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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re SONY PS3 "OTHER OS" LITIGATION

CASE NO. 3:10-CV-01811

DEFENDANT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

Date: November 4, 2010
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg
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RULES

I. INTRODUCTION

Plaintiffs' claims and the factual allegations offered to support them are patently unsuitable for class treatment, as defendant Sony Computer Entertainment America LLC ("SCEA") demonstrated in its opening brief. Plaintiffs offer nothing in their opposition that refutes SCEA's showing and accordingly the Court should strike the class allegations.

The five putative class representatives purchased PS3s over a span of more than two years from unidentified retailers (not SCEA) at significantly different purchase prices. They have declined in both the Consolidated Complaint and their Opposition to identify specifically what (if any) statements by SCEA each of them actually read and relied upon in making their purchasing decision. Plaintiffs' evasiveness does not save them – the mere variation among purchase dates precludes any assertion that all five saw and relied upon the representations alleged in the Consolidated Complaint. The five putative class representatives used their PS3s in very different ways: Mr. Stovell never utilized the Other OS function in 30 months (notwithstanding that he supposedly intended to at the time of purchase); conversely, Mr. Herz used the feature extensively, including to develop applications and program software. Nothing that Plaintiffs say in their opposition dispels the conclusion compelled by these facts: even the five putative class representatives lack the necessary cohesiveness to prosecute a class action.

But the lack of cohesion is even more apparent when the absent putative class members are considered. For example, the Consolidated Complaint contains a litany of supposed injuries sustained by absent class members but not by the putative class representatives – including purchased peripherals rendered superfluous by Update 3.21 and data lost due to its download. SCEA identified these injuries unique to absent class members in its opening brief. Plaintiffs offered no response, thus conceding that these consequential damages could not be supported by proof relevant to the class representatives.

Overlaying the inescapable defects regarding predominance of common issues and typicality is the fact that the class as defined would include many, likely millions, of PS3 owners who have suffered no injury, because they never saw or relied upon any representation by SCEA regarding the Other OS feature, never intended to use this feature, and/or regard their PS3 as just

as valuable today as it was prior to the release of Update 3.21. Try as they might, Plaintiffs cannot manufacture an injury for absent class members who do not themselves contend to have suffered a loss, *i.e.*, standing to sue.

Finally, SCEA established in its opening brief that Plaintiffs' class is not ascertainable. Plaintiffs simply ignored definitional flaws SCEA raised, most notably the fact that PS3 gift recipients and gift givers cannot objectively and readily discern their right to participate in the class. Plaintiffs did argue that class members could be determined by "readily available mechanisms" but failed to elucidate the mechanisms they had in mind. Thus, for all the reasons stated below and in SCEA's opening brief, the class allegations should be stricken.

II. THE MOTION TO STRIKE IS PROCEDURALLY APPROPRIATE

Plaintiffs expend more than six pages arguing that SCEA's motion to strike is procedurally improper and even contend that SCEA attempted to mislead the Court by citing *General Telephone Company of Southwest v. Falcon.*[1] But references to *Falcon* in the context of pleading challenges to class allegations appear repeatedly in the very cases that Plaintiffs cite. For example, in one such case, a Northern District of California Court stated:

> Class allegations are generally not tested at the pleadings stage and instead are usually tested after one party has filed a motion for class certification. . . . However, as the Supreme Court has explained, '[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim.' *Gen. Tel. Co. of Sw. v. Falcon* [citation omitted]. Thus, a court may grant a motion to strike class allegations if it is clear from the complaint that the class claims cannot be maintained.[2]

Another cited case from the Northern District includes the following statement:

> Rule 23(c)(1) provides that 'as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.' Though that determination is often undertaken after the issue of class certification has been fully briefed, class allegations can be stricken at the pleading stage as well. [citation omitted] Whether discovery (or further discovery) is necessary to refine and clarify class-certification issues is a case-specific

[1] Opposition to Motion to Strike (Docket #103), 2:9 – 8:13.
[2] *Collins v. Gamestop Corp.,* 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6, 2010) (cited in Opposition to Motion to Strike (Docket #103), 4:6 & 20:8, n.9); *Accord Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205, 1211 (C.D. Cal. Aug. 25, 2008) (citing *Falcon* as well as *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) and *Miller v. Motorola Inc.*, 76 F.R.D. 516, 518 (N.D. Ill. Nov. 10, 1977)).

