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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE SONY PS3 "OTHER OS" LITIGATION	CASE NO. CV-10-1811-RS (EMC) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SCEA'S MOTION TO DISMISS** Date: November 4, 2010 Time: 1:30 p.m. Judge: Honorable Richard Seeborg Courtroom: 3

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I. INTRODUCTION

The Sony PlayStation and PlayStation 2 were popular video game consoles that generated numerous sales both in the United States and internationally. Introduced on November 17, 2006, the PlayStation 3 ("PS3") was advertised as more than just a video game console. In addition to allowing users to play video games, the PS3 also functioned as a Blu-ray disc player and a personal computer. As a Sony executive proudly stated: "We don't say it's a game console (*laugh*) – PlayStation 3 is clearly a computer, unlike PlayStations [released] so far . . . [.]" Consolidated Class Action Complaint ("Complaint") at ¶ 35.[1] Defendant Sony Computer Entertainment America ("SCEA") constantly boasted about and advertised the PS3's personal computer functions, such as the "Other OS" function.

On or about April 1, 2010, Sony released PS3 Firmware Update 3.21 ("Firmware 3.21"), which intentionally eliminated the ability of users to utilize the "Other OS" function. If users chose not to install this update, they would lose other core functions, such as the ability to play games online. As a result, PS3 users were forced to forego the PS3 unit's core and essential functions for which they had paid a premium price.

Plaintiffs bring this action to obtain injunctive relief and to recover restitution and damages sustained as a result of SCEA's intentional acts that stripped the PS3 of its personal computing functions. Plaintiffs allege claims for breach of express and implied warranties; violations of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"); the False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.* ("FAL"); the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.* ("CFAA"); the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* ("MMWA"); and common law claims for conversion and unjust enrichment. For the reasons below, SCEA's motion to dismiss should be denied.

[1] Hereafter, unless otherwise noted, all references to "¶ __" are to the Consolidated Class Action Complaint.

II. FACTUAL BACKGROUND

The PS3 was introduced on November 17, 2006 as "the most advanced computer system that serves as a platform to enjoy next generation computer entertainment." ¶ 30. SCEA advertised the PS3 as having several significant functions, including a built-in Blu-ray disc player, the ability to play games online against other players through the PlayStation Network ("PSN"), the ability to install other operating systems and act as a personal computer, and the ability to periodically update the software (called "firmware") on the device to maintain and enhance its functionality. ¶ 33. Because of these unique functions, the PS3's suggested retail price is considerably higher than competing video game consoles, such as the Microsoft Xbox 360 and Nintendo Wii. ¶¶ 31-32. SCEA has reportedly sold approximately 23 million PS3s. *Id.*

A. SCEA'S REPRESENTATIONS

SCEA (and its parent, Sony) have repeatedly promoted the capabilities and functions of the PS3 since launch, including the ability to install other operating systems (the "Other OS" function), which was unique to the PS3. ¶ 30. This function allowed the PS3 to run a second operating system, such as Linux, and allowed the PS3 to operate as a personal computer. The "Other OS" function made it possible for customers to use word processing software, spreadsheet software, and alternate email clients. ¶ 47.

B. SCEA'S REMOVAL OF THE "OTHER OS" FUNCTION

In August 2009, SCEA released a new, "slim" version of the PS3 that did not support the "Other OS" functionality. Senior-level SCEA executives such as John Koller, director of hardware marketing, assured customers at the time that Sony would continue to support the PS3's computing functions. ¶ 45. Geoffrey Levand, Principal Software Engineer at Sony Corporation, even mailed letters to existing customers assuring them that the "Other OS" functionality would not be lost. *Id.*

On March 28, 2010, however, Patrick Sebold, SCEA's Senior Director of Corporate Communications and Social Media, announced that SCEA would release Firmware 3.21 on April 1, 2010 and that it would disable the "Other OS" function available on the "fat" PS3s.

Customers who chose not to download Firmware 3.21 in order to retain the "Other OS" function instead lost the following functions: (1) the ability to sign into the PSN as well as access any money they had in their PSN accounts; (2) the ability to use online capabilities that require PSN access, such as chat; (3) the ability to use the online capabilities of PS3 format software; (4) the ability to playback new PS3 software or Blu-ray discs that required Firmware 3.21 or later; (5) the ability to playback copyright-protected videos that were stored on a media server; and (6) the use of other new functions and improvements requiring Firmware 3.21 or later. ¶ 53.

Customers who updated their PS3s with Firmware 3.21 and lost the "Other OS" function also lost any information stored on the hard drive utilizing Linux or other operating system. ¶ 57. Additionally, customers who sent their systems into SCEA for service were automatically updated to the most recent firmware and lost their "Other OS" functionality and the data contained therein. ¶ 55. In short, Firmware 3.21 (and subsequent firmware) required customers to download Firmware 3.21 and lose the "Other OS" function and the data contained therein, or lose all access to the PSN, the ability to play games online as well as the ability to play new PS3 games or Blu-ray discs that required Firmware 3.21 or later.

III. ARGUMENT

A. APPLICABLE LEGAL STANDARD

On a Rule 12(b)(6) motion to dismiss, the court must "construe the complaint liberally by viewing it in the light most favorable to the plaintiff." *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996). Moreover, the court "should accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations." *Westlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *see also Barker v. Reiverside County Office of Ed.*, 584 F.3d 821, 824 (9th Cir. 2009).

A "dismissal under Rule 12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable theory." *Baba v. Hewlett-Packard Co.*, No. 09-05946, WL 2486353, at *2 (N.D. Cal. June 16, 2010) (citing *Balisteri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988)). Thus, the "issue on a

motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted." *Villegas v. U.S. Bancorp*, No. 10-1762, WL 2867424, at *2 (N.D. Cal. July 20, 2010). Furthermore, a "complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual assertions;" rather, the pleader must simply provide the "grounds" of his "entitle[ment]" by pleading more than "labels and conclusions, and a formulaic recitation of a cause of action's elements." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2009). As courts within this Circuit have noted, "[t]his new standard is not a 'heightened fact pleading' requirement, but 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim].'" *Hardling v. Time Warner, Inc.*, No. 09-1212, 2009 WL 2575898, at *3 (S.D. Cal. Aug. 18, 2009).

