nexus is how can you come in and ask for damages for a property that you have basically violated? You don't have an ownership right in the software that Sony Computer allows you to use. That's it the whole point of the license agreement, it's not an ownership interest, it is a privilege that Sony conveys on them. And if these people violate the terms of that licensing agreement, they have no entitlement to continued use of a software.

Plaintiffs also claim, for instance, that they can

no longer get their prepaid Netflix subscriptions, they can no longer participate in the PlayStation network games. Well if, in fact, someone has used this most recent hack, which allows you to circumvent 3.21, how would we know that without an examination of their hard drive? And if, in fact, they have circumvented update 3.21, how are they damaged? Because they are still running Linux.

So there are so many variables here, Your Honor. And again, the plaintiffs now would like you to believe that this is just a very simple case, and all they are seeking here is restitution of some amount of the purchase price, but when you look at their complaint, they have substantial allegations of consequential damages in there that have nothing to do with the purchase price.

For instance, they claim that they bought games that they can no longer play; well, how do we know that if we can't inspect their hard drive? Because many of those games are electronically part of the PS3 as opposed to somebody purchases a DVD or a CD.

They claim they can't use e-mail anymore; now, one of the plaintiffs, says, oh, gee, you know, all I ever do with this is Internet browsing. Well, we are entitled to find that out and find out if, in fact, there is any actual change in those usage patterns as a result of update 3.21.

Beyond that, Your Honor, some of these people didn't

download update 3.21, or at least they say they didn't. The only way we are going to know that for sure is to have an inspection of their hard drive.

***THE COURT:*** Well, that's not -- you could also find that out through their proposal, having the neutral make that determination.

***MS. SACKS:*** Yes, that would be revealed by the forensic examination, I don't disagree with that, Your Honor.

I think part of the problem is is that what the information is that we would get from the forensic proposal they make is it's going to be a lot of nothing. It's going to give information that actually has no substantive effect.

How could we possibly use something as bare-bones as what the plaintiffs are talking about to cross-examine them in their deposition? And --

***THE COURT:*** Let me hear from the other side on this issue.

***MS. SACKS:*** Certainly.

***THE COURT:*** I would like to hear from the plaintiffs.

In view of the fact that there are allegations in the complaint that are specific, that I would assume that at trial and in some other process some of these plaintiffs would testify about what happened to them in their particular situation. Even before you get to affirmative defenses,

hacking defense and typicality and adequacy, just a straight questions of veracity would seem to come into play.

If somebody is going to represent in a complaint and potentially testify at an evidentiary hearing or at trial about the specifics of their -- what happened to them, their use of the PS3, why -- why can't the defendant inquire into -- and get a hold of the documents or the instruments which might form the basis of cross-examination?

***MS. RIVAS:*** Your Honor, there is no dispute in this case about the functions of the PS3. Plaintiffs allege that they used the PS3 the way that it was advertised, they will testify to it. And we've offered a reasonable proposal for the defendant to test the veracity. That's sufficient.

***THE COURT:*** Well, you would agree that veracity is an issue and whether they use it properly might be an issue?

***MS. RIVAS:*** Right, but does that mean that -- that they get unfettered access to their PS3 hard drives? They get to know every single movie the plaintiffs have watched, every single game that they watched --

***THE COURT:*** Well, once we have a protective order in place, perhaps they do, at least for purposes of discovery, to see whether there is something there that might have value to the question of veracity.

Or, to get into these other issues, the level of damages and loss of use suffered by the individual named

plaintiff might go to their question of typicality as well as adequacy.

***MS. RIVAS:*** And let me address that, Your Honor.

We met and conferred about this damages issue and the peripherals and the games and how the PS3s were used ad nauseam. We met and conferred about it. We provided an amended disclosure, initial disclosures to the defendant, saying that what we are seeking is a refund of the full or partial price paid for the PS3 and any money paid for the P -- any money that's in the PSN accounts that anyone can't access because they no longer have access to the PSN network.

Those are two items that we've -- that we've amended in the -- that we've put in the initial disclosures. So all this stuff about we need to know what the damages are, it's just a red herring, it's not relevant.

Second, in terms of usage being relevant to adequacy and typicality, we dispute that. In any event, we are willing -- we are not contesting that people used the PS3 differently than other people. We are not contesting that some people may have played video games every day while other people didn't. That's not a contested issue.

And they can make that arguments about how usage, you know, reflects -- or goes against typicality and adequacy at class cert, and we will fight about it then. But to get unfettered access --

***THE COURT:*** You say we'll fight about it then, here's the problem: We are at the early stages of discovery. These issues have not been decided by any court as to exactly what is going to be relevant, what is not, what the criteria are for typicality and adequacy, so it's very hard to make a preemptive kind of judgment now saying, well, I think Judge Seeborg is likely to rule X, Y, and Z, and Linux -- an inquiry into these things, I don't know that. It's the cart before the horse.

***MS. RIVAS:*** Your Honor, I understand that concern, but we have made a reasonable proposal. We are not going to contest that there are different usages of the PS3's advertised functions. They can make that argument. They can rely on the allegations in the complaint to show that there is no typicality or commonality.

***THE COURT:*** What if --

***MS. RIVAS:*** But do they need -- oh, I'm sorry.

***THE COURT:*** That assumes that the allegations are taken as true. What if they show the allegations are somewhat of an exaggeration, that, in fact, plaintiff X and Y didn't even do the things here, were even less effective.

You are saying that is probably going to be irrelevant to the ultimate totality analysis, but I don't know that. It could go to adequacy, maybe these aren't the best plaintiffs.

Number one, if they represented certain things here that don't prove out; number two, if, in fact, they didn't use or need the PS3 in this way and they only use it for the very limited purpose of playing, you know, Sony games.

***MS. RIVAS:*** And, Your Honor, that's all addressed by a reasonable proposal.

All the cases that Sony has cited about where one party was ordered to produce a hard drive and there was unfettered access have been in cases against -- by recording companies where they are suing a plaintiff for illegally downloading music.

That's where the evidence is going to be, in the hard drive. Or where there has been destruction of evidence: There hasn't been any of that in this case. The plaintiffs have provided the information that Sony wants. They are willing to have a neutral expert look at that information.

And, Your Honor, even if Your Honor is inclined to say, okay, they get detailed access to the hard drive, does that mean we have to turn over the hard drive to them? No, it means a neutral expert could look at the contents and tell them. They could ask specific questions about what's on there and the neutral could decide that. It doesn't mean that our plaintiffs have to give -- turn over the hard drive to the defendant.

***THE COURT:*** What's the privacy interest -- the other

concern I have, as your opponent pointed out, there has been no articulation of the kind of private information that is particularly sensitive that even with a protective order -- now you are making a benefit/burden argument, that it's so intrusive and so sensitive that we ought to go through a neutral screen.

