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April 6, 2011

Magistrate Judge Chen
United States District Court
Northern District of California
450 Golden Gate Avenue, 15th Floor
San Francisco, CA 94102

Re: *In re Sony PS3 "Other OS" Litigation*
U.S. District Court, Northern District of California – Case No. 3:10-cv-01811 RS (EMC)

Dear Judge Chen:

Following a February 9, 2011 hearing before this Court regarding multiple discovery matters, the Court directed the parties to submit any future discovery disputes in the form of a joint letter brief. Plaintiffs' submission does not comply with the Court's directions. Rather than submitting a concise joint letter brief containing each party's positions on the disputed issues, Plaintiffs instead submitted an eight-page, single-spaced letter containing only their own positions and attaching 136 pages of exhibits.

Ironically, Plaintiffs' voluminous submission omits the most critical documents, *i.e.*, the parties' meet and confer correspondence from the last three weeks. In that correspondence, SCEA repeatedly requested that Plaintiffs meet and confer with SCEA before submitting several of these issues to the Court. *See* Attachment C. In addition, Plaintiffs' hastily-filed submission raises matters that they know to be no longer in dispute. In fact, SCEA reminded them of this fact prior to the filing of their letter.

On the grounds set forth below, SCEA requests that the Court enter the order submitted herewith covering the matters ripe for the Court's intervention (*see* Section I, *infra*), and ordering the parties to meet and confer on the remaining matters so that the parties may in good faith attempt to narrow the number and scope of issues that require the Court's resolution (*see* Section II, *infra*).

I. MATTERS RIPE FOR COURT INTERVENTION

1. Stipulated Protective Order

There is no question that Plaintiffs are requesting production in this litigation of highly confidential and proprietary information belonging to SCEA. Yet, Plaintiffs ask the Court to enter a protective order that would give Plaintiffs *carte blanche* to disclose SCEA's highly confidential information to **anyone** that it designates as a consultant or expert, even if such a person was employed by SCEA's competitors. If such a protective order was entered, SCEA would run a serious risk every time that it produced confidential documents in this case. For precisely this reason, this Court and others have routinely ordered that confidential documents such as those requested by Plaintiffs not be disclosed to consultants and experts who work for competitors. *See, e.g., Nygren v. Hewlett-Packard Co.*, No. C07-05793-JW (HRL), 2008 WL 2610558, *1 (N.D. Cal. July 1, 2008) ("Nevertheless, the court will give defendant at

least a measure of additional protection by ordering plaintiffs not to disclose HP's eyes only information to a consultant or expert who within the past five years: [w]as an employee of HP, [w]as an employee of a competitor of HP, or [w]orked as a consultant or expert witness for any HP competitor."); *Layne Christensen Co. v. Purolite Co.*, --- F.R.D. ----, 2010 WL 3001744, *10 (D. Kan. July 28, 2010) (concerns addressed by prohibiting disclosure to experts or consultants employed by defendant's competitors); *see also Shell Petroleum, Inc. v. U.S.*, 2001 WL 36142015, *5 (Fed. Cl. 2001); *Dean Foods Co. v. Pleasant View Dairy Corp.*, 2011 WL 38994, *2 (N.D. Ind. Jan. 05, 2011).

During the parties' meet and confer, SCEA requested that the parties simply agree that any consultant or expert designated by Plaintiffs not be employed by any of SCEA's competitors. Plaintiffs agreed with this concept, and in particular **agreed** that two of SCEA's primary competitors (Microsoft and Nintendo) be specifically referenced in the order. Since, however, SCEA has many competitors other than Microsoft and Nintendo, the parties then discussed how best to capture that group of companies. SCEA proposed that its competitors be defined to include manufacturers or distributors of video game console hardware or peripherals, including but not limited to Microsoft and Nintendo, and publishers and developers of video game software. This proposal was perfectly reasonable, as demonstrated by the fact that Plaintiffs were never able to propose any alternative language. Alternatively, SCEA proposed that if the proposed consultant or expert worked for any video game-related company other than Microsoft or Nintendo, Plaintiffs provide the name of that individual to SCEA's counsel for review and approval. Although the proposed protective order SCEA submitted with this letter precludes disclosure of "Highly Confidential" information to competitors (*see* Attachment B, Section 7.6), SCEA would accept a provision that includes such a disclosure requirement. Either of these approaches would be acceptable to SCEA.

SCEA also suggested at one point during meet and confer that the parties "agree to disagree" regarding this issue and submit the Stipulated Protective Order with a provision that Plaintiffs would not provide "Highly Confidential" documents or information to potential experts until this issue is resolved. This would have allowed SCEA to immediately begin producing "Highly Confidential" documents to Plaintiffs' counsel while the parties continued to negotiate this issue; however, Plaintiffs also rejected this proposal.