In *Twombly*, the Court reaffirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing the pleader is entitled to relief.'" *Id.* at 550 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Thus, to survive a Rule 12(b)(6) motion, a complaint need contain "only enough facts to state a claim to relief that is **plausible on its face**." *Id.* at 1974 (emphasis added); *see also Perretta v. Prometheus Development Co.*, 520 F.3d 1039, 1043 (9th Cir. 2008), amended, 521 F.3d 1061 (9th Cir. 2008).

B. PLAINTIFFS STATE A BREACH OF EXPRESS WARRANTY CLAIM

Plaintiffs state a claim for breach of express warranty. Plaintiffs allege that SCEA advertised and sold the PS3 as a personal computer with certain enumerated functions set forth in SCEA's manuals, website, packaging, and advertisements. ¶¶ 2, 34-45. Plaintiffs further allege that these affirmations of fact created express warranties and that SCEA warranted that its future firmware updates would maintain and improve the PS3's capabilities, not destroy and eliminate the PS3's core functions. ¶¶ 33, 45, 79.

California Uniform Commercial Code ("UCC") § 2313, subdivision (1)(a) and (b) provide that express warranties are created by:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an

> express warranty that the goods shall conform to the affirmation or promise; (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Thus, to prevail on a breach of express warranty claim, the plaintiff must prove that "(1) the seller's statements constitute an "affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *Weinstat v. Dentsply Intern. Inc.*, 180 Cal. App. 4th 1213, 1227 (2010) (quoting *Keith v. Buchanan*, 173 Cal.App.3d 13, 20 (1985)). Plaintiffs have adequately alleged these elements here.

1. Plaintiffs Have Properly Pled Specific Statements That Identify the Terms of the Express Warranty

Express warranties may be found in advertisements, brochures, written sales contracts, and owner manuals. *Keith*, 173 Cal. App. 3d at 20. No particular terms such as "warrant" or "guarantee" are required to create an express warranty. Cal. Com. Code § 2313(2). Statements relating to the goods being sold are presumptively express warranties. *Weinstat*, at 1227.

The Complaint is replete with specific instances where SCEA expressly warranted the PS3's unique functions. These representations are affirmations of fact and constitute a description of the product. Specifically, SCEA touted the PS3's ability to function as a personal computer and defined those computing capabilities to include playing PS3 games, connecting to the PSN, playing Blu-ray discs, and running Linux (or other operating systems). Plaintiffs allege these statements referencing the following sources:

User Manual:

- "Install other system software on the hard disk. For information on types of compatible system software and obtaining the installer, visit Open Platform for PlayStation 3." ¶ 45.

Product Packaging:

- Affirmative representations and symbols representing that the PS3 had a built-in Blu-ray Disk drive for high-definition games and entertainment, and broadband connectivity with access to the PSN, among other things. *Id*.

SCEA Website (2006-2010):

- "[t]here is more to the PLAYSTATION 3 computer entertainment system than you may have assumed. In addition to playing games, watching movies, listening to music, and viewing photos, you can use the PS3 system to run the Linux operating

system. By installing the Linux operating system, you can use the PS3 system not only as an entry-level personal computer with hundreds of familiar applications for home and office use, but also as a complete development environment for the Cell Broadband Engine (Cell/B.E.)." ¶ 36.

Advertisements, Interviews, and Representations by Senior-level Executives:

- "Speaking about the PS3, we never said we will release a game console. It [the PS3] is radically different from the previous PlayStation. It is clearly a computer." – Ken Kutaragi, former President of SCEI, before the PS3 release. ¶ 34.

- "[The PS3] is radically different from the previous PlayStation. It is clearly a computer. Indeed, with a game console, you need to take out any unnecessary elements inside the console in order to decrease its cost…This will of course apply to the PS3 as well." "Everything has been planned and designed so it will become a computer. The previous PlayStation had a memory slot as its unique interface. In contrast, the PS3 functions PC standard interfaces. Because they are standard, they are open." – June 2006, Ken Kutaragi, former President of SCEI. ¶ 38.

- "We believe that the PS3 will be the place where our users play games, watch films, browse the Web, and use other computer functions. The PlayStation 3 is a computer. We do not need the PC." – Phil Harrison, President of Sony Computer Entertainment Worldwide Studios 2005-2008. ¶ 45.

- "Because we have plans for having Linux on board [the PS3], we also recognize Linux programming activities…Other than game studios tied to official developer licenses, we'd like to see various individual participate in content creation for the PS3." – Izumi Kawanishi, head of Sony's Network System Development Section, May 2006. *Id*.

Other

- The ability to install other operating systems was a built-in component of the core functionality of the PS3 system and users were able to use this function out of the box. ¶ 40.

These statements are affirmations of fact or promise and not mere puffery. The *Keith* court held that a seller's statements during the course of negotiations are presumptively affirmations on their face (*i.e.*, warranties) unless the seller can show that a reasonable buyer could only have considered them statements of opinion. *Keith*, 173 Cal. App. 3d at 19. The court identified three characteristics that distinguish statements of opinion from those of warranty and held that a statement is probably opinion if it: (1) "lacks specificity; (2) is made in an equivocal manner; or (3) reveals that the goods are experimental in nature. *Id*. The seller bears the burden to show that a reasonable buyer should have understood the statement to be

merely the seller's opinion about the goods and not a statement of facts. *Id*. at 21. Here, SCEA's statements were factually specific, unequivocal, and non-experimental because SCEA did not merely state that its game console was able to replace a computer. Rather, SCEA specifically represented on its website, in its user manuals, and through the statements of senior-level executives that the PS3 *was* a computer on which a purchaser could install a second operating system and substantiated this claim with evidence. SCEA's representations do not constitute puffery but are specific descriptions of the product substantiated by concrete facts and able to be tested.