Like you say, whether it's limited to these three areas of inquiry or broader inquiry that could be interrogated by Sony, there has been no -- I don't see any real articulation of exactly what is --

***MS. RIVAS:*** Well, Your Honor, it would be difficult for the plaintiffs to go into the hard drives and do a forensic analysis at this stage and explain what's in there.

***THE COURT:*** They don't have to do a forensic analysis, I just -- they can even do it under seal and say, I'm plaintiff so-and-so, and here is the kind of stuff that is very, very sensitive in here, I have correspondence with -- I mean, whatever.

***MS. RIVAS:*** Your Honor, the cases that we have cited in our briefs say they recognize that hard drives of computers and not PS3s, but of computers, which the PS3 essentially was a computer, that that -- people have a privacy right interest in that.

***THE COURT:*** Well, but it's context specific, and I got to look at the facts of each case. At the end of the day,

I have to weigh the intrusiveness of this under Rule 23(b)(2), the burden, which includes intrusiveness to be weighed against the need and against the potential probative value.

And all I'm saying is that other than a sort of conclusory citation case that says, generally, you don't go into the full hard drive, I'm sort of at a loss -- you know, I will tell you, when it comes to trying to get access to PCs, I think that's a whole different ball game. The calculus is very different there.

But these are the very instruments at issue. These have been identified, it's been told to me, as a relevant piece of evidence in the disclosures. And the substance of what might be in there has been alleged in the complaint. So it's kind of a hard argument to make unless there is something very, very sensitive in there that requires a special sort of solution, like having a neutral screen go through.

***MS. RIVAS:*** Well, Your Honor, I would -- I would say that the types of things that are on there, movies that people do watch, that is -- that is protected. I think we can provide more information to Your Honor, if Your Honor requests that.

***THE COURT:*** I'm not going to accept any more briefing. You guys -- you know, I've got enough.

***MS. RIVAS:*** Your Honor, we've made a reasonable proposal on this, for Sony to get the -- to test the veracity and while at the same time protecting plaintiff's privacy

rights.

This argument that they need it for damages is just not correct. We've amended the initial disclosures after meet and confers on the issue. It's not relevant to typicality. Typicality is, does the plaintiff's claims arise from the same transaction as the class members. Yes, it does. This claim arises from Sony's removal of the PS3 -- I'm sorry, of the other OS function.

If you look at the ***In re: Teleaid Litigation***, similar circumstances. The ***Chavez v. Blue Sky*** case, similar circumstances. You done go into usage. I've never had a defendant say you have to go into usage. In a product defect case, yes, because you need to see, is it really defective or is it the way --

***THE COURT:*** Why are there allegations about usage particular to each plaintiff.

***MS. RIVAS:*** I'm sorry?

***THE COURT:*** Why does the complaint, the consolidated complaint contain a fair amount of detail about usage and how each one was injured. It's specific individualized information on usage.

***MS. RIVAS:*** To support standing.

***THE COURT:*** Okay, well, then, it's relevant.

***MS. RIVAS:*** To support reliance.

The proposal that we have made will allow them to

test that, to -- if they want to say, you have to show that you downloaded Linux to have standing, the proposal allows them to do that.

***THE COURT:*** What about --

***MS. RIVAS:*** If they -- I'm sorry, go ahead.

***THE COURT:*** What about that hacking defense? They say that if there is evidence of misuse or hacking that that might impair somebody's ability of being an adequate representative. It may constitute a substantive defense, for instance, showing there is really no damages, if you could hack around this and you could really still do all these function, et cetera, why isn't that at least potentially relevant enough that that could be inquired into?

***MS. RIVAS:*** Well, first of all, in terms of adequacy, that -- there is two components to that: Does your counsel, are they competent to prosecute the litigation, and do you have any conflicts with the class.

In terms of someone who may have used the PS3s in some unauthorized manner, there is no evidence of that whatsoever. They can --

***THE COURT:*** That's the cart before the horse.

***MS. RIVAS:*** Right, but there is no evidence about that. It's all supposition that all these people are hackers. They advertise that you could use Linux, and use it in a certain way, that's how our clients have used them.

***THE COURT:*** Take the extreme fact scenario: What if it's proven that each of the named plaintiffs were successfully able to get around the update and restore the function through some kind of, call it hacking, or whatever, and therefore it's really suffered no damages; would they be adequate class representatives?

***MS. RIVAS:*** Well, I think that would go to the issue of damages. And then there is still injunctive relief that would be available.

I guess your point is, it's relevant. Our point is that it isn't relevant to those defenses. If someone used the PS3 in an unauthorized manner, that's not a defense to false advertising, that's not a defense at all to that. They don't have to rely on the plaintiffs.

Obviously. They filed a -- Sony filed a lawsuit against George Hotz; that could be used. They don't need to use discovery to harass and burden a named plaintiff who decided to be a plaintiff and step forward for consumers.

And just as an analogy, if someone bought a car, it turned out that the horsepower was falsely advertised, is it relevant that they got a speeding ticket? I don't think so.

***THE COURT:*** Well, a souped-up carburetor and exhaust and got back that horsepower for two bucks with nothing, with the flip of a switch.

***MS. RIVAS:*** Well --

***THE COURT:*** I guess your theory is that still the market value has been diminished, et cetera, et cetera, but again, I can't preordain or figure out in advance what Judge Seeborg might rule is the criteria.

It may be in the end day-to-day use is not relevant to typicality, but it's a hard call to make at this stage. And I have to balance that with the probable probative value of what might be in there against the privacy intrusion.

And if we fashion, and we'll talk about this, a protective order, and maybe it has to be for attorney's eyes only, to make sure that this information is kept private, you know.

And maybe other things can be said, that information specifically about movies watched, or something, if that is not relevant, you can fashion that that information would not be kept or logged, or whatever.

There is things that might be done, but right now I don't even know what private information is in there.

***MS. RIVAS:*** Your Honor, the PS3 was advertised to do many things. We don't contest that the plaintiffs used those PS3s in that way at all. We don't contest that their usage was different.

I just don't see how that information, detailed information about how many video games did they watch in one day or what video games did they actually watch, who did they

go online and play video games with, that's just not going to be relevant to typicality. It's not contested that people use it differently.

Our proposal is fine for that purpose.

***MS. SACKS:*** Your Honor, may I respond for a moment on the hacking issue?

One thing I neglected to say earlier, is that it was actually the plaintiffs who put the hacking issue squarely in this case. It was pled not only in the consolidated complaint here, although in a much more abbreviated fashion than in the prior complaints that were consolidated in this case.

Some of those complaints even went so far as to identify Mr. Hotz. It quoted things that had been found on the Internet that showed that, in fact, many PS3 users were worried about their own secure information as a result of this hacking.

