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April 1, 2011

Magistrate Judge Chen  
U.S. Northern District Court  
San Francisco Courthouse  
Courtroom C  
450 Golden Gate Avenue, 15th Floor  
San Francisco, CA 94102**RE: In Re Sony PS3 "Other OS" Litigation**  
*U.S.D.C. Case No.: 3:10-cv-01811-RS (EMC)*

Dear Magistrate Judge Chen:

Plaintiffs' request<sup>1</sup> the Court's assistance in resolving five issues: (i) a stipulated protective order, (ii) a protocol for copying of Plaintiffs' PS3s, (iii) issues relating to Plaintiffs' depositions, (iv) SCEA's use of keywords, and selection of custodians of documents, relating to SCEA's search for documents responsive to Plaintiffs' requests, (v) discovery to be performed relating to SCEA's failure to produce documents in SCEI's possession, and (vi) the format of SCEA's production of documents.<sup>2</sup>

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<sup>1</sup> The parties have discussed submitting a joint letter to Your Honor regarding the discovery disputes herein for weeks. On the morning of March 30, 2011, Plaintiffs asked SCEA that the parties exchange their respective submissions on April 1, 2011 for a joint letter to the Court on the same day. Shortly before the close of business on March 31, 2011, Defendant stated that until it received Plaintiffs' submission, it would not provide its submission for the joint letter for four business days. Plaintiffs responded that their position has not changed since the parties' lengthy meet and confer on March 16, 2011 and Plaintiffs' confirming letter on March 18, 2011. The same evening of March 31, 2011, Plaintiffs sent Defendant their submission and requested that Defendant provide its submission by 3:00 p.m. the next day so that the parties could submit the joint letter without further delay. On April 1, 2011 at 2:30 p.m., Plaintiffs received a response from Defendant indicating that it would not provide Plaintiffs with their submission and would file a letter separately within four business days.

<sup>2</sup> The parties also have a dispute regarding the deposition of third party witness Geoffrey Levand, an employee of Sony Computer America, an affiliate of SCEA. Counsel for SCEA is representing Mr. Levand, and agreed to accept service of a subpoena, which Plaintiffs served on March 14, 2011. Plaintiffs noticed Mr. Levand's deposition for March 31, but SCEA stated that Mr. Levand would not appear on that date, and has refused to set a new date for the deposition. SCEA also objected to

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**I. Stipulated Protective Order**

The parties appeared before this Court on February 9, 2011, regarding multiple discovery disputes. On February 10, 2011, the Court entered an order stating in part, "The parties shall meet and confer and agree upon a stipulated protective order that contains a provision for highly confidential documents for attorneys' eyes only, but shall not contain the procedures suggested by SCEA applicable to source codes and expert witness disclosure." (Docket No. 152.)

On February 16, 2011, Plaintiffs transmitted a proposed protective order that fully complied with this Court's order. SCEA objected to Plaintiffs' proposed protective order. The parties met and conferred both verbally and in writing over a period of one month, and Plaintiffs accepted certain changes proposed by SCEA.

On March 18, 2011, after incorporating those changes, Plaintiffs transmitted a new protective order to SCEA. (Exhibit 1.) Despite substantial meet and confer efforts, SCEA refuses to comply with the Court's order and seeks to re-litigate issues this Court already decided. In particular, SCEA seeks to add the following language:

1. Paragraphs 2.6, 7.3(c): SCEA wishes to add language to Paragraph 2.6 defining "expert" to exclude any employee, director, or officer of any of SCEA's "competitors." SCEA's proposal on this issue was already rejected by this Court. Nevertheless, SCEA seeks again to preclude Plaintiffs from showing any expert witness any Confidential or Highly Confidential documents if Plaintiffs' expert is or may become an employee of some unnamed "competitor." Moreover, SCEA again wishes to add language to Paragraph 7.3(c) requiring Plaintiffs to notify SCEA in advance if Plaintiffs wish to show any "consultant" of any "competitor" such documents. During the meet and confer process when Plaintiffs sought to understand what SCEA meant by the term "competitor," SCEA went even further to state that the term "competitor" should also include any independent contractor working for *any* company that manufactures or distributes video game consoles or peripherals, and any publishers or developers of video game software. Using this definition of "competitor," SCEA's proposed language would prohibit Plaintiffs from showing SCEA's documents to, for example, any person who is a consultant of an independent contractor of a company that distributes video game consoles. SCEA's proposed terms are too vague, would unduly inhibit Plaintiffs' ability to hire and work with consultants and experts, and, most importantly, this Court already rejected SCEA's request to insert similar provisions into the protective order. Accordingly, Plaintiffs

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Plaintiffs' document requests to Mr. Levand, and refused to meet and confer on those objections until next week. Plaintiffs plan to submit an additional letter relating to this issue next week if the parties are unable to resolve SCEA's objections.