> determination, but dismissal of class allegations at the pleading stage is nonetheless rare. . . . But when the necessary factual issues can be resolved without discovery, it is not required. *Kamm*, 509 F.2d at 210.[3]

Consequently, notwithstanding all of Plaintiffs' lamentations to the contrary, it is well-settled that class allegations may be attacked through a motion to strike. Indeed, this case is akin to *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978 (N.D. Cal. Jan. 21, 2009), and *Dodd-Owens v. Kyphon, Inc.*, 2007 WL 3010560 (N.D. Cal. Oct. 12, 2007), in which two different Northern District of California courts concluded that class allegations were susceptible to pending pleading challenges – even though discovery had not yet commenced.[4]

Plaintiffs also argue repeatedly that the Court may not look beyond the four corners of the Consolidated Complaint in ruling on SCEA's motion to strike, and thus may not consider the contents of the Underlying Complaints, nor any matter of which SCEA has requested the Court take judicial notice. Notably, the opposition brief is devoid of any legal authority for this proposition, other than as it relates to the Underlying Complaints. Even there the cited authority fails to support Plaintiffs' position that "[i]t is well settled that parties may not rely on allegations made in a complaint that is superseded by a consolidated complaint . . . courts routinely reject defendants' arguments based on prior, superseded complaints."[5] The three cited cases are all from distant courts, suggesting that the issue is hardly well-settled, particularly in the Ninth Circuit. None of the cases involved a motion to strike class allegations.[6] The only case involving class claims actually supports SCEA's references to the Underlying Complaints in its pending

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[3] *Brazil v. Dell Inc.*, 2008 WL 4912050, at *3 (N.D. Cal. Nov. 14, 2008) (cited in Opposition to Motion to Strike (Docket #103), 4:14 & 5:16-17); *see also Hibbs-Rines v. Seagate Tech., LLC*, 2009 WL 513496, at *3 (N.D. Cal. Mar. 2, 2009) ("Defendants correctly assert that class allegations may be stricken at the pleading stage.") (cited in Opposition to Motion to Strike (Docket #103), 5:14-15).

[4] Plaintiffs also confuse the applicable standard, asserting that the Motion to Strike is governed by Rule 12(f). Opposition to Motion to Strike (Docket #103), 2:11-3:20. Although the Motion to Strike is procedurally based on Rule 12(f), it is governed by Rule 23. *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607, 612 (W.D. Wis. Feb. 13, 2003); *Cook County Coll. Teachers Union v. Byrd*, 456 F.2d 882, 885 (7th Cir. 1972).

[5] Opposition to Motion to Strike (Docket #103), 8:1-12.

[6] One court did decline to consider allegations from a prior complaint in ruling on a motion to dismiss. *Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 264 (D.N.J. Jul. 6, 2000). However, there the Court found that allegations dropped by a single plaintiff from a prior pleading, argued in support of an out of jurisdiction pleading standard, were not sufficient to warrant granting a motion to dismiss.

motions, as the Court held that "the prior allegations . . . stand as evidentiary admissions, which the defendants may offer to show that plaintiffs' theory of the conspiracy has changed" and "to contradict plaintiffs' theory of the case on the merits."[7] Numerous other courts agree.[8] Thus, the allegations of the "superseded" underlying complaints are nonetheless available to SCEA for use in attacking Plaintiffs' class action theories.

Moreover, it is well-settled that in ruling on a motion to strike, like a motion to dismiss, the Court may consider material submitted with the complaint, including documents attached to the complaint and incorporated therein by reference,[9] documents referenced by the complaint but not attached,[10] and matters subject to judicial notice.[11]

III. THE PROPOSED CLASS IS NOT ASCERTAINABLE

Plaintiffs overtly acknowledge that a class definition must be precise, objective, and identifiable based on readily-available criteria for the class to be ascertainable.[12] They concede that membership may not turn on extensive fact-finding, a resolution of the merits of the claims,

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[7] *In re Commercial Tissue Prod.*, 183 F.R.D. 589, 592 (N.D. Fla. Jul. 22, 1998).