Having challenged Sony's right and Sony's reasoning for issuing firmware update 3.21, which the plaintiffs do both in the consolidated complaint and, in fact, is the premise for their request to that discovery of Sony Computer Entertainment, Inc., a former Japanese parent of Sony Computer.

So they are putting at issue whether or not there was, in fact, hacking; how can they say that hacking is irrelevant to this case?

And, of course, when we start talking about typicality --

***THE COURT:*** Well, I'm not sure -- there is a disconnect, and you have done this in the other thing, too: I don't see the connection between that allegation of hacking and what might be found in these computers. I don't get it.

***MS. SACKS:*** Your Honor, these people may very well be some of the people who were engaged in that hacking.

***THE COURT:*** Well, that's pretty speculative.

***MS. SACKS:*** It may seem speculative --

***THE COURT:*** If you have some evidence of that, you ought to present that.

***MS. SACKS:*** We have to first get the discovery.

But let me point out --

***THE COURT:*** If that were the only basis, I would say no. So you should move on to something else.

***MS. SACKS:*** One of the things that is also at issue in this hearing is the question of the hacking or unauthorized posting on the lawsuit -- I'm sorry, the law firm that represented Mr. Ventura, the first named plaintiff.

Now, just because I might be paranoid, it doesn't mean that somebody isn't really trying to kill me. And if we have a situation here when there is a hacked or unauthorized posting on the law firm's web site that is representing the named plaintiff, that goes directly to the merits of this case, tells putative class members and the general public that Sony was found in default by the Court and has been ordered to pay

50 percent of the purchase price, it does start to make something more than just supposition about hacking. And that is one of the things that we would look for on the hard drives of these named plaintiffs.

Plaintiff keeps talking about this unfettered access; I'm really not sure exactly what they are talking about there, Your Honor. Obviously, we are not going to publicize the contents of these hard drives. They can be produced to you subject to a stipulated protective order or a protective order entered by the Court.

And again, if there is something, there is truly private information, if someone has their children's medical record on it, all the plaintiffs need to do is to identify that specific information, and we will enter into an agreement to protect from the disclosure of that. But right now they are talking about not letting us have access to anything. And that has not met their burden to keep this information confidential.

And just to close on this issue, Your Honor, in the ***Coles versus Nyko Tech*** case, that was a case about the Xbox, the plaintiffs were ordered to produce their Xbox and the hard drives on them. So there is certainly case law that says exactly what Sony is doing is entirely appropriate.

***THE COURT:*** Let me tell you what I'm going to do here because there is a bunch of issues, and I've read the briefs, and I don't need a whole lot of argument on a whole lot

of stuff. But putting aside the retainer agreement and the web site question, I'm going to allow access to the PS3 hard drives for the reasons I've stated. I think there are enough questions here, enough arguable relevance as it may affect adequacy, as it may affect standing, perhaps typicality and commonality, as well as potential affirmative defenses as it may relate to reliance or not, et cetera, that it's very difficult for me to forecast and say absolutely no way this could be relevant.

Balancing against that are the privacy rights, which are going to be raised any time there is concern about getting into somebody's hard drive. But there has been no specific showing or proffer here of any particularly sensitive information.

In any event, to protect that I'm going to order that any information that is obtained will be subject to a protective order for attorney's eyes only until further order or stipulation. And I will give the plaintiffs in advance, if there is specific files or information they know about that they want to keep private, that that be conveyed. And that can be at least for now, segregated and kept off limits.

With respect to access to other PCs, I understand the arguable relevance, but to me that is so speculative and remote and so much more intrusive that the balance weighs completely in the other direction. And so I'm not going to

grant access to other PCs that are owned.

Now, in the process of discovery and depositions, if there's sort of a prima facie case or reasonable suspicion that there is something very probative in the PC arises, you know, we can revisit that, but a blanket order to turn over PCs on theories is just not probative enough to outweigh the privacy interests.

With respect to reliance documents, I'm not sure what the dispute is. It is clear, and I will make it clear, that the plaintiff must turn over all documents in its possession, custody, and control, that whether it's in electronic form or hard form, they have to conduct an electronic search.

So if there is an assertion that -- and this may be disputed, that they didn't turn over and did not do an electronic search, that is not good enough. On the other hand, there is no obligation to produce documents that are not in their possession that can be obtained through searching the Internet, even though they may have claimed to have relied on something that they saw on the Internet.

The normal way to do that is you can propound interrogatories asking about which documents were relied upon and, you know, get some specifics that can be asked in deposition to find that.

But in terms of a document request, you can't

require people to conduct a search that is not in their possession that they go out and find it, even if you say you saw it and now you don't have it anymore.

With respect to the pseudonyms of class representatives, I think that's also speculative at this point. And without some specific showing, I'm not going to require that to be turned over.

I will also say that I'm going to remind the parties, and particularly the plaintiffs, since they are the ones producing the documents, that Rule 34 requires that not only places be searched, but they have to be consistent with Rule 34, either turned over in a way that it is kept or indicate that they are responsive to particular document requests. And this is true for everyone. You can't just dump a hundred thousand documents on somebody and say, you find it. And unfortunately, this is something we see all too often.

Peripheral equipment, again, that is, at least the way it's phrased, would include, you know, TVs and printers and controllers and all sorts of stuff. I understand that there could be some probative value, but, again, that is so burdensome, it seems to me, that absent some specific information that suggests that a particular piece of equipment may be relevant, and therefore you can come back and/or reask the question, I'm not going to require a general turnover of all peripheral equipment.

What's been referred to as contention-type documents supporting contention questions, I think they were numbers 10 through 13 and 16 through 25 -- well, maybe I should ask: What is the status of that? I couldn't quite tell from the briefing whether that has been responded to and is not adequate or has not been responded to at all or --

***MS. RIVAS:*** Your Honor, we've produced on behalf of the plaintiffs. Anything that was cited in the complaint that we used in making the allegations, it's been produced.

Some of it, you know, may be in Sony's possession, custody and control. I understand they made changes to the web site after update 3.21; we may not have the prior stuff before that. We definitely have the stuff after that. And so we obviously can't produce that.

***THE COURT:*** All right.

Are there things you are not producing on the assertion that the contention-type documents are too broad and over -- overburdensome at this point?

***MS. RIVAS:*** We have produced what we have. And we expect that as Sony produces documents, those will also support our claims.

***THE COURT:*** All right, then, the answer is, you ought to certify that you have produced what you have. Of course, you have a continuing obligation to update periodically, and you will do that. And you produce what you

have.

***MS. RIVAS:*** Exactly.

***MS. SACKS:*** I think, Your Honor, the difficulty is because the documents were not produced to us pursuant to the organizational requirements of Rule 34, it's hard for us to say whether, in fact, everything has been produced.

What I would suggest is if the plaintiffs are making the representation here that they have given us everything that they have that they can locate through a reasonable, diligent search, we'll establish that in their deposition. And if, in fact, they didn't, then we will have to be back here and seek more relief on it.