Regarding SCEA's proposed inclusion of the word "lawfully" in Section 3 of the protective order, the Court is aware that SCEA has fallen victim to widespread hacking of the PS3. Indeed, the Court permitted SCEA to file under seal certain documents that were obtained from the public domain but that were placed there illegally. Docket #151. By including this reasonable qualifying term in the protective order, SCEA is merely ensuring that Plaintiffs cannot publicly file documents which they know are confidential to SCEA but which have escaped into the public domain due to unlawful hacking or other activities. Of course, if there is any future dispute between the parties over whether documents are lawfully in the public domain, this can be the subject of meet and confer between the parties. Plaintiffs should not, however, be given the right to publicly reveal information to the world simply because that same

information was obtained through an illegal hack and briefly appeared on the Internet.

Plaintiffs' proposed protective order also omits a critical provision found in the District's templates. Section 5.1 of every one of the District's form stipulated protective orders that afford multiple levels of designation reads, in part, "**To the extent practical to do so**, 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." (Emphasis added). Plaintiffs' proposed protective order omits "To the extent practical to do so," placing an unreasonable burden on SCEA to identify, from the tens of thousands of pages it will likely produce in this matter, what paragraphs or even sentences on a single document are entitled to "Highly Confidential" protection, "Confidential" protection, or none at all, whether is it practical to do so or not. Of course, if Plaintiffs have any concern regarding over-designation, they may raise a challenge. *See* Attachment B (SCEA's Proposed Protective Order), Section 6.

Finally, SCEA already agreed to Plaintiffs' proposal to delete the provision regarding designation of deposition transcripts following a deposition (Docket #169, p. 3, Item No. 3). SCEA is puzzled as to why Plaintiffs are raising matters before the Court that are not in dispute.[1]

2. Deposition and PS3 Imaging Protocol

On February 9, the Court ordered the parties to agree on a protocol regarding Plaintiffs' depositions and PS3 imaging. The parties have already agreed upon a number of matters regarding the Plaintiffs' depositions and PS3 imaging. These uncontested matters are covered in the proposed order attached to this letter. Only four issues remain in dispute:

First, Plaintiffs informed SCEA that Mr. Stovell wishes to remove some family photographs from his PS3 prior to production. Because Mr. Stovell's PS3 is a central piece of evidence in this case that needs to be handled and preserved in a forensically-sound manner, it is clear that having a party to this case such as Mr. Stovell delete the photographs from the PS3 would be unwise. SCEA suggested instead that Mr. Stovell provide some description of those files, such as the file names, to SCEA's forensic electronic specialist, TERIS, and SCEA would direct it to delete those files from the image of Mr. Stovell's PS3. In a meet and confer, Plaintiffs' counsel responded that they would ask Mr. Stovell if he would agree to this procedure. Without ever conferring with SCEA again about this issue, Plaintiffs filed their brief asking the

[1] Plaintiffs provided SCEA with a draft of their letter brief on March 31 which included this moot issue. Prior to its filing, SCEA demanded that Plaintiffs delete this and other misstatements, but Plaintiffs refused to do so.

Court to permit Mr. Stovell to personally delete these photographs from his PS3, without disclosing SCEA's proposal and the reasons therefor. SCEA maintains that its proposal should be adopted, as it is vastly preferable to permitting a party to personally make the deletions.

Second, Plaintiffs have ostensibly dropped Mr. Herz from their First Amended Consolidated Complaint, but have not dismissed his claims with prejudice. FAC (Docket #165), ¶¶ 17-24. Plaintiffs' counsel have stated, without further explanation, that Mr. Hertz elected to drop out because of "privacy" concerns, but wishes to remain a member of the putative classes. The documents Mr. Hertz produced in the litigation, however, indicate that he may have dropped out because he was involved with hacking the PS3. *See* Docket #117-38, HERZ 0000023-33. Contemporaneously, Plaintiffs removed any references to hacking in the First Amended Complaint, and the remaining named Plaintiffs are now alleging that SCEA removed the Other OS feature because of "cost savings," not the threat of hacking. SCEA believes that the deposition of Mr. Herz will lead to evidence of hacking, a serious matter that is squarely at issue in this litigation. SCEA nevertheless proposed to Plaintiffs that this issue be deferred until the conclusion of the other named Plaintiffs' depositions.

Third, Mr. Huber refuses to bring his PS3 into California for any purpose, including trial, notwithstanding that he identified it in his Rule 26 initial disclosures. Indeed, Mr. Huber will only offer his PS3 for imaging and inspection near his home in Knoxville, Tennessee. SCEA initially offered that the parties split TERIS' costs associated with travelling to Knoxville to perform such imaging.[2] Plaintiffs refused. As a compromise, SCEA recently offered to pay all of the costs associated with TERIS's travel to Knoxville to image Mr. Huber's PS3 there if he agrees to appear in San Francisco for his deposition and bring his PS3 for that deposition. Plaintiffs never responded to this request and failed to inform the Court of it in their letter brief. *See* Footnote 1, *supra*. The Court has already recognized that transporting a PS3 is neither difficult nor subject to any substantial risk of damage. Docket #169, Exhibit 2, 46:23-47:18. Furthermore, while Mr. Huber may not wish to produce such critical evidence at trial, which would pose adverse evidentiary consequences to his case, SCEA may demand the production of such evidence for its defense. If Mr. Huber does not wish to produce his PS3 for inspection in a reasonable manner and cooperate with the discovery process, he should withdraw as a named Plaintiff.