[8] *See Pennsylvania R. Co. v. City of Girard*, 210 F.2d 437, 440 (6th Cir. 1954) ("[P]leadings withdrawn or superseded by amended pleadings are admissions against the pleader in the action in which they were filed."); *see also White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 n.5 (5th Cir. 1983); *U.S. v. Purdy*, 144 F.3d 241, 246 (2d Cir. 1998) (citing *U.S. v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991)); *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1432 (10th Cir. 1990).

[9] *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990); *Kaufman & Broad–South Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1472 (N.D. Cal. May 7, 1993) (disapproved of on other grounds by *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995)).

[10] *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (plaintiff not required to attach to the complaint the documents on which it is based, but if he or she fails to do so, defendant may attach to a Rule 12(b)(6) motion the documents referred to in the complaint to show that they do not support plaintiff's claim) (overruled on other grounds in *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 n.16 (11th Cir. 1999); *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (court may consider the full text of a document that the complaint quotes only in part).

[11] *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16, 20 (1st Cir. 2003).

[12] *See DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Deitz v. Comcast Corp.*, 2007 WL 2015440, at *8 (N.D. Cal. Jul. 11, 2007); Opposition to Motion to Strike (Docket #103), 8:21-28.

or the subjective belief of class members.[13] Nonetheless, they fail to offer a class definition consistent with these requirements.

The parties and the Court have no means of determining those individuals who "continued to own the PS3 on March 27, 2010," as opposed to those who sold, gave away, or simply disposed of their PS3s before, on or after that date.[14] Plaintiffs offer a circular argument that their class is ascertainable by identifying "those persons who actually possessed a PS3 on a date certain"[15] through "readily available mechanisms."[16] But Plaintiffs propose no such mechanism and thus have not shown how class membership can be determined without extensive individualized inquiry. This is glaringly obvious when one considers the effect on class membership of having given or received a PS3 as a gift – a complicating factor raised by SCEA in its opening motion, and completely ignored by Plaintiffs in their opposition brief. Plaintiffs said nothing to clarify the uncertainty regarding whether a PS3 purchased to be given as a gift or received as a gift from a third party qualifies as one bought for "personal use and not resale."

Confusing the matter further, Plaintiffs contend that the "personal use" requirement is easily resolved by the "objective" inquiry of whether "a particular person purchase[d] a PS3 for use in a business."[17] Rather than resolving the problem, Plaintiffs' assertion only highlights it. What qualifies as buying for "use in a business?" Would the purchase by Mr. Huber, or others like him, who supposedly used their PS3 to develop applications, software programs and video games constitute "use in a business"?

Plaintiffs also assert that they have defined their class to include only those that purchased for "personal use" to comply with the limitations of the CLRA.[18] But that does not save them either – the mere fact that the CLRA does not permit claims by an individual who has purchased for "business" purposes does not answer the question of whether, in this particular instance, the

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[13] *Adashunas v. Negley*, 626 F.2d 600, 603-04 (7th Cir. 1980) (class certification denied because of extensive fact finding necessary to identify members of class); Opposition to Motion to Dismiss (Docket #104), 8:15-12:7.
[14] Motion to Strike (Docket #96), 15:13-16.
[15] Opposition to Motion to Strike (Docket #103), 9:1-9.
[16] Opposition to Motion to Strike (Docket #103), 11:12-27.
[17] Opposition to Motion to Strike (Docket #103), 9:20-10:2.
[18] Opposition to Motion to Strike (Docket #103), 9:22-10:1.

proposed class is ascertainable, given that Plaintiffs have proffered no objective or readily-available means of distinguishing those who purchased for "personal use and not for resale" from among all current owners of PS3s.[19]