***THE COURT:*** All right.

***MS. SACKS:*** But I do think that it's important to note that at this point there is Rule 34 disclosures -- the allegations of the complaint, we are trying to find out what they have, what they saw and what they relied upon. They are the only people who can tell us that.

What Sony may have published, that's out there, but the plaintiffs are the ones who have to identify what they saw and relied upon.

***THE COURT:*** And I would think either through deposition or a focused contention interrogatory, a focused contentions interrogatory, not the kind that supports every fact, document, thing in the universe that supports your

contentions.

If you want to say, cite every document that you saw that you relied upon in making the purchase of the PS3, that is something much more specific. I don't know if you have done that or not or are going to ask that in deposition. That is the kind of thing I would encourage as something very specific. So at least as this stands, it sounds like there is not a live issue for me to resolve.

***MS. RIVAS:*** Not really. On a lot of these there aren't live issues.

***MS. SACKS:*** Your Honor, just to respond to your comment: Request for Production No. 14 specifically asks for any and all documents that plaintiffs relied upon in purchasing, receiving, or acquiring any PS3.

***THE COURT:*** That one's fine.

***MS. SACKS:*** Okay, but I believe the only document that they have produced are those that are referenced in the complaint.

***THE COURT:*** Okay.

***MS. SACKS:*** As opposed to anything else that they may have seen or relied upon.

***THE COURT:*** If, in fact, your clients have other documents and have not produced them and then it comes out later, there is a litigation risk.

***MS. RIVAS:*** What we haven't done is, we haven't

searched the Internet the way they have asked and the way you have said we are not required to do. We are not required to recreate evidence and search for advertisements that they may have seen four years ago.

***THE COURT:*** That's true as phrased as a document.

***MS. RIVAS:*** Right.

***THE COURT:*** If you phrase it as an interrogatory, then, like they say, what did you rely on, whether you have it or not in your possession, you better state what you relied on.

***MS. RIVAS:*** Exactly, yes, Your Honor.

***THE COURT:*** Or in a deposition question I assume that's going to be asked at some point.

So I'm going to leave that one alone. Seems to me it's not right -- I'm getting the representation that everything that is in their possession pursuant to what I have defined as possession has been produced, and that's -- you've stated that for the record.

***MS. RIVAS:*** And just so Your Honor knows, we have already sent a proposal that we are preparing an index of our documents that were produced and what requests they go to. And we have asked that defendant do the same. And that is something that we'll be preparing.

***THE COURT:*** All right, let's talk about the retainer agreement. I've looked at the cases that are cited in there, and the cases that Sony cites are those in which there has been

a competition for selection by the Court for lead counsel and lead plaintiffs. So you have to get into a level of inquiry that is deeper than just, you know, trying to show general inadequacy.

I do think that the case law, as I read it, does not allow, absent some kind of prima facie showing that there is a conflict or inadequacy problem, as Judge Lloyd suggested in the ***In re: Google*** litigation that retainer agreements are not subject to discovery.

So let me ask you: If I adhere to the logic of Judge Lloyd, would you agree with that? You may disagree with the logic of Judge Lloyd, but --

***MS. SACKS:*** I do disagree with the logic, Your Honor, but I think, also, there has been a new issue that has arisen in the course of plaintiff's reply briefs that suggest that, in fact, what the terms of the engagement agreement with the named plaintiffs are -- is directly relevant.

In connection with the idea of having a forensic image done of their hard drive and having it analyzed, the plaintiffs commented that that would cost thousands of dollars, maybe a few thousand, maybe 4, 5, and that that would be -- would imperil their financial position. This is in their reply brief, it comes up all of a sudden.

So the question then is, is it plaintiff's counsel who is actually bearing the risks of the costs in the case?

Because after all, when they came in and asked to be appointed interim lead counsel, they made the assertion that they were financially capable to do so.

If something insignificant as $5000 creates a financial impediment to discovery in this case, how, then, is this massive class action going to continue? What other requests to shift the cost to Sony are we going to get here?

After all, the plaintiffs have issued document requests to Sony that calls for millions, literally millions of electronic documents. And Sony is supposed to bear the cost of doing that. So they have put the financial question here.

This is not an instance where, for instance, what the nature of the engagement is could potentially be confidential, this is not something where someone's being represented in a criminal matter and the content of the retainer agreement could disclose confidential information, this is simply a question of cost sharing and adequacy.

And, in particular, where we've got an issue that we had nine, I believe it's nine named plaintiffs who sued Sony who were suddenly abandoned from the consolidated complaint. Which is basically the kind of self-selection of who is going to be involved in discovery the courts have said is not appropriate. So it is worthwhile to find out, it is certainly potentially probative to find out what that nature of the engagement is.

***THE COURT:*** What's your response to the issue of cost sharing and adequacy and whether there is sufficient provision here?

***MS. RIVAS:*** Your Honor, I note that the cases that you talked about, the fee arrangements being disclosed, I think they were -- some were in camera. I also note that the request isn't for your fee arrangement, it's for your retainer agreement.

The retainer agreement is obviously broader than that. The ***In Re: Horn*** case says that that's -- that that's privileged information, these retainer agreements, because they set out communications between attorney and client.

***THE COURT:*** What about the cost sharing? What if everything were redacted but the cost sharing, how the costs are going to be provided for as between attorneys, clients, and plaintiffs?

***MS. RIVAS:*** I guess I'm confused about how -- about why the retainer agreement are relevant to our -- to the -- our request that because Sony wants to inspect the hard drives they should bear the --

***THE COURT:*** That they are saying because in response you are saying that -- she is saying that you are implying that you couldn't even afford $5000.

***MS. RIVAS:*** We didn't say that. We said that Sony wants this discovery, which is what we believe is irrelevant,

which can be taken by testimony which we can stipulate to. They should have the burden of the cost. We enumerated the factors in how we need it.

You know, these product cost as low as 3-, $400. Sony's a big corporation, they are -- they have the ability to minimize the litigation costs in this case. They are choosing, in our view, a method of discovery that's burdensome, that what they seek to discover is only minimally relevant, if at all, to the claims and the defenses. They should bear the burden of the cost of that.

***THE COURT:*** All right, let me ask you the broader question, though: Is the plaintiffs and their counsel's ability to finance, you know, a substantial class action like this a relevant factor in determining adequacy?

***MS. RIVAS:*** I don't think so. I think -- well, counsel, but they are not asking for the fee arrangement, they are asking for the retainer agreement.

***THE COURT:*** Well, I take it what you are most interested in is the financial arrangements.

***MS. SACKS:*** Yes, Your Honor.

And, Your Honor --

***THE COURT:*** So let me go back.

To the extent that the retainer agreement contains the financial terms as to cost sharing, how the litigation would be funded, is that not relevant to adequacy?