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request that the Court enter the Order attached as Exhibit 1 without any further changes to Paragraphs 2.6 or 7.3.

2. Paragraph 3: Paragraph 3 of the Stipulated Protective Order excludes information in the public domain from the scope of the order's protection. SCEA wishes to insert the word "lawfully" into this paragraph to exclude from the scope of the order only information that is "lawfully" in the public domain. Such a modification to the Northern District's standard protective order is unworkable, as it is impossible for Plaintiffs to tell whether information in the public domain is there "lawfully" or not without engaging in a mini-trial regarding how the information in question reached the public domain. For example, during the meet and confer process, SCEA has raised the example of having its source code divulged in the "public domain," but Sony itself tweeted a PS3 master key to the public through a Twitter application. Even if such a "tweet" was done in error, the information remains in the public domain, and cannot be said to have been tweeted "unlawfully," at least without taking a deposition of the Sony officer who tweeted the information, conducting discovery into why the Sony officer tweeted the information, and full briefing on the impact and legal consequences of mistakenly tweeting the information. To engage in this level of litigation over information in the public domain would substantially increase the discovery disputes in this case, be expensive and time consuming, and is not realistic. That said, if SCEA believes that information has been used in a filing in this case that should be placed under seal, it is within its rights to make a motion for such relief. If the information is already in the public domain, it defies logic to claim SCEA would be prejudiced by having it appear on Pacer for a short period while SCEA makes an appropriate motion.
3. Paragraph 5.2: Paragraph 5.2 provides for designation of deposition excerpts as confidential. There is a sentence in this paragraph which states that an entire transcript can be designated as confidential. Although the Northern District's Form Protective Order for Litigation Involving Patents/Highly Confidential Material includes this provision, the Court rejected SCEA's contention that this was the model to follow. As such, Plaintiffs followed the standard protective order with an insert regarding "ATTORNEYS' EYES ONLY" designations. Moreover, it is difficult to imagine a scenario in this case where it would be appropriate to designate an *entire* transcript as confidential, at least not beyond the 21 day designation period. Therefore, Plaintiffs request that the following sentence, which SCEA has requested inclusion of, be excluded from the protective order: "Alternatively, a Designating Party may specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

Plaintiffs' final version of the protective order, with SCEA's changes accepted but for the three exceptions mentioned above, is attached hereto as Exhibit 1. Plaintiffs request that the

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Court enter this order so that SCEA's production of non-public documents will finally begin. To date, SCEA has not produced any documents in response to the Court's February 10, 2011 Order.

## II. PS3 Copying Protocol

1. On March 15, 2011, after numerous requests, SCEA finally provided a proposed protocol regarding the copying of Plaintiffs' PS3s hard drives and Plaintiffs' depositions. The parties met and conferred, and it is Plaintiffs' understanding that the parties have reached agreement as to a protocol, with the following exceptions:
2. Plaintiff Stovell has requested that he be granted permission to remove his family photographs from his PS3 prior to providing it to SCEA. SCEA has taken the position that Mr. Stovell should not be permitted to do so. The parties have been unable to resolve this issue and request the Court's assistance.
3. Plaintiff Herz has elected to withdraw as a class representative rather than be subjected to the intrusive discovery proposed by SCEA. He is no longer named in the operative complaint. This Court has already ruled that "formerly named Plaintiffs who are no longer named Plaintiffs in the consolidated complaint shall be treated as unnamed class members for discovery purposes." (Docket no. 152 at 2:7-8.) Mr. Herz's privacy should not be invaded given that he has withdrawn as a class representative. Mr. Herz also should not be required to attend a deposition given his withdrawal. SCEA wishes to postpone resolving this issue until later, but Plaintiffs request that the Court resolve the issue now.
4. Two of the named Plaintiffs live in California. SCEA has agreed to copy one PS3 near Plaintiff Stovell's home in San Diego, California. Plaintiffs have agreed to produce two other PS3s in San Francisco. For one class representative only, Plaintiffs have requested that any copying of Mr. Huber's PS3 or deposition at which Mr. Huber appears with his PS3 take place at a location near his home in Knoxville, Tennessee. Keeping the PS3 in Tennessee would minimize the risk that the PS3 would be damaged during transportation to San Francisco.<sup>3</sup> SCEA

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<sup>3</sup> The PS3 belonging to Plaintiff Baker, who lives in South Dakota, is not functioning and has not yet been repaired pending SCEA's request to have the hard drive imaged (in case during such repairs something happens to the drive), but could still sustain unrelated damage during transportation. Nevertheless, in the interest of compromise, Plaintiffs agreed that Mr. Baker's PS3 could be transported to San Francisco for copying, and that Mr. Baker will appear in San Francisco for his deposition.