In addition, *Shein v. Canon U.S.A., Inc.*, cited by Plaintiffs, comports with SCEA's position on ascertainability – in that case, everyone who owned a Canon printer that emitted an ink status level message was in the class[20] – membership did not turn on the subjective intent of the original retail purchaser at the time he or she bought the printer, *i.e.*, whether to use it for personal versus business purposes, or whether to give it as a gift or resell it on eBay. Class membership turned on the simple requirement that an individual own(ed) the subject printer.[21] *Williams v. City of Antioch* is similarly supportive of SCEA's position – the court concluded that the original class definition improperly required "inquiring into the subjective mindsets of individual police officers."[22] Another case cited by Plaintiffs, *O'Connor v. Boeing North American, Inc.*, is one in which the Court originally rejected the proposed class definition due to ascertainability concerns, but then allowed a refined class definition to proceed based on evidence the plaintiffs offered showing their definition to be reasonable.[23]

The remainder of Plaintiffs' cited authority is factually inapposite – involving challenged lending practices or employment claims – and thus hardly supports Plaintiffs' assertion that "courts routinely reject objections to class certification based on the claim that some consumers' use of a particular product for business purposes . . . makes a class definition unmanageable or unascertainable."[24]

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[19] It was Plaintiffs' decision to define their class to include only those individuals who purchased for "personal" purposes, but also allege that numerous PS3 owners purchased for "business" purposes. SCEA cannot be blamed for identifying the ascertainability flaws that this presents.
[20] 2010 WL 3170788, at *6 n.13 (C.D. Cal. Aug. 10, 2010).
[21] *Id.*
[22] 2010 WL 3632197, at *6-7 (N.D. Cal. Sept. 2, 2010).
[23] 184 F.R.D. 311, 327- 29 (C.D. Cal. Jul. 13, 1998).
[24] Opposition to Motion to Strike (Docket #103), 10:10-11:3 (citing *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 551 (E.D. Va. May 12, 2000) (court could examine the general nature of the debts at issue to determine categorically if they were personal or business in nature); *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 598-99 (E.D. Cal. Feb. 22, 1999) (class action involving lending practices); *Powell v. Advanta Nat'l Bank*, 2001 WL 1035715, at *1 (N.D. Ill. Sept. 10, 2001) (class action involving lending practices); *Sullivan v. Kelly Services, Inc.*, 268 F.R.D. 356, 361 (N.D. Cal. Apr. 27, 2010) (class action involving employment claims)).

IV. PLAINTIFFS' PROPOSED CLASS IS OVERBROAD

"[N]o class may be certified that contains members lacking Article III standing"; rather a proposed "class must [] be defined in such a way that anyone within it would have standing."[25] Plaintiffs' proposed class is comprised of numerous individuals that lack standing because they sustained no injury: they did not see any representation regarding the Other OS function, they did not rely upon such a representation in making their purchasing decision, and they never used or intended to use the Other OS function.[26] Certification of the proposed class is therefore improper.

Plaintiffs offer no legal authority in their response to SCEA's standing argument and fail to even attempt to distinguish SCEA's cited cases. Instead, they regurgitate their arguments regarding the supposedly pervasive nature of SCEA's representations regarding the Other OS function.[27] This gains them nothing, particularly in light of the fact that even the five class representatives have yet to identify a single specific statement by SCEA that each of them saw and relied upon. But more notably, the very chat room that Plaintiffs quoted from in their Consolidated Complaint is replete with statements by putative absent class members indicating the absence of any injury prompted by SCEA's actions,[28] and confirms that there was no ubiquitous representation by SCEA regarding the Other OS function reviewed and relied upon by all PS3 purchasers.[29]

Based on the overbreadth of Plaintiffs' proposed class alone, the Court may strike the class allegations. Neither the Court nor the parties should bear the burden, time, and expense of litigating a class action that ultimately cannot be certified.

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[25] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).
[26] Motion to Strike (Docket #96), 15:22-16:15.
[27] Opposition to Motion to Strike (Docket #103), 14:24-27.
[28] Motion to Strike (Docket #96), 16:9-12. As a further example of Plaintiffs' desire to have it both ways, Plaintiffs demand that the Court bar SCEA from using documents that Plaintiffs cite in their Consolidated Complaint. Specifically, they demand that the Court not consider these Internet postings even though they were made on the same site as the postings Plaintiffs cite in their Consolidated Complaint. Opposition to Request for Judicial Notice (Docket #102), 6:14-7:2. Plaintiffs cannot both rely on these postings as a basis for their claims and also demand that the Court not consider them when offered by SCEA. By relying on these postings, Plaintiffs have opened the door to their admission and they must live with the obvious consequences.
[29] Motion to Strike (Docket #96), 16:4-8.