***MS. RIVAS:*** Adequacy is whether the counsel can -- has the resources and the qualifications to prosecute the case. We do, we were appointed co -- co-lead counsel in the case. There is no question that we meet that. They don't -- and we don't dispute that we are upfronting the cost of the litigation.

***MS. SACKS:*** Well, Your Honor, I'm looking at the reply brief at page 6, line 16 to 17:

"SCEA has admitted that each forensic copies it seeks will cost thousands of dollars and exponentially exceeds the total cost of a 399 PS3 console and will place plaintiffs under undue financial pressure."

I don't know who they are referring to there as between themselves or their clients.

Also, as Judge Seeborg noted as in ***Carrizosa*** case, fee agreements are, in fact, discoverable. They fall outside the scope of the attorney-client privilege.

And in ***Mitchell Tracy***, a case that plaintiff's cited, they quoted one part of the decision, and then they left off the rest, Your Honor, which said.

"Other courts have permitted the discovery of fee arrangement as evidence of the ability of class counsel and plaintiff to maintain the class action and pay all associate costs."

***THE COURT:*** Now, would that be the case routinely,

then, in a class action case?

***MS. RIVAS:*** No.

***THE COURT:*** Well, hold on.

***MS. RIVAS:*** Sorry.

***MS. SACKS:*** Certainly, once when there is an assertion made of a financial impairment as related to having to pay some of the discovery costs it is.

***THE COURT:*** So if there had not been that sentence in the brief, would you still argue that just as a matter of routine that there ought to be a turnover of retainer agreements to make sure that counsel's adequate?

***MS. SACKS:*** Yes, Your Honor, because, after all, if Sony prevails here, it has a right to recover costs at the end from the plaintiffs.

***THE COURT:*** So your argument is broader, it really extends to every single class action certification case.

***MS. SACKS:*** Yes, Your Honor, it does.

And one of the reasons is does also is because it raises questions about incentive agreements. And this is something that has been recently heavily litigated here in the Northern District of California. The nature of any agreement between the plaintiffs and their counsel is subject to discovery because it helps us to see if there is any kind of particular motivation or bias on the part of the named plaintiffs.

Why were these five selected out of the 12 who originally brought these lawsuits? It may bear on that issue, also.

***MS. RIVAS:*** Your Honor, under California law, the Business and Professions Code, it's cited in our brief, these documents are privileged. Most of our claims arise under California law, so that statute would apply.

In -- you're right to point out what Judge Lloyd did in ***In re: Google*** case. He said absent some basis for thinking that the plaintiffs are inadequate, you can't have these.

And there is Ninth Circuit law on that that we cited ***In Re: Horn***, they have asked for more than the fee arrangement, they have asked for the retainer agreement.

We have simply asked that the costs be shifted to the defendant. We meet the factors in the ***Zubulake*** case.

***THE COURT:*** All right, I am going to rule that at least on this present showing, the retainer agreements are not going to be disclosed. I don't think it's the case in every single case, the mere fact of a class action, a putative class action mandates that retainer agreements be turned over. Whether or not they are covered by attorney-client or work product, they are -- there still is a privacy interest involved here that needs to be considered.

Now, if there is some specific showing, whether it's a showing of a conflict or some other showing that suggests

some inadequacy or problems, you know, I would reconsider that. The sentence in the reply brief, taken in its context, doesn't meet that standard to establish that prima facie showing, in my book. So that's going to be denied.

With respect to documents regarding the false web site posting, again, at this point I don't find it sufficiently relative -- relevant, and it is speculative. But, again, if in depositions or in other discovery there suggests there is some kind of prima facie case of relevance, perhaps there is more there than meets the eye, I might revisit that question. But on the showing that we have here now, it's just too speculative.

And finally, with respect to the nonnamed plaintiffs, the -- I guess previously withdrawn, or however you want to call it, people were named plaintiffs previously but no longer are named plaintiffs in the consolidated complaint, the question is, how should they be treated for discovery purposes as continuing named plaintiffs or unnamed plaintiffs. They have kind of now resumed the status of unnamed plaintiff.

And technically, the way the consolidated complaint reads, these folks are no longer named plaintiffs; therefore, they don't have the roles and responsibilities and duties owed to the class as named plaintiffs, and thus are not subject to the same level of scrutiny. In my view, they should be treated as nonnamed plaintiffs, unless, of course, they get substituted

in for some reason or something else. The fact that they were previously named doesn't make them named plaintiffs now.

Now, I want to -- I'll talk about scheduling of the production and the depositions because there is a lot of talk about how this is going to occur. And I -- I do want to minimize sort of repeat depositions that -- or at least the risk of repeat depositions, and the best way to do that is to have the documents that -- or the hard drives that are going to be produced to be produced within a certain time period.

And frankly, rather than just showing up at the deposition, as you normally would, perhaps that's the way, technically, it was done here as opposed to a separate Rule 34 request, that just doesn't make any sense. It seems to me we ought to just do this common sense.

Produce whatever I have said is going to be produced, and I'm not sure I ordered anything other than the hard drives at this point. And then after a certain period of time, the depositions should be taken within a reasonable period of time thereafter so we don't go back and say, well, now we found this in the hard drive, so let me have you come back, and you have a second round of questions, I want to minimize that.

I will apply, if there is a request for a second deposition, the good cause standard that is contained in the rules. But if we can minimize repeat depositions now, we ought

to do that.

***MS. RIVAS:*** Your Honor, I have a question about the production of the hard drives.

Should we meet and confer about a protocol for inspection, who's going to inspect, who's going to be present during the inspection? And then there was the issue of cost; we think that that is something that Sony should bear.

***THE COURT:*** Yeah, I'm not ordering the third-party forensic. They are going to do it, and it's their cost.

***MS. SACKS:*** And, Your Honor, if I understand, there is going to be an image made of the hard drive, and we will then obtain the electronic image of the hard drives. Plaintiffs will still retain their actual hard drives.

***THE COURT:*** That's certainly one way to do it. And I would like you to meet and come up with a protocol, because they might want to have someone present when it's deconstructed, or whatever it is.

***MS. RIVAS:*** Present.

***THE COURT:*** Yeah. Normally, that's the way it's done.

***MS. SACKS:*** The other aspect to that, Your Honor, is the physical production of the PS3 itself. We have asked that the plaintiffs bring their PS3s to their depositions. I think that's a very legitimate request. One of the things, for instance, we would like to know is whether the feature actually

still functions, whether the PS3 actually functions because if the PS3, as it turned out, broke before update 3.21 was issued and after warranty, that plaintiff isn't going to have any claim for damages.

***THE COURT:*** That wouldn't be revealed by inspection of the hard drive?

***MS. SACKS:*** Not necessarily, Your Honor, you are just taking an electronic image of the hard drive. So we should have the opportunity to see if the computer has been abused, if it's been tampered with.