2. SCEA's Representations Formed the Basis of the Bargain

For warranty liability to attach, the representation must be part of the parties' bargain. The fundamental question is: "What is it the seller has in essence agreed to sell?" *Weinstat*, 180 Cal. App. 4th at 1228. Actual reliance on the seller's statements when entering the sale is not required. The official comment to Section 2313 of the California Commercial Code states in part, "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown to weave them into the fabric of the agreement." *Weinstat*, 180 Cal. App. 4th at 1227 (quoting Cal. Com. Code § 2313, Comment 3).

All affirmations of fact by the seller become part of the basis of the bargain unless good reason is shown to the contrary. *Keith*, 173 Cal. App. 3d at 21. As the *Keith* court held:

> A buyer need not show that he would not have entered into the agreement absent the warranty or even that it was a dominant factor inducing the agreement… [T]he representation need only be part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation. *Id.*

The statute thus creates a presumption that the seller's affirmations go to the basis of the bargain. *Id*. In light of Section 2313's language and Comment 3, the *Keith* court concluded that "reliance has been purposefully abandoned." *Id.* at 23.

Here, the "Other OS" function of the PS3 is an affirmation of fact SCEA heavily

advertised and promoted. California's UCC treats such prominently disclosed functions as part of the basis of the bargain. The buyer need not allege or prove that but for the representation the buyer would not have purchased the PS3; nor does the buyer have to allege the representation was a material part of the decision. Therefore, Plaintiffs adequately pled this claim.

3. SCEA's Actions Breached the Express Warranty by Eliminating the PS3's Personal Computer Function.

Plaintiffs allege that SCEA breached the express warranty by releasing Firmware 3.21 on April 1, 2010. Firmware 3.21 forced Plaintiffs to choose whether to keep the "Other OS" function or retain the ability to play games online and other important functions. SCEA erroneously argues that, after the firmware, the PS3 retained its functionality as a "personal computer." Defendant's Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities (Docket No. 97) (hereinafter "MTD") at 12:17. This argument misses the mark and goes to the merits – not to whether Plaintiffs' claims are viable. In that regard, the issue is not whether the PS3 can still run some computer functions, but whether Firmware 3.21 significantly impaired the PS3's functionality – depriving customers of advertised functions that were part of the basis of the bargain. It was because the PS3 could run virtually any software via the "Other OS" function that it functioned as a personal computer. Removal of this function breaches the express warranty regardless of whether the PS3 still performs some other functions.

4. The End-User Agreements Do Not Authorize Removal of the PS3's Functions

SCEA contends that various "agreements" provided with a PS3 purchase[2] clearly state that a buyer does not own the system software but receives only a license to use it and authorizes SCEA to remove or alter the PS3's functionality. MTD at 2:13. A seller that makes express

[2]Plaintiffs expect discovery will show that these agreements are provided to customers after they have already purchased and set up the PS3s in their homes and that the specific language SCEA relies upon is inconspicuous and buried in fine print. In contrast, the express warranties created by SCEA's advertisements and other statements were prominently and clearly made on its website and the product's packaging, among other places. ¶¶ 11, 15.

warranties, however, cannot disclaim or take them away. *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 958 (1984). Moreover, SCEA's agreements are ambiguous.

The agreements SCEA references include (1) The Limited Hardware Warranty and Liability Agreement ("Warranty"); (2) The System Software License Agreement ("SSLA"); and (3) The Terms of Service And User Agreement ("TOS").[3] The SSLA, as pleaded in the Complaint, and which contains the only terms the Court may consider, provides in relevant part:

> "Some services may change your current settings, cause a loss of data or content, or cause some loss of functionality…SCE, at its sole discretion, may modify the terms of this Agreement at any time…" ¶ 32.

SCEA's argument that this language authorizes it to eliminate the PS3's essential functions at will is a disputed issue of fact and is improper for consideration on Rule 12(b)(6) motion where the facts are construed in the light most favorable to the Plaintiffs. Nevertheless, SCEA's argument is incorrect for several reasons. First, the language in the SSLA does not authorize the removal of the PS3's functions. The term "loss of functionality," as interpreted by a reasonable consumer means that minor changes may occur to the system as a result of system upgrades. No reasonable consumer would understand the above language as granting SCEA the authority to eliminate core advertised functions of the device. Does SCEA contend it could eliminate the ability to play games and Blu-ray discs as well? If so, then under SCEA's arguments, Plaintiffs bought a $600 paperweight. At most, this is an argument for the jury – not one for decision here.

Second, even if the Court considers SCEA's Warranty and TOS, which it should not, each of those documents state that any updates or services will be performed to "ensure" that the PS3 is "functioning properly[.]" MTD at 4:7; 4:23; 5:20-21. Firmware 3.21, however, was not issued to ensure the PS3 was functioning properly or to enhance functionality; it was issued solely to remove the PS3's computing functionalities. If SCEA was free to do as it asserts, its

[3] With the exception of limited language from the SSLA, the Warranty and TOS are not reference or included in the Complaint and therefore cannot be considered. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Request for Judicial Notice, concurrently filed herewith.

warranties would be meaningless.

Third, the *Weinstat* Court reaffirmed the notion of "good faith," which "infuses the [California] Uniform Commercial Code," and reasoned that "[e]ven before purchasing a product, a buyer would reasonably expect any statement or description of the product appearing in a user manual or similar publication to be true, regardless of when the manual was received or read. A seller's defense based solely on the post-sale awareness of the manual arguably would fall short of good faith." *Weinstat*, 180 Cal. App. 4th at 1231. Here, the elimination of the PS3's basic functions, such as the "Other OS" function or the ability to use the PSN if Firmware 3.21 is not downloaded, violates the notions of "good faith." Finally, SCEA's reasons for removing the "Other OS" function are irrelevant because such removal is not allowed by the SSLA. In any event, the reasons for SCEA's removal of the "Other OS" function are subjects to explore in discovery. Further, regardless of SCEA's reasons, customers should be compensated for the loss of advertised functions for which they paid a premium.

