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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 RS (EMC)

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date: November 4, 2010
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg
Courtroom: 3

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I. INTRODUCTION

Plaintiffs offer nothing that refutes the pleading challenges asserted by defendant Sony Computer Entertainment America LLC ("SCEA"). To the contrary, Plaintiffs' opposition is premised on the insupportable notion that SCEA guaranteed all advertised features and functions of the PS3, including the Other OS feature, for the "life" of the PS3, *i.e.*, forever.

Plaintiffs offer no representation by SCEA promising the continued availability of any PS3 feature, including the Other OS feature. Instead, they offer a hodgepodge of statements that they characterize as express warranties SCEA supposedly breached when it issued Update 3.21. Plaintiffs neglect to specify which, if any, of the statements recited in their Opposition were actually relied upon in their decision to buy a PS3. They also fail to explain how any statement(s) they relied upon was false. Finally, Plaintiffs fail to refute that SCEA's Limited Hardware Warranty ("Warranty"), System Software License Agreement ("SSLA"), and Terms of Service and User Agreement for the PlayStation®Network ("Terms of Use") preclude their express warranty claim. Plaintiffs also concede they are not in privity with SCEA, continue to use their PS3s, and never communicated to SCEA any particular intended use of the PS3 they purchased. Accordingly, their implied warranty claims should be dismissed.

Plaintiffs concede that at the time of purchase, their PS3s performed all functions advertised by SCEA. Thus, Plaintiffs cannot state a Consumer Legal Remedies Act ("CLRA") claim premised upon supposed misrepresentations or omissions regarding their PS3 purchases. Plaintiffs' Unfair Competition Law ("UCL") claims fair no better. They did not buy their PS3s from SCEA and thus are not entitled to restitution from it. Moreover, SCEA's conduct was neither unlawful nor unfair, as this Court may adjudicate as a matter of law. Plaintiffs' UCL fraudulent prong claims (like their CLRA claims addressed above) are also inadequate under Federal Rule of Civil Procedure ("Rule") 9(b)'s heightened pleading standard.

Plaintiffs' federal statutory claims and state common law claims are equally deficient. The Magnuson-Moss Warranty Act claim is inadequate due to Plaintiffs' failure to proffer a supposed warranty of express duration that SCEA has allegedly breached. They cannot state a claim under the Computer Fraud And Abuse Act based on their voluntary download of Update

3.21. Plaintiffs cannot plead around the terms of the SSLA, which they each admittedly accepted, to allege a conversion claim, because that agreement disavows Plaintiffs' ownership of PS3 system software. Nor can they state a claim that SCEA was unjustly enriched as a result of its alleged actions. On these bases, the Court should grant SCEA's motion to dismiss.

II. PLAINTIFFS HAVE FAILED TO PLEAD AN EXPRESS WARRANTY CLAIM

Plaintiffs contend that SCEA warranted that the Other OS feature and all other advertised functions would be available for the "life" of the PS3. In their opposition, they attribute six statements to SCEA that they contend comprise actionable express warranties. But as the chart below shows, none of these constitutes an express warranty by SCEA that the Other OS feature would be available, along with all other advertised functions, throughout what Plaintiffs refer to as the "life" of the PS3:

Statement	Asserted Source	The Statement Is Not An Express Warranty
"'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.'"[1]	"User Manual"	• Not an explicit affirmation of fact • Does not guarantee the Other OS feature for the "life" of the PS3 • Plaintiffs do not allege they saw/ relied on this statement
"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."[2]	"Product Packaging"	• Not an explicit affirmation of fact • Says nothing about Other OS • Plaintiffs do not allege they saw/ relied on this statement
"'There 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.)."[3]	"SCEA Website (2006-2010)"	• Does not guarantee the Other OS feature for the "life" of the PS3 • Plaintiffs do not allege they saw/relied on this statement • No indication made at time of sale

[1] Opp. to Motion to Dismiss (Docket #104), 5:19-21.
[2] *Id.*, 5:22-25.
[3] *Id.*, 5:25-6:3.