I'm not talking about taking it apart, but I want to have the physical PS3 there in the deposition so that I can cross-examine the plaintiffs about it.

***THE COURT:*** And plug it in and see if it works?

***MS. SACKS:*** Yes.

***THE COURT:*** Is that the only reason you would have the --

***MS. SACKS:*** No, Your Honor, also to physically inspect it, by that I mean a visual inspection.

At this point in time, from the plaintiff' perspective, we are not supposed to see the PS3s, the articles that they are suing for damages about, until we are at trial.

***THE COURT:*** Okay. Well, I know it's a hassle, but it's not a huge computer.

***MS. SACKS:*** Actually, Your Honor, these are

basically designed to be mobile. People buy backpacks for them.

***MS. RIVAS:*** I think we should meet and confer about it and come up with a protocol that is acceptable. And that is one way, is to have your expert at the deposition and our expert, if we choose to have one there, also be there.

***THE COURT:*** I don't know -- my idea was to have the hard drive mirrored, with or without some kind of supervision or protocol, and have the analysis done before the deposition so that in the middle of the deposition then you find out, oh, there is more stuff and we got to call you back again. That's what I'm trying to avoid.

***MS. RIVAS:*** We would like to avoid that as well. And we should probably meet and confer about that.

***THE COURT:*** My inclination, I'll tell you, is I don't think it's that much of a burden to bring the PS3. I'm not sure how probative that is, but the burden is so low on that I think it ought to be produced at the deposition.

So I would like you to reach an understanding and stipulation on a protocol and the time of this, you know, whether this process of producing and inspecting the hard drives takes place over the next 30 days, 45 days, depositions to follow 30 days thereafter, or something like that.

I do want a concrete timetable, since this has been noticed and pending for sometime. And I don't want to hold up

any case management schedule that Judge Seeborg might enter into this matter.

Now I need to turn, with the time we have left, to the other motion. With respect to documents in the possession of SCEA, I've read the cases. And I understand that in some situations it's sort of obvious that, you know, both the parent and the subsidiaries would have possession of certain documents. But here it's not just the operative documents implementation of the firmware, or the update. It sounds like some of what is being sought are kind of the upper level strategic documents, why they decided to do this in the first place.

So it's not apparent to me why there is an a priori reason to believe that the subsidiary would have access, or would have these in their possession as opposed to the implementation.

***MR. FIZZIRUSSO:*** Well, first of all, the subsidiary SCEA, S-C-E-A, has admitted it has some of those documents in its possession for the first time in its briefing. In our meet and confers, it first told us, we didn't make this decision, we don't have those documents, sorry, but we are going to make a defense that we were justified in doing this because of purported security reasons.

So our position is, how can you make that defense? How can you say that this was done by your parent, SCEI, for

purported security reasons if you don't have those documents in your possession?

So then they came back, and they said, well, we do have some of those documents in our possession. And this leads us to the next issue: We have no idea what those documents are, because they haven't produced anything other than publicly available documents for five months, despite our stipulation that we would treat anything as attorney's eyes only until the protective orders issue was resolved. They said, no, we are not going to give you anything. And they didn't even file a protective order, they made us file a motion to compel.

So it does not make any sense that Sony -- or that SCEA could put forward this defense but not have access and the documents that would support it. And if they are going to make that defense, then they should give us the documents. But they shouldn't just give us hand-picked documents that support them, we should be able to see the other documents that relate to this issue because we don't think that it had to do with security reasons, we think it had everything to do with money. And so we want to see those discussions.

***THE COURT:*** All right. So first of all --

***MR. FIZZIRUSSO:*** We want -- sorry.

***THE COURT:*** So first of all, there are documents that have yet to be produced that are admittedly in possession of SCEI, right?

***MR. FIZZIRUSSO:*** SCEA.

**(Laughter.)**

***THE COURT:*** SCEA. I got it backwards, here.

***MR. FIZZIRUSSO:*** Sorry, it is confusing. SCEA.

***THE COURT:*** SCEA.

***MR. FIZZIRUSSO:*** SCEA, S-C-E-A, has said it has SCEI documents in its possession.

***THE COURT:*** Right.

***MR. FIZZIRUSSO:*** So clearly, there are some documents. And they have come back to us with a proposal that said, we will give you the other documents so they can clearly have access to them, but you have to agree to never name SCEI as a defendant.

***THE COURT:*** With respect to the ones that they admitted they have, I'm assuming, once you have a protective order in place, those will be produced.

***MS. SACKS:*** Yes, Your Honor.

***THE COURT:*** All right.

***MS. SACKS:*** And just to clarify, we have always acknowledged that we would produce any documents that we had received relevant to these issues from SCEI. So if SCEI communicated something to SCEA, that would be produced.

Plaintiffs aren't talking about that. Plaintiffs want SCEA to be ordered to basically have its parent open its kimono; in other words, things that were never shared with SCEA

by SCEI in the ordinary course of business plaintiffs are demanding somehow be produced. And that is just completely violative of the case law. We don't have legal control over those documents.

***THE COURT:*** Well, okay, there is two routes to get it. One is, you actually have it. There is a presumption that you have it because of the operating nature of the thing, and that is what my first question was.

Your answer, though, goes to the question of whether or not, as a practical matter, which I think you concede as one of the problems, can you obtain these documents in the ordinary course. For instance, whether it's for litigation or for operations or for tax purposes, is this the kind of thing that you could normally get from the parent?

And the suggestion I'm hearing is that, well, you know, once you produced these, if it gives -- if you were able to produce these documents which show some strategic level of decision-making that suggest that either if you don't have it you could have easily gotten it, and how could you litigate this case without getting full access and cooperation from the parent.

***MR. FIZZIRUSSO:*** And that's been their defense, Your Honor. That is our fear: They are going to hand-pick the documents that support their defense, but we're not going to have access to the other documents that might not.

***THE COURT:*** So that's the question I have, is, if you are in a position to say, well, the reason why -- there is a good business reason why we did this for security reasons, et cetera, and here are the documents, and we got these from -- you know, normally you wouldn't have this as part of your operating daily stuff, but if you got something through the process of litigation, doesn't then that suggest that that third prong of custody, possession, and control, that is practical ability to get it from the parent really does exist here?

***MS. SACKS:*** Two things, Your Honor.

First of all, the Ninth Circuit rejected the practical ability test in the ***In re: Citric Acid.*** The Court specifically refused to switch from the legal control test to the party's practical ability.

The facts in that case are exactly the same as they are here. There was the argument that the U.S. sub had the, quote/unquote, "practical ability to obtain documents from its Swiss parent because the Swiss parent had voluntarily furnished them with documents and information in the past."

The Court said that's not good enough, there has to be legal control over the parent's documents. We have to be able, as the ***Camden*** court said, in effect, to do this on demand. And there is no evidence whatsoever that we did it on demand.