V. PLAINTIFFS ARE NOT TYPICAL OF THEIR PROPOSED CLASS

A. The Class Representatives' Facts, Claims and Defenses Are Not Typical Of Those Of Putative Class Members

Plaintiffs' argument regarding typicality is relatively brief, and consists principally of the notion that everyone who bought a PS3 has been injured in the same way because of the release of Update 3.21.[30] Plaintiffs' argument entirely ignores the substantial distinctions between and among the injuries alleged by the class representatives and those ascribed in the Consolidated Complaint to absent class members, as well as other differences SCEA highlighted in its opening brief and its Motion to Dismiss, and the apposite legal authority SCEA cited.[31]

Plaintiffs' theory of injury turns on the fundamental notion that everyone bought a PS3 based on SCEA's supposed representations regarding the Other OS feature. Of course, given that the class representatives themselves have yet to specifically identify the representations they each saw and relied upon, Plaintiffs' theory is insupportable. In fact, based on the dates on which they allegedly purchased their PS3s, the class representatives could not all have seen and relied upon the same supposed representations by SCEA.[32] Compounding that fact is that there is nothing proffered in the Consolidated Complaint, nor in Plaintiffs' opposition, that constitutes a representation regarding the Other OS function that necessarily was seen by all putative class members. As Plaintiffs have now conceded, there was nothing on the packaging of the PS3 about the Other OS function. And the fact that many PS3 purchasers never saw any representations regarding the Other OS function is highlighted by postings on the very chat room that Plaintiffs offered in the allegations of the Consolidated Complaint.[33]

If PS3 purchasers did not see representations regarding the Other OS function, surely they could not have relied upon them and could not have suffered injury based on the alleged elimination of the feature. And this is further confirmed by postings on the chat room selected for inclusion in the Consolidated Complaint by Plaintiffs.[34]

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[30] Opposition to Motion to Strike, 14:5-8.
[31] Motion to Strike (Docket #96), 22:1-24:4.
[32] Motion to Strike (Docket #96), 22:9-18.
[33] Motion to Strike (Docket #96), 22:14-23:4.
[34] Motion to Strike (Docket #96), 23:4-24:4.

But most importantly, the Consolidated Complaint asserts claims for consequential damages on behalf of the class that the class representatives do not seek, which is fatal to typicality. Specifically, SCEA identified in its opening brief a litany of additional injuries supposedly sustained by class members – including loss of data, inadvertent download of Update 3.21, and loss of the use of peripherals for the Other OS function. Plaintiffs completely ignore this troublesome issue in their opposition. Thus, on this basis alone, the Court may find that the putative class representatives are not typical of their proffered class.[35]

Finally, Plaintiffs cannot save typicality by arguing that their case is based on a uniform omission, *i.e.*, "SCEA's failure to inform users that it would disable that [Other OS] feature when it found it expedient to do so…."[36] This omission theory depends entirely on the notion that there was an ubiquitous representation of fact regarding the Other OS function that in turn required SCEA to make the alleged disclosure and that its failure to do so caused common injury among the class. The Consolidated Complaint's factual allegations, as well as the matters offered by SCEA in its request for judicial notice, refute such a notion conclusively.

VI. PLAINTIFFS CANNOT SATISFY RULE 23(b)(3)

The Consolidated Complaint demonstrates that common issues of law and fact will not predominate in the resolution of the putative class claims; instead, individual inquiries of each class member will be necessary. Here, as in most fraud cases, class treatment is not appropriate because of the material variations in the representations that each class member relied upon and the injuries that they each allegedly sustained. Indeed, Plaintiffs concede that each class member's potential injuries depend upon his or her particular use of the PS3 and the representations he or she heard or saw and relied upon in deciding to buy a PS3. Statements from members of Plaintiffs' proposed class support this – many admit that they never saw or heard any representations regarding the Other OS feature or even knew what it was before Update 3.21 was released. Clearly, further questions regarding materiality abound.