"'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.'"[4]	Ken Kutaragi, former President of SCEI, before the PS3 release	• Says nothing about the Other OS • Plaintiffs do not allege they saw/relied on this statement • No indication made at time of sale
"'[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 costs…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.'"[5]	Ken Kutaragi, former President of SCEI, June 2006	• Says nothing about the Other OS • Plaintiffs do not allege they saw/relied on this statement • No indication made at time of sale
"'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.'"[6]	Phil Harrison, President of Sony Computer Entertainment Worldwide Studios, May 2006	• Says nothing about the Other OS • Plaintiffs do not allege they saw/relied on this statement • No indication made at time of sale
"'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 (sic) in content creation for the PS3.'"[7]	Izumi Kawanishi, head of Sony's Network System Development Section, May 2006	• Does not guarantee the Other OS function for the "life" of the PS3 • Plaintiffs do not allege they saw/relied on this statement • No indication made at time of sale
"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."[8]	"Other"	• Not an explicit affirmation of fact • Says nothing about the Other OS • Plaintiffs do not allege they saw/relied on this statement. • No indication made at time of sale

Of course, most of these statements do not concern the Other OS feature and are therefore irrelevant. And obviously, none of these asserted statements constitute the requisite "exact terms"

[4] *Id.*, 6:4-6.
[5] *Id.*, 6:7-11.
[6] *Id.*, 6:11-13.
[7] *Id.*, 6:14-16.
[8] *Id.*, 6:17-19.

necessary to create a warranty that Plaintiffs could plead they reasonably relied upon in making their purchasing decisions. Consequently, the express warranty claim should be dismissed.

In their first of many attempts to distract the Court, Plaintiffs contend that "[a]ctual reliance on the seller's statement when entering the sale is not required."[9] However, Plaintiffs completely ignore the *Blennis v. Hewlett-Packard* decision by Judge Fogel, in which he confirmed that reliance was indeed a required element of an express warranty claim.[10] Instead, they cite *Weinstat v. Dentspy Intern Inc*., in which a California appellate court held that a class of dentists could assert express warranty claims against the manufacturer of a medical device that issued express written limited warranties included in the device packaging at the time of sale.[11] *Weinstat* is completely inapposite to the Plaintiffs' pending claims – it was premised on very precise and explicit written warranty statements that accompanied the subject medical device at the time of sale to the plaintiff dentists. Indeed, the express written warranties at issue in *Weinstat* are analogous, if at all, to the one-year Warranty provided by SCEA for new PS3 sold at retail. Plaintiffs do not contend that the Warranty was breached here, as the plaintiff dentists did in *Weinstat.* To the contrary, Plaintiffs have endeavored in this case to exclude the Warranty from this Court's consideration of SCEA's pending motions. Thus, *Weinstat* is irrelevant to this Court's decision regarding dismissal of Plaintiffs' allegations.

Plaintiffs also embrace a new theory – that the PS3 was advertised as a "personal computer" but it can only perform this function when the Other OS feature is utilized and running Linux. Plaintiffs build from this fabricated foundation the notion that SCEA promised that the PS3 would continue to function as a "personal computer" using a non-native operating system for the "life" of the PS3. Notably, no such promise is attributed to SCEA in the Consolidated Complaint. To the contrary, Plaintiffs admit in that pleading and in their opposition that the PS3 functions as a "personal computer" regardless of which operating system is running. Thus, their argument regarding "personal computer" representations are irrelevant.

Finally, Plaintiffs offer multiple arguments to refute the application of the Warranty, the

[9] *Id.*, 7:12-13.
[10] 2008 WL 818526, at *2 (N.D. Cal. Mar. 25, 2008).
[11] *See* 180 Cal. App. 4th 1213 (2010); Opp. to Motion to Dismiss (Docket #104), 7:14-17.