We will offer the evidence that we have in our possession, SCEI told us it was doing this for security reasons. We will offer what they told us, the plaintiffs will get it, but what we don't have and are not entitled to get is documents that SCEI didn't share with SCEA in the ordinary course of business.

This is not like a service manual for an airplane, this is as Your Honor said, high level, internal strategic information. And basically, parents -- I'm sorry, plaintiffs are attempting to pierce the corporate veil. They are ignoring the corporate separateness.

***THE COURT:*** Now, let me ask you -- it's -- I'm a little puzzled because in your opposition brief you say, quoting from the ***Pitney Bowes*** case.

"In a parent subsidiary situation, determination will turn on whether the" -- "relationship establishes some legal right, authority, or ability to obtain requested documents on demand."

And then you look at the closeness of the parties and -- that suggests a practical test.

And then on page 10, now you are saying that ***In re: Citric Acid*** has ruled to the contrary.

***MS. SACKS:*** ***In re: Citric Acid***, that's correct, Your Honor, it rejects the practical ability test.

***THE COURT:*** Stop right there.

Let me ask you: Is that legally correct?

***MR. FIZZIRUSSO:*** Well, first of all, no, I don't think that's legally correct. Second of all, I don't think ***Citric Acid*** is even close to the facts at hand.

We would argue that ***Choice-Intersil*** by Judge Larson, which was decided after ***Citric Acid*** in this district is a more relevant case.

In ***Citric Acid***, you were dealing with Coopers & Lybrand Switzerland and Coopers & Lybrand US. And there the Court said that given the unique Swiss corporate status, that it was not a parent/sub relationship. There was no sharing of profits or losses, management, authority, or control over the other firms. There was no relationship between US and the Switzerland parties there.

So, you know, it's not -- I don't think that that is relevant to the situation at hand, where you have SCEA clearly acting as the wholly-owned subsidiary, the U.S. marketing service and distribution arm of its parent company. And it clearly has some of these documents that it gets through the normal course of business. Just because it hasn't asked for the other ones does not mean that we shouldn't be able to get them.

***THE COURT:*** Well, let me ask you this, let me ask Sony this: Has there been a showing that SCEA has asked for documents from SCEI and been refused?

***MS. SACKS:*** Your Honor, let me clarify one thing, and then I'll answer that question, if I may?

SCEI is not currently the parent of SCEA. I don't want the record to be confused on this. We acknowledge that SCEI was the corporate parent at the time that update 3.21 was issued, but it is no longer the corporate parent of SCEA.

***THE COURT:*** What's the structure now?

***MS. SACKS:*** The structure is that Sony -- SCEA is a subsidiary of the domestic Sony here in the U.S. It does not report directly to SCEI --

***THE COURT:*** What is that entity called that it reports to?

***MS. SACKS:*** Sony Corp. America.

***THE COURT:*** And then does Sony Corp. America then answer to SCEI?

***MS. SACKS:*** No, Your Honor, it does not. It answers directly to the ultimate parent holding company. They are like sister corporations as opposed to parent subsidiaries.

***THE COURT:*** So SCEI is a sister of SCEA?

***MS. SACKS:*** I think that's a fair statement. It's very complicated, Your Honor. I don't profess to be a corporate attorney on this, but ultimately, the shares are held by the Japanese ultimate parent.

***THE COURT:*** So there is an ultimate parent somewhere.

***MS. SACKS:*** There is an ultimate parent in Japan, yes, Your Honor.

***THE COURT:*** Good.

Whatever the exact relationship is, obviously, they are cousins, or something, and maybe they are second cousins, or something, has there been a showing that these documents were requested from SCIE, these historic documents?

***MS. SACKS:*** No, Your Honor.

***THE COURT:*** Well, then, how can I -- I mean, isn't that the first step?

***MS. SACKS:*** Well, Your Honor, the difficulty with that is that the plaintiffs are putting us in a position of obtaining evidence that they don't have a right to have. If they want to get documents --

***THE COURT:*** Well, that begs the question, because if it's the kind of thing where you ask for it and they would normally give it, like they have given you documents A and B and you haven't asked for C, to stand here and say, well, we don't have the power to get document C, well, maybe you do and maybe you don't. The fact that you got A and B says something.

And if you asked for C and they say, go away, forget it, well, then, at least you've got the argument, see, we don't have the power. But on the other hand, if you've never asked, how do --

***MS. SACKS:*** But, Your Honor, that goes right back to

the practical ability test. I've got the ***In re: Citric Acid*** case in front of me, and it says, specifically, that the Court was asked to reject the legal control test and instead to define control in a manner that focuses on the parties' practical ability to obtain the requested documents." And the Court said, no, we are not going to do that. Unless you have a legal right to those documents, you cannot be held to be in possession, custody, or control of them.

***THE COURT:*** Legal right as opposed to practical right.

***MS. SACKS:*** Yes, Your Honor.

***MR. FIZZIRUSSO:*** Your Honor, the cases that have interpreted legal right, both pre- and post- ***Citric Acid***, both in this district and elsewhere have focused on the prongs that were outlaid by ***Camden v. New Jersey***, as do most of the cases that the defendants cite.

The ***Camden v. New Jersey*** factors are: Was there an alter ego? Was the sub an agent of the parent and the transaction giving rise to the suit? Can the sub secure the documents for business needs, and are they helpful in litigation? Does the sub have access to the documents in the ordinary course of business? Was the sub a marketer and servicer of the parent's product?

So whether or not it's called a legal control or practical ability test, the factors that courts look at go to

the ability of the -- of the sub to get the documents from the parent. And they generally focus on the nexus of the suit and is it something that would be ordinarily entitled to in the ordinary course of business.

***THE COURT:*** Has the Ninth Circuit spoken on this topic since the 1989 decision?

***MR. FIZZIRUSSO:*** Not that I'm --

***THE COURT:*** Legal versus practical?

***MR. FIZZIRUSSO:*** Not that I'm aware.

***MS. SACKS:*** I'm not finding anything right this moment, Your Honor.

I'm not sure if ***U.S. International Trade*** is a Ninth Circuit case or not, I would have to go back and look.

What the cases all do conclude is that there actually has to be a nexus between the business of the subsidiary and the nature of the documents that are being requested such that you would expect the subsidiary to receive them, as the Court said, in the normal course of business.

***MR. FIZZIRUSSO:*** We agree with that test a hundred percent.

***MS. SACKS:*** There has been no showing here that SCEI ever provided to SCEA any of its internal strategic internal decision makings about the design of the PS3.

***MR. FIZZIRUSSO:*** SCEA just said that it gets documents from SCEI in the normal course of business about this

issue. So and it says it has documents about this issue that it has received in the normal course of business.