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[35] Motion to Strike (Docket #96), 23:13-24:4; Consolidated Complaint (Docket #76), ¶ 45.
[36] Opposition to Motion to Strike (Docket #103), 13:17-20.

Nevertheless, Plaintiffs contend that the Court can certify their class pursuant to Rule 23(b)(3) based on two "primary issues": (i) "whether SCEA's release of Update 3.21, which disabled the Other OS feature…was a violation of California common and statutory law and Federal statutory law"; and (2) whether the "release of Update 3.21 uniformly devalued PS3s because they were no longer capable of both running an Other OS and the On-Line Features."[37] But the questions specific to each class members' experience related to their purported reliance and any duty to disclose as a result of such representations, materiality, and the specific injury (or injuries) they sustained make resolution of these questions based on common proof impossible and unmanageable.[38]

In an effort to avoid the consequences of these individual issues, Plaintiffs also contend that the Court may presume reliance on a classwide basis.[39] But the authority they rely on – based on a theory espoused in *Plascencia v. Lending 1st Mortgage*, 259 F.R.D. 437 (N.D. Cal. Aug. 21, 2009) – provides no support.[40] In *Plascencia*, the district court concluded that questions regarding the putative class members' reliance did not preclude class certification because the plaintiff's claim, which was based solely on fraudulent omissions, did not require positive proof

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[37] Opposition to Motion to Strike (Docket #103), 18:27-19:5.

[38] Motion to Strike (Docket #96), 7:18-11:12. The authority Plaintiffs cite are also factually distinguishable and do not apply here. *Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 440-41 (N.D. Cal. Aug. 21, 2009), relates to a class action regarding the violation of the Truth in Lending Act based on the use of allegedly uniform loan documents that allegedly did not "clearly and conspicuously disclose" the interest rate of the mortgage and other information required by the Truth in Lending Act. *Randolph v. Crown Asset Mgmt., LLC*, 254 F.R.D. 513, 516 (N.D. Ill. Dec. 11, 2008), relates to a class action regarding, in part, specific documents uniformly not afforded by the defendant to class members in the defendant's collection actions against those class members, in violation of federal and state law. *Keele v. Wexler*, 149 F.3d 589, 591-92 (7th Cir. 1998), addresses a class action regarding threatening debt collection letters and improper collection fees received by class members. And *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 289-294 (3d Cir. 1998), relates to specific uniform sales practices. Plaintiffs incorrectly offer that SCEA contests certification of some of their claims but not others. Opposition to Motion to Strike (Docket #103), 19 n.7. As made clear in its Notice of Motion and Motion, SCEA seeks an order striking all class allegations. In addition, SCEA's Memorandum of Points and Authorities demonstrate that the issues precluding certification infect all of their claims.

[39] Opposition to Motion to Strike (Docket #103), 19:16-22:15.

[40] Opposition to Motion to Strike (Docket #103), 19:16-21:5. The other cases Plaintiffs rely on are based on the holding in *Plascencia*. *Tietsworth v. Sears, Roebuck and Co.* is premised on the ruling in *Plascencia*. 2010 WL 1268093, at *20 (N.D. Cal. Mar. 31, 2010). And *Collins v. Gamestop Corp.* is premised on *Tietsworth*. 2010 WL 3077671, at *3 (N.D. Cal. Aug. 6, 2010).

of reliance.[41] That court's reasoning was based on *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), in which the Supreme Court concluded that "positive proof of reliance is not a prerequisite to recovery" in a Securities Exchange Commission Rule 10b-5 claim "involving primarily a failure to disclose…."[42] The *Plascencia* decision, however, is based on a misinterpretation of the applicability of *Affiliated Ute* to fraud claims.[43] First, the California Supreme Court has expressly held that the presumption of reliance in *Affiliated Ute* does not apply to fraud claims under California law.[44] Instead, under California law a plaintiff must "show actual reliance on a defendant's misrepresentations or omissions as a prerequisite to establishing fraud."[45] In addition, the *Plascencia* ruling is not applicable here because Plaintiffs' claims are not based purely on omission. Rather, at best, their claims are based on a mix of misrepresentation and fraudulent omission.[46]