C. PLAINTIFFS STATE A BREACH OF IMPLIED WARRANTY CLAIM

California Commercial Code § 2314(c) provides in part that "a warranty that the goods be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Furthermore, it provides that "goods to be merchantable must be at least such as (c) are fit for the ordinary purposes for which such goods are used." Cal. Com. Code § 2314(2)(c). Here, the PS3 was advertised and sold as a "personal computer" and later downgraded it to a mere video game console.

1. Direct Dealings Support Vertical Privity

California law requires vertical privity for recovery on a theory of breach of implied warranties of fitness and merchantability. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 695-96 (1954). While vertical privity can be established in various ways, such as a direct sale to a consumer, courts have not limited the privity requirement to only an actual sale of goods from a seller to a buyer. *U.S. Roofing v. Credit Alliance Corp.*, 228 Cal. App. 3d 1431, 1442 (1991). The Court in *U.S. Roofing* held vertical privity is not limited solely to "paper contract[s]," but is

also broad enough to include situations where "direct dealings" such as an oral agreement have taken place. *Id*.

Here, Plaintiffs have had numerous direct dealings with SCEA because the purchase of the PS3 inherently and necessarily included access to SCEA's online gaming site, the PSN, as well as SCEA's firmware updates that Plaintiffs received directly from SCEA. ¶ 53. Indeed, it was precisely through such an update from SCEA that Plaintiffs' PS3s were stripped of the "Other OS" function. In addition, unlike the oral contract in *U.S. Roofing*, the direct relations between SCEA and Plaintiffs were provided for in writing within the user manual and referenced on the SCEA website. ¶ 45. Thus, the direct dealings Plaintiffs had with SCEA satisfy vertical privity requirements because they were established as part of the sale transaction. Furthermore, an even more substantial relationship exists here between SCEA and Plaintiffs than in *U.S. Roofing* because the writings provide access to SCEA's PSN and firmware updates, which together ensure that the system continues to operate as it did when purchased. In other words, the dealings here are so significant that but for the agreement between SCEA and Plaintiffs ensuring future firmware updates, the PS3s would lose all but gaming functionality. Thus, the direct dealings between Plaintiffs and SCEA as alleged in the Complaint satisfy the vertical privity requirement. Also, whether there is vertical privity is a factual question inappropriate at the pleading stage. *U.S. Roofing, Inc.*, 228 Cal. App. 3d at 1442, n.3.

Further, SCEA's motion fails because SCEA extended express warranties to its ultimate purchasers both by the written warranty contained in the unit and because of advertisements and promotions that also formed the basis of the bargain. In a breach of implied warranty claim, privity is satisfied where the manufacturer extends an express warranty to the consumer by placing the consumer and the manufacturer in a direct relationship. *See, e.g., Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 229 (2006) (manufacturer brought itself into privity with the plaintiff, who had not purchased directly from manufacturer, by extending express warranty). Because SCEA extended an express warranty to Plaintiffs, SCEA brought itself into privity with Plaintiffs. *Atkinson*, 142 Cal.App.4th at 229; *U.S. Roofing, Inc.*, 228 Cal. App. 3d at 1442

(evidence of an express warranty from the manufacturer and communication between the manufacturer and consumer negate the need for privity for breach of implied warranty). Indeed, SCEA does not contest privity in relation to Plaintiffs' express warranty claims. If a consumer is in privity with a manufacturer for one claim it should be in privity for the other as well.

2. The Firmware Updates Were Part of the Original Bargained for Exchange

SCEA argues that because Plaintiffs did not complain of any problems at the time they purchased their PS3s and only later when Firmware 3.21 was released, Plaintiffs do not state a claim for breach of implied warranty. MTD at 14:14. Here, the subsequent firmware updates were an understood part of the original purchase. ¶¶ 33, 79. Plaintiffs have alleged and cited in their Complaint multiple instances where SCEA represented the ability of its system to be updated, upgraded, and remain current. ¶ 33. The problems did not occur until SCEA issued Firmware 3.21 that caused a loss of functionality; thus, Plaintiffs did not have problems to complain of at the time they purchased their PS3.

SCEA promoted firmware updates as necessary to maintain existing functionality. While SCEA claims that users were not forced to update to Firmware 3.21, had Plaintiffs not updated their systems, Plaintiffs would have lost core functions originally included in the PS3 at the time of purchase, such as the ability to play Blu-ray discs and access the PSN. Thus, because firmware updates are necessary to retain operation of unique functions, these updates (to the extent they benefitted functionality as promised) are part of the original bargained for exchange.

3. Loss of the "Other OS" Function Constitutes a Total or Substantial Loss of the PS3's Functionality

SCEA argues that Plaintiffs are barred from a breach of implied warranty claim because the PS3 still works, "but just not as well as the purchaser hoped." MTD at 12:14. While it is true that the PS3 retains some of its original functionality, it was sold with advertised functions that are no longer available and fails to perform in terms of its core capabilities, functions and purposes.

4. SCEA Knew or Had "Reason to Know" that Consumers Would Use The PS3 as Advertised and Expected to be Able To Do So for the Life of the Product

SCEA argues that Plaintiffs' claim fails because SCEA did not have "reason to know" of Plaintiffs' special purposes nor should SCEA be expected to support any particular function for the life of the system. MTD at 15:6. Plaintiffs, however, allege that SCEA knew that the PS3 systems would be used as SCEA advertised. Plaintiffs utilized the PS3 functions that SCEA and its senior-level executives repeatedly touted and advertised. Moreover, SCEA provided instructions for "Other OS" use in the user manual which was provided in the box at the point of purchase as well as referenced on SCEA's website. ¶ 45.

SCEA's reliance on *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291 (1995) is misplaced because that case stands for the proposition that items still operable, although perhaps not at the level desired by the consumer, do not result in *per se* breaches of implied warranty. MTD at 15:1. Here, SCEA completely stripped the PS3's core functions. At a minimum, whether or not customers could reasonably believe that basic functions sold with the device would remain usable for the life of the system is a factual question to be resolved by the jury. SCEA's argument that a company can sell a product and later remove any functions it desires is unreasonable, contrary to public policy and should be saved for the jury.