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has requested that Plaintiffs pay for half of their experts' travel costs to Tennessee, which Plaintiffs do not believe is appropriate.

Thus, Plaintiffs request that the Court allow Mr. Stovell to remove some personal family photos, order that Mr. Herz is an absent class representative who does not have to produce his PS3 or appear at a deposition, and order that Mr. Huber's PS3 inspection (at SCEA's cost) and deposition occur near his home in Knoxville, Tennessee. With the exception of the issues noted above, the parties are in agreement regarding the following protocol for copying the PS3s:

1. Scheduling of the PS3 copying should take place after the Court enters an appropriate protective order, and should be based on witness and attorney availability as the parties seek to work in good faith and cooperatively.
2. SCEA is responsible for promptly repairing, if possible, any damage done to the PS3s during the transportation or copying process, and may not seek to gain any litigation advantage arising from any damage done during such process. If the unit cannot be repaired, SCEA will replace the unit.
3. SCEA has selected TERIS to forensically image each PS3's internal hard drive onto a similar drive. TERIS will boot the copy from within the PS3 to confirm imaging. TERIS will make two such copies and provide one to plaintiffs' counsel. Plaintiffs' counsel will pay for the cost of the second copy at an estimated cost of \$499 including the cost of the hard drive. TERIS will also perform a PS3 system back-up onto a mass storage device or memory card.
4. Counsel for Plaintiffs or their designated expert or representative will be present during the copying of the PS3s and will be permitted to videotape the process.

### **III. Plaintiffs' Depositions**

SCEA has indicated that it now intends to ask the class representatives to perform substantial "demonstrations" at their depositions with their PS3s, including demonstrating what information is stored in their PS3s, where it was stored, and how they accessed such information in the units. Such a line of inquiry is irrelevant and Plaintiffs object to it as not likely to lead to the discovery of admissible evidence, and as being cumulative and burdensome.

Moreover, at the previous hearing on this issue, Plaintiffs objected to producing the PS3 units at their depositions in this case. SCEA responded that it intended to simply "plug it in and

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Plaintiffs have indicated that Mr. Baker wishes to repair his PS3 and has requested that SCEA state how it would like Mr. Baker to proceed with such repairs. SCEA has indicated it will provide a response, but has not yet done so.

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see if it works" and to visually inspect it during the deposition. (Exhibit 2 [Hearing Transcript] at 46:5-22). SCEA did not inform the Court, or Plaintiffs, that it intended to have the Plaintiffs perform a "demonstration." In addition, the Court agreed at the hearing that bringing peripheral equipment to the deposition would be burdensome and should not be required absent some showing of a particular piece of equipment's relevance. (Hearing Transcript at 31:17-25). SCEA's representations preceded the Court's decision that Plaintiffs are required to bring their PS3s to their depositions at all. It appears that SCEA may have misled the Court regarding its intent, hoping to later bootstrap cumulative and irrelevant demands for demonstrations at the depositions after securing the Court's order. Plaintiffs request that the Court deny SCEA's request to expand upon its earlier representations regarding its intended use of the PS3s at Plaintiffs' depositions, and find such extraneous questioning to be outside the scope of permissible discovery.

#### IV. Keywords/Custodians

SCEA has proposed using only four keywords to search its electronic files for relevant documents, and searching only the files of eight custodians. SCEA's proposed search is not adequate. A responding party has a duty to make a reasonable search of all sources reasonably likely to contain responsive documents. *A Farber and Partners, Inc. v. Garber*, 234 F.R.D. 186, 190 (C.D. Cal. 2006); *see also National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 554-56 (N.D. Cal. 1987) (issuing sanctions for failing to make a reasonable inquiry to respond to plaintiffs' discovery requests and stating that a reasonable inquiry required "at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information to plaintiffs.")