Plaintiffs also contend that the California Supreme Court decision *In re Tobacco II Cases*, 46 Cal. 4th 298, 324 (2009), supports their entitlement to a presumption of reliance. But the presumption utilized there is specifically limited to the facts of that case where a company had "engaged in a long-term campaign of deceptive advertising and misrepresentations to the consumers of its products regarding the health risks of [its] products."[47] Such a campaign stands

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[41] 259 F.R.D. at 447.
[42] 406 U.S. at 153.
[43] *Quezada v. Loan Ctr. of California, Inc.*, 2009 WL 5113506, at *4 (E.D. Cal. Dec. 18, 2009).
[44] *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993) ("We see no reason to adopt the *Ute* presumption as California law… it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently. Moreover…the body of law that has developed under Rule 10b-5 is not sufficiently analogous to the law of fraud to justify its importation into the latter.").
[45] *Gawara v. U.S. Brass Corp.*, 63 Cal. App. 4th 1341, 1351-52 (1998); *Quezada*, 2009 WL 5113506, at *4.
[46] *Quezada*, 2009 WL 5113506, at *5 (citing *Poulous v. Caesars World, Inc.*, 279 F.3d 654, 666-67 (9th Cir. 2004)).
[47] 46 Cal. 4th at 324. *See Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 632 (2010) ("The circumstances herein stand in stark contrast to those in *Tobacco II*…. *Tobacco II* does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution."); *Cohen v. DirectTV, Inc.*, 178 Cal. App. 4th 966, 981 (2009); *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 324 (2009); Opposition to Motion to Strike (Docket #103), 13 n.4 & 21:12-19 (citing and arguing Court should follow *In re Tobacco II Cases*).

in stark contrast to the handful of statements Plaintiffs rely on that numerous class members admit they never saw.[48]

Of course, in addition to the numerous individual issues regarding reliance and materiality, the Court must resolve questions specific to each class member's experience regarding entitlement to, type, and amount of relief. In such a case, federal courts routinely conclude that Rule 23(b)(3) certification is improper.[49] Having already admitted that they seek a myriad of different types of relief for their proposed class, Plaintiffs contend that these questions do not preclude certification in this Circuit,[50] but the legal authority they cite permits certification only where any question regarding damages can be resolved using a mathematical calculation.[51] Clearly, this is not the case here.

VII. PLAINTIFFS CANNOT SATISFY RULE 23(b)(2)

Plaintiffs' allegations and posted comments from members of their proposed class demonstrate that individual questions regarding each class member's entitlement to monetary relief will predominate in this litigation. Plaintiffs admit in their Consolidated Complaint that the types and amounts of monetary relief they seek for the class differ, depending on how each class member has been affected by Update 3.21, *i.e.*, the allegedly diminished value of each class member's PS3. The individual-specific questions related to materiality and reliance, as well as the type and amount of available damages also will necessitate individual inquiries of each class member. These questions will determine the key procedures that the Court will use in managing

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[48] Consolidated Complaint (Docket #76), ¶ 45; Motion to Strike (Docket #96), 7:18-11:12.

[49] *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 & 71-72 (4th Cir. 1977) (class certification not appropriate, in part, because of the "overwhelming burden of damage mini-trials that class certification would impose"; where the issue of damages "does not lend itself to ... mechanical calculation, but requires 'separate "mini-trial[s]"' of an overwhelmingly large number of individual claims," the need to calculate individual damages will defeat predominance); *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 791 (6th Cir. 2005) ("A plaintiff seeking class certification must present a damages model that functions on a class-wide basis."); *see also Reed v. Advocate Health Care*, 2009 WL 3146999, at *22 (N.D. Ill. Sept. 28, 2009) (relying on *Windham*, 565 F.2d at 68); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.,* 215 F.R.D. 523, 531 (E.D. Tex. Jun. 6, 2003); *Banda v. Corzine*, 2007 WL 3243917, at *19 (D.N.J. Nov. 1, 2007).

