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10 *Lindberg, his mother)*

11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 In re SONY PS3 “OTHER OS” LITIGATION) Case No.: 4:10-CV-01811-YGR
14)
15) **ADMINISTRATIVE MOTION OF**
16) **OBJECTOR ERIC LINDBERG FOR**
) **LEAVE TO FILE REPLY TO SETTLING**
) **PARTIES’ RESPONSES TO OBJECTIONS**
)
)

17 **NOTICE OF ADMINISTRATIVE MOTION AND ADMINISTRATIVE MOTION**
18 **TO ALL THE PARTIES AND COUNSEL OF RECORD:**

19 PLEASE TAKE NOTICE that Eric Lindberg hereby moves the Court pursuant to N.D. Cal.
20 Civil Local Rule 7-11 for leave to file a six-page reply to jointly address issues raised by Plaintiffs
21 and Defendant in their respective Responses to Objections, filed in the Court’s docket at #286 and
22 288 respectively.

23 This administrative motion is based on the following memorandum of points and authorities
24 and the attached proposed “Reply to Plaintiffs’ and Defendant’s Responses to Objections” and the
25 three declarations attached thereto.

26 Pursuant to Local Rule Rule 7-11(a), Mr. Lindberg hereby states that no stipulation is
27 included in this Motion as Plaintiffs indicated during a meet and confer telephone call and
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1 subsequent e-mail discussions held today that they will oppose the instant administrative motion.
 2 However, Defendant has authorized undersigned counsel to represent to the Court that they do not
 3 oppose the instant motion for administrative relief.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 **I. Mr. Lindberg is uncertain if the instant motion for leave is required but files it out 6 of an abundance of caution in the face of Class Counsel's insistence.**

7 Mr. Lindberg and undersigned counsel's experience is that Objectors are not required to
 8 make administrative motions such as this one to file something further beyond a single objection
 9 pursuant to Rule 23(e)(5).¹ However, when undersigned counsel discussed the Proposed Reply with
 10 Class Counsel, she insisted the instant filing was necessary. Consequently, and out of an abundance
 11 of caution and respect for the Court, Mr. Lindberg makes the instant motion for leave to file his
 12 Proposed Reply. To the extent the Court agrees with the practice of other judges in this District that
 13 leave is not required, Mr. Lindberg requests the Court provide clarity in its order so that future
 14 litigation can be simplified.

15 While Rule 23(e)(5) permits objections, it does not limit the objector to a single filing. Rule
 16 23(e)(5) also does not grant the Settling Parties an automatic last word. Nothing else in the rules
 17 does either. Certainly, and regardless of the form of the paper before the Court, when one appears at
 18 a tribunal and is personally attacked with *ad hominem* argument or incomplete facts, he should at
 19 least be permitted a short response.

20 **II. The issue of class membership is thoroughly addressed in the Proposed Reply and 21 includes a declaration of Mr. Lindberg's mother to clarify his rights in the PS3 and 22 resolve the Settling Parties' objections to Mr. Lindberg's standing.**

23 In the respective Responses to Objections filed by Plaintiffs at Dkt 286 and Defendants at
 24 288 on January 10, 2017, both Plaintiffs and Defendants (the "Settling Parties") made argument that
 25 Mr. Lindberg has no standing to object to the Settlement Agreement in this case. Dkt 286 at 8:18-

26 ¹ For example, in *Hendricks v. Starkist*, Case No. 13-cv-00729-HSG, Dkt #353, Mr. Lindberg
 27 simply filed a motion without seeking leave to do so. Judge Gilliam considered and decided the
 28 motion on its merits. *Hendricks v. StarKist Co.*, 2016 WL 5462423 at *17, Case No. 13-cv-00729-
 HSG. Several motions have also been filed and decided on their merits by objectors without seeking
 leave or any complaint from Judge Chen in *In re Carrier IQ, Inc., Consumer Privacy Litigation*,
 Case No. 12-md-02330-EMC.

1 9:7 and 288 at 13:7-21. In light of these arguments, Mr. Lindberg has promptly prepared the
2 Proposed Reply which should resolve those complaints.