D. PLAINTIFFS STATE A MAGNUSON-MOSS WARRANTY ACT CLAIM

Since Plaintiffs state claims for breach of express and implied warranties, as recognized by California law and discussed above, Plaintiffs state claims under the Magnuson-Moss Warranty Act ("MMWA"). 15 U.S.C. § 2301(d)(1). SCEA's motion to dismiss should be denied on this basis alone.

In any event, SCEA also argues that under the MMWA a written representation must state a specific period of time to constitute a "written warranty". MTD at 16:7. SCEA cites 16 C.F.R § 700.3 as its authority. That section is merely an interpretation of the MMWA. The examples provided state a "specified time period" is required for "***certain*** representations such as "energy efficiency ratings for electrical appliances [and] care labeling of wearing apparel…" 16

C.F.R § 700.3 (emphasis added). Unlike a product which will obviously lose energy efficiency over the life of the product, this interpretation clearly does not encompass the removal of a material function such as the ability to install other operating systems as advertised by SCEA. A key function suddenly removed as opposed to a gradual loss due to product aging is not a "certain representation" posited by the interpretations of the MMWA.

Further, the MMWA "requires that limitations on implied warranties be 'limited in duration to the duration of a written warranty of reasonable duration,' and that the limitation be 'conscionable.'" *Berenblat v. Apple, Inc.*, No. 08-4969, 2010 WL 1460297, at *4 (N.D. Cal., April 9, 2010). SCEA's argument misinterprets the limitations period under the MMWA. The MMWA protects the consumer and limits the extent to which a party may attempt to disavow or limit their warranty, it does not serve to limit rights of the consumer it is intended to protect. In addition, the warranty terms are unconscionable because the warranty language attempts to grant SCEA unilateral authority to alter the PS3 in any way they see fit, as discussed herein in Part F.2. Thus SCEA's arguments against the MMWA claim fail.

E. PLAINTIFFS STATE CLAIMS FOR VIOLATIONS OF THE UCL

The UCL is a broad consumer protection statue that allows for injunctive and restitutionary relief against any person who engages in unlawful, unfair, or fraudulent business practices. *Shersher v. Sup. Ct.*, 154 Cal. App. 4th 1491, 1496-97 (2007). Injunctive relief under the UCL is a prospective equitable remedy that may be ordered as "necessary to prevent the use or employment by any person of any practice which constitutes unfair competition." Cal. Bus. & Prof. Code § 17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).

Restitutionary relief may be ordered as "necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203. In interpreting this provision courts have held that the restitutionary relief under the UCL is, "broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest." *Korea Supply*, 29 Cal. 4th at 1144. "The concept of restoration or restitution, as used in the UCL, is not limited only to the return of

money or property that was once in the possession of that person." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 178 (2000). Furthermore, the Supreme Court of California has recognized that "indirect purchases [through a retailer] may support UCL standing." *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 288 (2010); *see also Shersher*, 154 Cal. App. 4th at 1500 ("Nothing in *Korea Supply* conditions the recovery of restitution on the plaintiff having made direct payments to a defendant who is alleged to have engaged in false advertising or unlawful practices under the UCL.").

Despite this authority, SCEA contends that the Court should dismiss Plaintiffs' UCL claim because they do not seek a "restitutionary remedy." MTD at 19:20. SCEA's argument fails. First, it is not necessary to seek or be eligible for restitution to have standing. *Clayworth*, 49 Cal. 4th at 790; *Finelite, Inc. v. Ledalite Architectural Prod.*, No. 10-1276, 2010 WL 3385027, at *2 (N.D. Cal. Aug. 26, 2010) (same). SCEA ignores the fact that Plaintiffs have explicitly requested "injunctive relief in the form of enabling the 'Other OS' function of the PS3," and reversing the crippling effect of Firmware 3.21. ¶¶ 161-63. The availability of injunctive relief is sufficient grounds to deny SCEA's motion without addressing the appropriateness of a restitutionary remedy.

Second, SCEA's motion fails because Plaintiffs have set forth sufficient grounds to obtain restitutionary relief arising from SCEA's unilateral decision to eliminate the PS3's valuable "Other OS" function. The Complaint alleges that between November 2006 and April 2010, SCEA engaged in a extensive advertising campaign in which it, "misrepresented in its advertising, marketing, and other communications disseminated to Plaintiffs, the Class, and the consuming public that the PS3 was capable of being used as a personal computer via the 'Other OS'" function. ¶¶ 1-5, 28-51, 150. "[SCEA] specifically advertised the PS3's 'Other OS'" function as an "essential and important characteristic which enabled users to . . . use the PS3 as a personal computer," in an effort to distinguish the PS3 from its competitors in the highly competitive video game console market. ¶¶ 2, 28-51.

Plaintiffs and Class members paid for the "Other OS" function as part of the purchase

price for the PS3 and would not have paid as much for their PS3, if at all, without the "Other OS" function. ¶¶ 8, 10-20, 47-51, 158-59. Therefore, SCEA was "enriched" by money it received as a result of the promotion and inclusion of the "Other OS" function on the PS3. SCEA's unilateral decision to disable the "Other OS" function of the PS3 resulted in the loss of a key function and left Plaintiffs and the Class with a product that was significantly less valuable than for which they bargained. *Id*. Plaintiffs have suffered a cognizable injury to their property (*i.e.*, the PS3s) and lost money (*i.e.*, the amounts they overpaid for the PS3s) as a result of SCEA's conduct. Accordingly, Plaintiffs have established a viable claim for restitution.

1. SCEA Has Engaged in Unlawful and Unfair Conduct

The UCL's "unlawful" prong allows a plaintiff to borrow from virtually any law or regulation to serve as the predicate wrong for a UCL claim. Hence, establishing a violation of the borrowed law results in a *per se* violation of the UCL. *Kasky v. Nike Inc.*, 27 Cal. 4th 163, 950 (2002); *Cel-Tech Comm. Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999).