[50] Opposition to Motion to Strike (Docket #103), 22:22-23:4.

[51] *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1093 (9th Cir. 2010) (2009 WL 2634770 (9th Cir. Aug. 28, 2009) has been withdrawn and superseded by 594 F.3d 1087).

the case, involve the introduction of significant legal and factual issues related solely to Plaintiffs' damages claims, require individual hearings regarding absent class members right to recover, and consequently raise due process and manageability concerns.[52]

Plaintiffs fail to address any of these concerns.[53] Instead, they repeat their refrain that the Court cannot resolve this question without discovery because it cannot otherwise determine the "value of the loss of function each class member suffered and the amount per class member owing in damages."[54] But the question is "the objective 'effect of the relief sought' on the litigation," not the "value" of damages. Here, the substantial questions and procedures necessary to resolve questions regarding monetary damages makes clear that that relief predominates over the equitable relief sought by the Plaintiffs.[55]

VIII. PLAINTIFFS' RULE 23(b)(1)(A) ARGUMENT IS IRRELEVANT

Plaintiffs cannot avoid an order striking their class allegations by their sudden assertion in their opposition brief that they also intend to pursue class certification premised on Rule 23(b)(1)(A).[56] Plaintiffs do not request that the Court certify such a claim in their Consolidated Complaint. Thus, Plaintiffs' Rule 23(b)(1)(A) argument should be disregarded for purposes of this pleading challenge as it is a transparent attempt to stave off an order by this Court striking their class claims.[57]

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[52] Motion to Strike (Docket #96), 24:14-25:16, *citing Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 623 (9th Cir. 2010).

[53] Motion to Strike (Docket #96), 24:5-25:16.

[54] Opposition to Motion to Strike (Docket #103), 17:11-20. Of course, Plaintiffs' argument that they need discovery, to establish that certification pursuant to Rule 23(b)(2) is appropriate, is disingenuous as, according to their Consolidated Complaint, they only seek certification pursuant to Rule 23(b)(3). Consolidated Complaint (Docket #76), ¶ 74.

[55] Plaintiffs' assertion that they can rely on a Rule 23(b)(2)/23(b)(3) hybrid certification to obtain class treatment is flawed. Opposition to Motion to Strike (Docket #103), 17:21-25. To obtain certification pursuant to a hybrid approach, they must satisfy Rule 23(a) as well as 23(b)(2) and 23(b)(3), none of which they can do. *See Dukes*, 603 F.3d at 620 (citing *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999) (hybrid certification permissible "only when the monetary relief is incidental to the equitable remedy…."); *Garcia v. Veneman*, 211 F.R.D. 15, 24-25 (D.D.C. Dec. 2, 2002); *Cooper v. Southern Co.*, 205 F.R.D. 596, 631 (N.D. Ga. Oct. 11, 2001) (hybrid certification not available when "common elements of proof would not predominate . . . to meet the requirements of (b)(3)"); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 563 (D.S.C. May 25, 2000) (hybrid certification "requires satisfaction of both the (b)(2) and (b)(3) requirements").

[56] Opposition to Motion to Strike (Docket #103), 16:3-9.

[57] *Cwiak v. Flint Ink Corp.*, 186 F.R.D. 494, 497 (N.D. Ill. Apr. 26, 1999) (citing *Heastie v. Comm. Bank of Greater Peoria*, 125 F.R.D. 669, 672 n.3 (N.D. Ill. 1989) (plaintiff's attempt to

IX. CONCLUSION

On the grounds set forth more fully above and in its Motion to Strike, defendant Sony Computer Entertainment America LLC respectfully requests that the Court enter an order striking the class allegations in the Consolidated Complaint.

Dated: October 21, 2010

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SONY COMPUTER ENTERTAINMENT AMERICA LLC

amend class definition via the class certification is improper; "we refused to treat the motion for class certification as a '*de facto* amendment' of the pleading….")); *see also Richard v. Oak Tree Group, Inc.*, 2009 WL 3234159, at *1 (W.D. Mich. Sept. 30, 2009) (denial of class certification motion because it "was different from the class as alleged in the first amended complaint.").