Plaintiffs have repeatedly requested that SCEA describe in writing how it arrived at the conclusion that it is only required to search the files and records of eight custodians, and why SCEA believes that list of custodians and keywords (to the extent it disputes Plaintiffs' proposed key words) is sufficient. (See Exhibit 3 [E-mail, James Pizzirusso to Carter Ott, February 25, 2011] ["It would also be helpful to have more information from you about the custodians, their positions, work areas, etc. that you promised to provide."].) SCEA has failed to do so. On March 14, 2011, Plaintiffs provided SCEA with additional proposed keywords and a non-exhaustive list of additional custodians whose records should be searched. (See Exhibit 4.) SCEA stated that it would provide a response, but again has failed to do so.<sup>4</sup> Plaintiffs request that the Court order that SCEA search its proposed custodians and Plaintiffs' additional proposed

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<sup>4</sup> Providing these lists is without prejudice to Plaintiffs' seeking additional searches using other keywords and/or demanding additional custodians' files to be searched.

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custodians using Plaintiffs' additional suggested keywords as set forth in Exhibit 4, without prejudice to any future searches once SCEA has begun to produce documents.<sup>5</sup>

## V. SCEI Discovery

On March 16, 2011, during a meet and confer conference call, Plaintiffs proposed to SCEA that Plaintiffs engage in the following discovery relating to SCEI discovery addressed in the Court's February 10, 2011 order:

- a. No more than 10 interrogatories in addition to the other interrogatories already permitted by law or court order;
- b. No more than 3 document requests; and
- c. A rule 30(b)(6) deposition of SCEA on the topics addressed in the attached proposed notice; this Rule 30(b)(6) deposition notice would be in addition to the Rule 30(b)(6) deposition notice that Plaintiffs intend to serve on SCEA regarding other topics.

On March 18, 2011, Plaintiffs confirmed the foregoing proposal in writing, and provided the form of a proposed Rule 30(b)(6) deposition notice. (See Exhibit 5.) Defendant SCEA still has not provided a substantive response to Plaintiffs' proposal.

## VI. Document Production Protocol

On March 16, 2011, during a meet and confer telephone conference, Plaintiffs met and conferred with SCEA regarding the method of production of documents. Plaintiffs indicated that they would like to receive documents in native format.<sup>6</sup>

<sup>5</sup> Deciding upon appropriate custodians is a negotiated process, and cannot be imposed upon SCEA unilaterally and without explanation. Plaintiffs anticipate that additional searches will need to be performed after the initial terms are used to perform searches of the identified custodians' records, particularly given the fact that SCEA has not been forthcoming in providing information.

<sup>6</sup> Courts frequently order document production in native format. *See, e.g., Nova Measuring Instruments Ltd. v. Nanometrics, Inc.*, 417 F. Supp. 2d 1121, 1122 (N.D. Cal. 2006) (requiring defendant to produce documents in their native file format with original metadata); *Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L.* 2006 WL 665005 \*3 (N.D. Ill. Mar. 8, 2006) (ordering production in native format and commenting that TIFF files "do not contain all of the relevant, nonprivileged information contained in the designated electronic media," including metadata); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 2011 WL 381625, at \*2 (S.D.N.Y. Feb. 7, 2011) (ordering that all spreadsheets be reproduced in their native format).

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SCEA refused to agree to produce the documents in native format, first claiming that SCEA had already started preparing its production in “searchable TIFF format” with metadata, but later admitting that no downloading process has yet begun. Though Plaintiffs maintain that producing in native format is the most cost effective way to proceed, Plaintiffs nevertheless advised SCEA on March 18, 2011 that Plaintiffs would be willing to compromise and to accept searchable TIFFs for most documents under the conditions set forth in a protocol drafted by Plaintiffs, including but not limited to the provisions regarding certain fields of metadata (that would normally be produced with native files) also being produced. Plaintiffs still request, however, that all Excel files should be produced in native format given the difficulty of converting Excel files to TIFF, and that Plaintiffs may request native format of other particularized documents in the event it becomes appropriate (*e.g.*, they are unusable in TIFF format). Plaintiffs set forth these details in a proposed protocol transmitted to SCEA on March 18, 2011, which is attached hereto as Exhibit 6. SCEA has also not provided a substantive response to Plaintiffs’ proposed protocol either. Plaintiffs request that the Court enter the proposed order regarding document production protocol attached hereto as Exhibit 6.

Plaintiffs respectfully request that the Court assist them in resolving the foregoing issues.

Dated: April 1, 2011

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Exhibits