In this case, Plaintiffs have established that SCEA violated the unlawful prong of the UCL, because its conduct "violates the Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq*., the Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301 *et seq*.), the Computer Fraud and Abuse Act (18 U.S.C. § 1030), and False Advertising Law (Cal Bus. & Prof. Code §§ 17500, *et seq*.")[4] ¶ 153. As set forth in detail herein, Plaintiffs have adequately pled a violation of each of the above laws and therefore established a basis for recovery under the UCL's unlawful prong.

[4] SCEA asserts that Plaintiffs fail to state an FAL claim because its representations were true when made. SCEA's representations, however were untrue and misleading because if the Warranty, the SSLA and the TOS do in fact allow SCEA to unilaterally remove advertised and essential functions, then the PS3 is not like a computer with an operating system and software that are available for use for the life of the product. Additionally, SCEA's representations that system firmware updates add new features so that customers "don't have to worry about your PlayStation®3 system becoming outdated or missing out on cool new features" were untrue. ¶ 33. Further, SCEA's representations were misleading because SCEA failed to adequately disclose material information, namely, that it purportedly reserved the unilateral right to take the advertised functions away through firmware updates. ¶ 68.

As to Plaintiffs' claim for unfair business practices, SCEA cannot rely on the hidden terms in its Warranty, SSLA and TOS (to the extent they can even be read as SCEA suggests) to absolve it of liability under the UCL's unfair prong. *See In re Facebook PPC Advertising Litigation*, No. 09-0343, 2010 WL 1746143, at *7 (N.D. Cal. Apr. 22, 2010) (plaintiffs stated claim for unfair business practices notwithstanding language in defendant's hidden disclaimer).

2. Rule 9(b) Does Not Apply to Plaintiffs' UCL Claims

The applicable law is clear that fraud is not an essential element of a claim under the "unfair" or "fraudulent prong" of the UCL. To state a claim under the "fraudulent" prong of the UCL, "'it is necessary only to show that 'members of the public are likely to be deceived.'" *See, In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud.") Similarly, a defendant's conduct is "unfair" within the meaning on the UCL if it has engaged in conduct that is, "immoral, unethical, unscrupulous or substantially injurious to consumer." *State Farm Fire & Cas. Ins. v. Sup. Ct.*, 45 Cal. App. 4th 1093, 1103-04 (1996).

SCEA argues that Plaintiffs' claims under the "unfair" and "fraudulent" prongs of the UCL fail because they do not meet the heightened pleading standards Rule 9(b). MTD at 9-10. SCEA fails to establish any basis for the application of Rule 9(b) to Plaintiffs' UCL claim. Furthermore, even, "[w]here averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated." *Vess v. Ciba-Geiby Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Here, the Court should refuse to apply Rule 9(b) to Plaintiffs' UCL claim because Plaintiffs' claims are not solely based on allegations of fraud. ¶¶ 28-69, 148-163.

3. Plaintiffs' UCL Claims are Pled Specifically and Satisfy the Heightened Requirements of Rule 9(b)

Even if pleading standards of Rule 9(b) apply, SCEA's motion to dismiss fails because Plaintiffs carefully pled allegations establishing the, "who, what, when, where, and why"

required under Rule 9(b). ¶¶ 28-69.

Specifically, the Complaint details the numerous misrepresentations by SCEA during the class period in which it promoted and advertised the "Other OS" function as a value added characteristic of the PS3. ¶¶ 28-69. The Complaint also establishes that each of these representations were made by SCEA and, to the extent possible, identifies the specific employee or agent who made these misrepresentations. *Id.* The Complaint sets forth the specific date or period of time in which SCEA made these misrepresentations. *Id*. The Complaint specifies that SCEA disseminated these misrepresentations to Plaintiffs and Class, through its website, press releases, product packaging, and owner's manual. *Id.* The Complaint details the bait and switch tactics utilized by SCEA in the promotion of the "Other OS" function and disabling it via Firmware 3.21. *Id.* The Complaint alleges that the reason for SCEA's conduct was to maximize its profits by inducing consumers to purchase the PS3 at higher prices. *Id*. Additionally, the Complaint includes a specific section that details the manner in which Plaintiffs have satisfied the requirements of Rule 9(b). ¶¶ 64-69. Simply put, the Complaint is well pled and easily meets even the heightened pleading standards under Rule 9(b). Accordingly, Plaintiffs request that the Court deny SCEA's motion to dismiss their UCL cause of action.

F. PLAINTIFFS STATE CLAIMS FOR VIOLATION OF THE CLRA

1. Plaintiffs Have Sufficiently Alleged a Causal Connection

Under the CLRA's Section 1780(a), "causation is sufficiently alleged where the facts plausibly suggest that the defendant's misrepresentation 'played a substantial part, and so has been a substantial factor' in influencing the plaintiff's actions which, in turn, led to his harm." *Ramkissoon v. AOL*, No. 06-58663, 2010 WL 2524494, at *8 (N.D. Cal. June 23, 2010) (quoting *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1386-87 (2010)).

Plaintiffs allege that they relied on SCEA's representations that the PS3 could be used to run Linux or other operating systems and to access the PSN to play games and chat with friends online. ¶¶ 10, 12, 14, 16, 18. SCEA's representations played a substantial factor in influencing their decision to buy the PS3s over other video game consoles. *Id.* SCEA, however, purportedly

reserved the right to remove such advertised functions at any time without clearly explaining or adequately disclosing the right; instead it was hidden in the SSLA. When SCEA exercised that purported right, Plaintiffs were damaged.[5] Contrary to SCEA's position, the language in the SLLA, TOS and Warranty do not confer an unfettered right of removal. Plaintiffs' damages (the loss of the "Other OS" or other advertised functions) are clearly "as a result of" the alleged unlawful conduct. *See, e.g., Rubio v. Capital One*, No. 08-56544, 2010 WL 2836994, at *7 (9th Cir. June 23, 2010) (allegations that plaintiff lost money when defendant increased the advertised fixed APR based on hidden term in credit card agreement sufficient for causation)[6]; *Hale*, 183 Cal. App. 4th at 1386-87 (allegations that plaintiff entered into contract expecting regular rates and instead charged excessive rates sufficient for causation).