***THE COURT:*** Here is the situation: At least as briefed, we haven't seen these documents because they haven't been produced. There has been no specific showing because there has been no discovery, no inquiry as to what the lines of communication normally are, what's been asked in the past, what's been gotten, whether or not there has been an effort and what the likelihood, if there was such an effort, to obtain these documents from SCEI.

And so this seems to me to be an appropriate case to allow for some focused discovery, that you ought to first produce the documents that you do have. And maybe you will be satisfied, and maybe that is 90 percent of what you want.

And then, you know, I would think very focused document requests or interrogatories and perhaps a 30(b)(6) deposition. And then, you know, whatever the applicable test is, whether it's ***In re: Citric Acid*** or ***Choice Intersil***, or the ***Pitney Bowes*** case, you at least have a factual basis now to argue that this is the kind of document that they normally would be able to get in the ordinary course, or they have some control aspect.

And normally I don't like to have collateral discovery going on, but sounds like this is going to be a key issue in this case, and so I'm going to allow that.

I would like you all to meet and confer and come up with a very narrowly tailored, short but to the point, discovery plan to look at this question about access under the appropriate legal standard. And of course, I'm going to look at the ***Citric Acid*** case so I'll be prepared the next time you all come back.

But as of the showing, as we sit here today, it's not enough. But I'm going to allow you discovery. And you should produce those documents that you do have. And that will also enlighten, number one, what you need, and maybe some pattern as to what, you know, how were those documents obtained, when were they obtained, and does it show that these documents are customarily or easily available, et cetera, et cetera.

The last thing I want to address is the protective order. I've looked at both the standard court order and the super protective order that's advocated by Sony, and I think the proper instrument lies in between. I think if you took at any one of those, you need to add something for highly confidential, for attorney's eyes only, as we just stated, with respect to some of the plaintiff's hard drive information.

And there may be information that is particularly sensitive that even though this is not a competitor suit, there still could be sensitive commercial information that should be for attorney's eyes only and not be broadly disseminated.

I don't see the need at this point, unless it comes up, for the super-duper source code and having to inform and disclose your experts. That doesn't seem to be applicable.

Now, if something comes up, and you present source code information, something very sensitive, then you can meet and confer and do that as an add-on on an ad hoc basis. But as a basic, one, I would just take either the Court standard one and add a layer of highly confidential for attorney's eyes only, as we often do, or take the proposed one and strip out the stuff about that third tier one. So I'll ask you to meet and confer with those comments and see if you can now work out an intermediate solution.

If you could also -- I want to get a timetable once you meet and confer about the production and the deposition timing and also what that discovery plan is, narrow discovery plan on the parent/sub or the cousin/sub, whatever it is now, relationship --

***MR. FIZZIRUSSO:*** Um-hmm.

***THE COURT:*** -- and how you intend to exchange information in that regard.

So if you could -- I don't know, ten days to get me a letter that kind of tells me where you are at? And then I'll leave it to you to notice any further motion or come-back.

I will ask that if you come back again, just send me a joint letter with disputes that you need to resolve. No more

several hundred-page 35 days' notice stuff, just a short letter, and I can either resolve it without argument or get you on the phone or might have you come back in. But I would like to truncate this process.

***MS. SACKS:*** Thank you, Your Honor.

***MR. FIZZIRUSSO:*** Thank you, Your Honor.

One real quick question of clarification.

***THE COURT:*** Yeah.

***MR. FIZZIRUSSO:*** Before when you said "they will pay for the imaging of the hard drives," you meant the defendant, not to plaintiffs, right?

***THE COURT:*** Yeah.

***MR. FIZZIRUSSO:*** Okay.

***THE COURT:*** You are just going to produce it.

**(Proceedings adjourned at 12:23 p.m.)**

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## CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

**/s/ Sahar McVickar**

**Sahar McVickar, RPR, CSR No. 12963**

**Friday, February 11, 2011**

# EXHIBIT 3

-----Original Message-----
From: James Pizzirusso [mailto:jpizzirusso@hausfeldllp.com]
Sent: Friday, February 25, 2011 11:12 AM
To: Ott, Carter
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: RE: Deposition of Geoffrey Levand

Carter:

We are working on the additional key words. It would be helpful to know what volume of documents you are envisioning would be produced by your proposed key words and custodians. It would also be helpful to have more information from you about the custodians, their positions, work areas, etc. that you promised to provide.

And we can get you the revisions to the protective order today.

Thanks,

James

-----Original Message-----
From: Ott, Carter [mailto:Carter.Ott@dlapiper.com]
Sent: Friday, February 25, 2011 1:55 PM
To: James Pizzirusso
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: RE: Deposition of Geoffrey Levand

James,
We are conferring with our client about your request, and should have an answer for you today.

When will you provide us with your proposed additional keywords for our document review? And do you have an answer for us on our proposed revisions to the protective order?

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

-----Original Message-----
From: James Pizzirusso [mailto:jpizzirusso@hausfeldllp.com]
Sent: Thursday, February 24, 2011 4:35 PM
To: Ott, Carter
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: RE: Deposition of Geoffrey Levand

Carter:

When do you think you will have an answer on this and the other outstanding issues for which you were going to get back to us? This is time sensitive - particularly the deposition of Levand, which we would like to take ASAP.

Best,

James

-----Original Message-----
From: Ott, Carter [mailto:Carter.Ott@dlapiper.com]
Sent: Wednesday, February 23, 2011 11:02 AM
To: James Pizzirusso
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: RE: Deposition of Geoffrey Levand

James,
We are conferring with our client, and will get back to you soon.

Carter W. Ott
Associate

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

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F 415-659-7338
M 415-336-9408

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-----Original Message-----
From: James Pizzirusso [mailto:jpizzirusso@hausfeldllp.com]
Sent: Wednesday, February 23, 2011 8:00 AM
To: James Pizzirusso; Ott, Carter
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: RE: Deposition of Geoffrey Levand

Carter:

Please advise.

Thanks,

James

James J. Pizzirusso, Partner
jpizzirusso@hausfeldllp.com

Hausfeld LLP
1700 K Street, NW, Suite 650, Washington, DC 20006
202.540.7200 main / 202.540.7201 fax / http://www.hausfeldllp.com/



-----Original Message-----
From: James Pizzirusso
Sent: Monday, February 21, 2011 11:50 PM
To: Ott, Carter
Cc: Rosemary M. Rivas; James Quadra; Rebecca Coll; Sacks, Luanne
Subject: Deposition of Geoffrey Levand

Carter:

Plaintiffs would like to take the deposition of Geoffrey Levand. He was previously an employee at Sony Corporation of American in San Jose and had responsibilities related to maintaining Linux on the PS3. We are not sure if he is still employed there. Please advise as to whether you will agree to accept service of the subpoena. If you will not accept service, please let us know who we should contact. If he is no longer an employee of SCA, please advise if you have his last known address.

Thanks,

James