Fourth, Plaintiffs object to inquiry by SCEA during their depositions that would demonstrate how they used their PS3s, including the specific features and software they used and how they used them. SCEA is unaware of any authority – and Plaintiffs have cited none – which would permit Plaintiffs to avoid this inquiry at their depositions. Clearly, SCEA is entitled to determine at deposition how the Plaintiffs used their PS3s, including asking the Plaintiffs to provide a visual demonstration of such use if necessary. Plaintiffs cannot deny that such inquiry is relevant, nor have they even attempted to explain how such a straightforward inquiry could possibly be "cumulative" or "burdensome." Furthermore, contrary to

[2] SCEA has agreed to incur the costs for TERIS' travel to San Diego to image Mr. Stovell's PS3.

Plaintiffs' disingenuous assertion that SCEA agreed to limit the inspection of Plaintiffs' PS3s at their depositions to plugging them in to see if they work, the portion of the hearing transcript relied upon by Plaintiffs' includes the following statement by SCEA's counsel: "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**." Docket #169, Exhibit 2, 46:11-13 (emphasis added). Plaintiffs' failure to acknowledge SCEA's clearly stated intention to cross-examine Plaintiffs regarding their PS3s, coupled with their inflammatory (and patently inaccurate) suggestion that SCEA somehow misled the Court on this issue, is itself misleading.

II. PREMATURE MATTERS REQUIRING MEET AND CONFER

1. Document Search Keywords & Custodians

On March 14, 2011, Plaintiffs first proposed a list of over 150 keywords that they wished to add to those SCEA is using. Though SCEA believes that 150 keywords is clearly excessive, it never had any chance to provide a counterproposal to Plaintiffs before they rushed to file this letter brief.

SCEA is willing to agree to many of Plaintiffs' new keywords; however, others are simply too burdensome. For example, Plaintiffs demand that SCEA review and produce all responsive documents resulting from the keywords "PS3" or "PS 3" or "PlayStation*"[3] within twenty-five words of "personal computer" or "PC" or "comput*." This combination alone results in over **350,000** documents from the eight relevant custodians SCEA has identified. Because these terms are so broad, almost all of these documents will likely be irrelevant to this case. Moreover, Plaintiffs have included keywords that are not related to the relevant issues in this case or the discovery requests that Plaintiffs have propounded. Nevertheless, the parties have yet to meet and confer on these matters, and should be given further opportunity to do so.

With respect to the list of custodians, SCEA was about to provide its own positions on this issue for purpose of meet and confer when Plaintiffs rushed to file their letter brief. This issue is not ripe for adjudication, and SCEA respectfully requests that the parties be provided an opportunity to meet and confer.

2. Discovery Related To SCEI

Plaintiffs are seeking an order regarding hypothetical discovery yet to be served on SCEA regarding its relationship with SCEI. SCEA is generally agreeable to such limited discovery (Docket #169, p. 7), subject to specific objections. A meet and confer, however, is necessary to determine why a total of ten interrogatories are necessary to obtain discovery regarding a concise issue such as the relationship between SCEA and SCEI. Furthermore, the proposed discovery is duplicative and cumulative; for

[3] "*" indicates any word that includes the prefix that comes before it.

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example, either interrogatories or a Rule 30(b)(6) deposition – but not both – would be arguably sufficient to obtain discovery on such a narrow issue. Moreover, Plaintiffs' proposed Rule 30(b)(6) deposition notice includes topics pertaining to substance of the case, rather than the limited issue of SCEA's relationship with SCEI. It may be possible to mitigate these concerns, and the chances of a dispute requiring the Court's intervention, if Plaintiffs provide SCEA with the specific interrogatories and document requests they are proposing to propound, or otherwise explain the scope of those requests and the need for additional discovery testimony. If Plaintiffs decide to serve such discovery, SCEA will formally respond and, if necessary, object, and the parties can meet and confer on any matters in dispute.

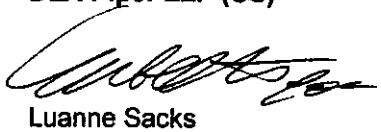
3. Format of SCEA's Document Production

If Plaintiffs had met and conferred with SCEA, as requested by SCEA, they would have learned that SCEA is generally in agreement with Plaintiffs' requests regarding the format of SCEA's document production. For example, SCEA is willing to produce Excel spreadsheets in native format, except where redaction is necessary to protect personal and private information or otherwise. Redacting native format documents is virtually ineffective because it is relatively simple to delete or uncover the redactions.

A number of Plaintiffs' demands with regard to the format of SCEA's production, however, are cumulative and overly burdensome. For example, with regard to email production, Plaintiffs demand SCEA produce "Parent ID" and "Child ID" metadata fields which, based on the number of documents that will be produced, will be burdensome as the same information is available to them in other fields they have demanded SCEA produce ("Beg Bates" and "Beg Attach" fields). SCEA believes that these issues could potentially be resolved, or at least narrowed, through meet and confer.

Very truly yours,

DLA Piper LLP (US)



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Enclosures