Also, Plaintiff Baker's and Plaintiff Harper's claims are timely. The CLRA's statute of limitations run from the "time a reasonable person would have discovered the basis for the claim." *Mass. Mut. Life Ins. Co. v. Sup. Ct.*, 97 Cal. App. 4th 1282, 1295 (2002); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1148 (N.D. Cal. 2005). Here, the statute of limitations began to run on the date SCEA issued Firmware 3.21.

Finally, SCEA's representations and omissions are actionable. The CLRA is governed by the "reasonable consumer" test, meaning that to prevail, Plaintiffs must only show that "members of the public are likely to be deceived." *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The CLRA prohibits false advertising as well as advertising which,

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[5]Under the CLRA, the damage the Plaintiffs must show is "any damage" which is not synonymous with "actual damages" and "may encompass harms other than pecuniary damages." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 634, 640 (2009).

[6]Although the plaintiff's claims in *Rubio* were brought under the UCL, the UCL's causation requirement is similar to that of the CLRA's. Section 1780(a) of the CLRA states: "Any consumer who suffers any damage **as a result of** the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person . . . [.]" (emphasis added). A plaintiff asserting a UCL claim must allege that he or she "suffered injury in fact . . . and lost money or property **as a result of** the unfair competition." Cal. Bus. & Prof. Code § 17204. (emphasis added).

"although true, is either actually misleading or which has the capacity, likelihood or tendency to deceive or confuse the public." *Id.* Whether a business practice is deceptive is generally a question of fact inappropriate for resolution on a Rule 12(b)(6) motion. *Id.*

Specific statements of fact which can be established or disproved through discovery are not puffery. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. 2005). Further, statements not actionable standing alone, are actionable if, "[v]iewed in context, the language arguably is misleading to a reasonable consumer." *Haskell v. Time, Inc.* 857 F. Supp. 1392, 1401-02 (E.D. Cal. 1994). For instance, statements that a service "[w]orks virtually ANYWHERE you can see SKY" and that the "products can help you maintain productivity and keep in contact from remote locations or worksites" have been found actionable. *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 999 (N.D. Cal. 2007). Similarly here, statements that the PS3 is like a computer that can be used with other operating systems such as Linux and to access the PSN are actionable. Accordingly, SCEA's argument fails.[7]

2. Plaintiffs Have Sufficiently Pled Unconscionability

SCEA challenges Plaintiffs' CLRA claim under Section 1770(a)(19), which prohibits "[i]nserting unconscionable provisions in contracts." Unconscionability refers to "'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). Unconscionability has both a procedural and a substantive element. *Gentry v. Super. Ct.*, 42 Cal. 4th 443, 468-69 (2007).[8] While unconscionability is a question of

[7]SCEA asserts that "Most of the representations cited by Plaintiffs are . . . inactionable puffery," but then only cites to Paragraph 106 of the Complaint, which alleges that SCEA marketed the PS3 as a personal computer. When all of SCEA's statements are viewed as a whole and in context, however, this statement is also actionable. *Williams*, 552 F.3d at 939 (while the statement "nutritious" was arguably puffery, it contributed to the deceptive packaging of the product as a whole).

[8]Procedural unconscionability concerns the manner in which the agreement was sought or obtained, while substantive unconscionability concerns the impact of the term itself and focuses on overly harsh or one-sided results. *Gentry*, 42 Cal. 4th at 468-69. Procedural and substantive

law for the court . . . factual issues may bear on that question." *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 480 (2006); *see also Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83, 92 (2000).[9]

Plaintiffs have alleged facts supporting their claim under Section 1770(a)(19). First, Plaintiffs allege that the SSLA is contained in a contract of adhesion SCEA imposed through its superior bargaining strength without the opportunity to negotiate the terms. ¶ 115. Thus, the SSLA is procedurally unconscionable. *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148, 160 (2005) ("The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which is imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."). Second, the SSLA is substantively unconscionable because it is one-sided, harsh and oppressive to the extent it allows SCEA to unilaterally remove the PS3's advertised functions without compensation and was contrary to its representations. *See, e.g., Nagrampa v. MailCorps., Inc.*, 469 F.3d 1257, 1286 (9th Cir. 2006); *24 Hour Fitness, Inc. v. Super. Ct.*, 66 Cal. App. 4th 1199, 1213 (Cal. Ct. App. 1998); *State ex rel. Celebrezze v. Ferraro*, 63 Ohio App. 3d 168, 173-74 (1989) (unconscionability found where the agreement was one-sided because, in contrast to representations that termite extermination services were guaranteed, only retreatment was available).

The cases SCEA cites are distinguishable. *Meridian Project Systems, Inc. v. Hardin Constr. Co., LLC*, 426 F. Supp. 2d 1101 (E.D. Cal. 2006) did not involve a "click wrap" license that allowed the software manufacturer to remove advertised functions. That case also involved

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unconscionability need not be present in the same degree to be unenforceable. *Id.* Rather, a "sliding scale" is invoked, such that the greater the procedural unconscionability, the less evidence of substantive unconscionability is required, and vice versa. *Id.*

[9]Under California law, "[w]hen it is claimed . . . that the contract or any clause thereof may be unconscionable the parties [are] afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." Cal. Civ. Code 1670.5.

parties with equal bargaining power and was decided on summary judgment. In *Leong v. Square Enix of America Holdings, Inc.*, No. 09-4484, 2010 WL 1641364, at *1, 10 (C.D. Cal. April 20, 2010), the plaintiffs knew upfront that they had to pay a monthly service fee to continue playing the online video game at issue and therefore the clause revoking the user's software license for failure to pay the monthly fees was not unconscionable. In contrast here, Plaintiffs believed their PS3 came with certain functions based on SCEA's representations and the SSLA did not advise them to the contrary.[10]

G. PLAINTIFFS STATE A CLAIM FOR VIOLATION OF THE CFAA

The CFAA imposes liability for "knowingly caus[ing] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caus[ing] damage without authorization, to a protected computer." 18 U.S.C. § 1030(a)(5)(A)(i). SCEA wrongly argues that Plaintiffs fail to allege "damage" "without authorization" as required by the statute.