3 Mr. Lindberg recognizes that since the Preliminary Approval Order and the Settlement
4 Agreement did not require he disclose his age, the Settling Parties could not have known without
5 further inquiry that Mr. Lindberg was a 15-year-old minor at the time his PS3 was purchased. Mr.
6 Lindberg believes this significantly changes the legal analysis: the Court must also consider whether
7 Mr. Lindberg is the constructive or equitable purchaser of the PS3 since it was Mr. Lindberg who
8 was the victim of the false advertising alleged in this case.

9 None of the details set forth in the Proposed Reply were required by the Preliminary
10 Approval Order so were not included in Mr. Lindberg's Objection. Mr. Lindberg believes that by
11 following those rules, it created an opportunity for the Settling Parties to misunderstand his status as
12 a Class Member. The Proposed Reply succinctly sets forth Mr. Lindberg's legal argument as to why
13 he should be considered an equitable or constructive purchaser of the PS3 due to his age at the time
14 of purchase and the actual behavior of himself and his mother with regard to the purchase.
15 Additionally, it sets forth a request in the alternative that the Court, in its discretion, grant his
16 mother, Susan Lindberg, leave to join Mr. Lindberg's objection, which would resolve the Settling
17 Parties' arguments against standing.

18 **III. Mr. Lindberg also addresses the Settling Parties' *ad hominem* attacks.**

19 The Settling Parties both make *ad hominem* attacks against Mr. Lindberg that ask the Court
20 to treat his arguments with less solicitude because of their claims about his and his counsel's
21 supposed bad character. Dkt 286 at 9:11-12; 288 at 12:4-13:6. Mr. Lindberg would have no
22 opportunity to defend himself against such attacks or even to argue that they are improper *ad*
23 *hominem* attacks if he cannot file a short reply. It would be grossly unfair for Mr. Lindberg to not
24 have any opportunity to respond in writing in the face of both Settling Parties' *ad hominem* attacks.

25 **IV. No party can claim prejudice or harm from the filing of the Proposed Reply.**

26 The Proposed Reply addresses only two issues: (1) the factual basis of Mr. Lindberg's class
27 membership and (2) the *ad hominem* attacks. As set forth in the Reply, since Mr. Lindberg's
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1 Objection is already before the Court and the Court already owes a heightened fiduciary duty to the
2 Class, even if Mr. Lindberg's Objection was struck for lack of standing, the *arguments* therein still
3 have been before the Court and the Court *must* address them if it decides to grant final approval.
4 *See, e.g. Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). Thus, there should be no changed
5 outcome for the Settling Parties on the underlying question of the fairness of the Settlement
6 Agreement, let alone from the instant question of whether the Proposed Reply should be filed in the
7 first place. Even if a Settling Party intended to argue against the facts set forth in the Proposed
8 Reply, they have a full week prior to the hearing to prepare such arguments.

9 With regard to the *ad hominem* attacks, since they are improper in the first place, Mr.
10 Lindberg's defense against them cannot harm a cognizable right of any of the Settling Parties. Since
11 the underlying Proposed Reply cannot harm a cognizable right, neither could its filing.

12 **V. CONCLUSION**

13 For the reasons set forth herein, Mr. Lindberg, while uncertain of whether the instant motion
14 for leave is required by the applicable rules, nevertheless out of caution seeks leave of the Court to
15 file a short reply to the Settling Parties' Responses to his Objection. As that Proposed Reply itself
16 cannot harm any Settling Party, neither can the filing of it, which at least one Settling Party seems
17 to recognize with their non-opposition to the instant administrative motion. The Court should grant
18 the administrative motion and order that the Proposed Reply and declarations attached thereto
19 (attached to this administrative motion as Exhibit A) be filed in the record of the case.

20 DATED: January 17, 2017

21 Respectfully submitted,
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/s/ Sam A. Miorelli
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing and its exhibits and attachments were electronically filed via the CM/ECF system for the Northern District of California, thus effecting service on all attorneys registered for electronic filing.

/s/ Sam A. Miorelli
Sam A. Miorelli, E.I., Esq.