First, the SSLA, TOS and Warranty do not authorize SCEA to disable or remove the "Other OS" function or authorize SCEA to disable or remove the ability to access the PSN and to play games and chat with friends online if an update is not downloaded. At best, the SSLA, TOS and Warranty are ambiguous and must be construed against SCEA. *Badie v. Bank of America*, 67 Cal. App. 4th 779, 798 (1998) (credit card agreement was ambiguous and canon of construction interpreting ambiguity against drafter was a relevant consideration).

Second, SCEA asserts that it notified the public in advance that Firmware 3.21 would disable the Other "OS" function and that it was doing so due to security concerns related to its intellectual property. These assertions, however, are beyond the four corners of the Complaint, which the Court must accept as true. Plaintiffs allege that SCEA represented that Firmware 3.21's purpose was for "security reasons," when in actuality it was to protect SCEA's bottom

[10]Plaintiffs' unconscionability claims are not barred by the statute of limitations for the same reasons discussed above. *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1295; *Chamberlan*, 369 F. Supp. 2d at 1148. At minimum, this is a factual question inappropriate here.

line. ¶ 130. Plaintiffs also allege they had no choice but to download and install Firmware 3.21, otherwise they would lose the PS3's other important advertised functions. ¶ 132. Moreover, Plaintiffs allege that SCEA could have accomplished its stated purpose without disabling the "Other OS" function. ¶ 4. Thus, it cannot be said that Plaintiffs provided authorization if it was obtained through misrepresentations and oppression. *See, e.g., Multiven, Inc. v. Cisco Systems, Inc.*, No. C 08-05291, 2010 WL 2889262, at *3 (N.D. Cal. July 20, 2010) (no authorization where defendant accessed Cisco network using login and password given to him for use by Cisco employee in violation of company policies); *In re Apple & AT&T Antitrust Litig.*, 596 F. Supp. 2d 1288, 1308 (N.D. Cal. 2008) (lack of authorization where plaintiffs allege they authorized a firmware update but not destruction of their iPhones).[11]

H. PLAINTIFFS STATE A CLAIM FOR CONVERSION

The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages resulting from the conversion. *See Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1065 (1998). The Complaint alleges that Plaintiffs and similarly situated PS3 purchasers acquired an ownership interest in their PS3 and the functions thereon. ¶ 165. SCEA wrongfully interfered, took, and injured Plaintiffs' property by releasing Firmware 3.21 which disabled the "Other OS" function. ¶ 166. Plaintiffs and the Class were damaged as a result of SCEA's conduct by losing a key value added function of the PS3. ¶ 167.

SCEA contends the Court should dismiss the conversion claim because their licensing agreements do not provide Plaintiffs with ownership over the "Other OS" function. SCEA's argument fails *ab initio* because it improperly requires the Court to ignore the allegations of the Complaint and look beyond its four corners. *Broam v. Bogan*, 320 F.3d 1023, 1029 (9th Cir.

[11] The case SCEA cites is distinguishable. In *SecureInfo Corp. v. Telos Corp.*, 387 F. Supp. 2d 593, 608-09 (E.D. Va. 2005), there were no allegations that the defendant had misled the plaintiff into signing a licensing agreement providing authorization to the server.

2003). SCEA's argument also fails because Plaintiffs' conversion claim does not merely allege an injury to the "Other OS" function. Rather, the Complaint alleges that Firmware 3.21 caused a significant loss of functionality and injury to Plaintiffs' undisputed property interest in their PS3s. Thus, SCEA cannot establish a basis to dismiss Plaintiffs' conversion claim.

I. PLAINTIFFS HAVE ESTABLISHED A BASIS FOR RESTITUTION PURSUANT TO THEIR CLAIM FOR UNJUST ENRICHMENT

Although there is some dispute over whether unjust enrichment constitutes an independent cause of action, California courts have generally recognized that plaintiffs, "may assert a claim for restitution based on a theory of unjust enrichment." *See Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100-02 (N.D. Cal. 2006); *Hirsch v. Bank of America*, 107 Cal. App. 4th 708, 722 (2003) ("Appellants have stated a valid cause of action for unjust enrichment"); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 206 F.2d 495, 498 (9th Cir. 1953) ("[I]t is of course true that the California courts…recognize a cause of action based on unjust enrichment"); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004) ("[u]nder California law, unjust enrichment is an action in quasi-contract"). As this Court has recognized, "[s]ubstance, of course, is more important than labels, and any failure by plaintiffs to attach the correct label to a claim for relief would not be fatal in and of itself." *In re Sony PS3 Litigation*, No. C 09-4701, 2010 WL 3324941, at *3 (N.D. Cal. Aug. 23, 2010).

In this case, Plaintiffs are entitled to restitution in the form of all or part of the PS3's purchase price as a result of SCEA's decision to disable the "Other OS" function. Specifically, the Complaint alleges that SCEA advertised the "Other OS" function as a value added characteristic that distinguished the PS3 from competing video game consoles. ¶¶ 2, 28-51. Plaintiffs paid for the "Other OS" function as part of the purchase price for the PS3 and would not have paid as much for their PS3, if at all, without the "Other OS" function. ¶¶ 8, 10-20, 47-51, 158-159. Therefore, SCEA's unilateral decision to disable the "Other OS" function reduced the value of the PS3 and left consumers with a lesser valuable than they bargained for. *Id.* Thus, the Court should deny SCEA's motion and hold that Plaintiffs may assert a claim for restitution

under an unjust enrichment theory.

IV. CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court deny SCEA's motion to dismiss. Should the Court find any deficiencies in Plaintiffs' Complaint, Plaintiffs request leave to amend.

Dated: October 12, 2010

Respectfully submitted,

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Counsel for Plaintiffs

I, Rosemary M. Rivas, am the ECF User whose identification and password are being used to file the foregoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SCEA'S MOTION TO DISMISS. I hereby attest that James A. Quadra and James Pizzirusso have concurred in this filing.

Dated: October 12, 2010

FINKELSTEIN THOMPSON LLP

By: /s/Rosemary M. Rivas

Counsel for Plaintiffs