SSLA, and the Terms of Use, and particularly why those agreements did not contemplate and authorize issuance of Update 3.21. These require the Court to ignore those agreements:

- Plaintiffs argue that SCEA could not "disclaim or take [] away" any of the express warranties that it had made.[12] In support, they argue that "[t]he 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."[13] Plaintiffs offer no explanation of the effect of this assertion which is not alleged in the Consolidated Complaint. But it is of no effect, because as Plaintiffs concede, they can continue to use the Other OS feature notwithstanding Update 3.21.

- Plaintiffs contend that the Warranty, SSLA, and Terms of Use are ambiguous, and presumably unenforceable. But they make no effort to show what part of these agreements are ambiguous, let alone the supposed effect on the pending motion of such ambiguity.

- Plaintiffs contend that the SSLA only permits the disabling of "minor" PS3 functions, not "core" functions.[14] But the very language they reference makes no such distinction.[15]

- Plaintiffs assert that Update 3.21 was not permitted by the Warranty, SSLA, and Terms of Use because those agreements only permitted SCEA to issue updates "to 'ensure' that the PS3 is 'functioning properly,'" and Update 3.21 "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."[16] Plaintiffs misstate the relevant sections of the Warranty, SSLA, and Terms of Use which state, in relevant part, that updates and upgrades may be issued to ensure it is "functioning properly in accordance with [SCEA/SCE] guidelines."[17] They have already admitted that Update 3.21 was issued to protect SCEA's intellectual property from hacking.[18] Therefore, Update 3.21 was obviously in accordance with SCEA's guidelines."[19]

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[12] Opp. to Motion to Dismiss (Docket #104), 8:20-9:2.
[13] *Id.*, 6:17-19, 9:1-2. There is no allegation in the Consolidated Complaint or other grounds for the conclusion that SCEA has disclaimed or taken away express or implied warranties like those at issue in Plaintiffs' cited authority, *Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 958 (1984) (party generally may not disclose warranty).
[14] Opp. to Motion to Dismiss (Docket #104), 9:12-18.
[15] Motion to Dismiss (Docket #97), 3:17-5:24.
[16] Opp. to Motion to Dismiss (Docket #104), 9:19-24.
[17] Motion to Dismiss (Docket #97), 4:5-10, 4:23-5:7, 5:18-24 (emphasis added).
[18] Consolidated Complaint (Docket #76), ¶¶ 4 & 53.
[19] *Id.*, ¶¶ 10-19.

III. PLAINTIFFS CANNOT STATE AN IMPLIED WARRANTY CLAIM

Plaintiffs concede they did not purchase directly from SCEA, and thus are not in vertical privity.[20] They attempt to invoke the "direct dealings" exception to the vertical privity requirement acknowledged in *U.S. Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal. App. 3d 1431 (1991). But this Court has already rejected implied warranty claims by other PS3 purchasers challenging other PS3 firmware updates premised on *U.S. Roofing*, and nothing Plaintiffs assert here suggests that the Court should reach a different conclusion.[21] *U.S. Roofing* involved a unique set of facts: the plaintiff negotiated directly with, reached an oral agreement directly with, and paid deposits directly to the manufacturer.[22] Although the acquisition was ultimately structured as a lease involving a third party, all aspects of the deal were negotiated directly between the manufacturer and the plaintiff.[23] Consequently, subsequent California court decisions have declined to extend the "direct dealings" exception in *U.S. Roofing* to situations where the plaintiffs and the defendant did not engage in direct negotiations.[24] In addition, no such direct dealings are alleged here. Plaintiffs did not negotiate directly with SCEA, did not reach any oral agreements with SCEA, and did not pay any consideration directly to SCEA. Accordingly, they cannot circumvent the vertical privity requirement by incanting *U.S. Roofing*.

Plaintiffs attempt to contrive direct dealings, none of which resemble the circumstances of *U.S. Roofing.* In particular, they point to the fact that they were afforded access by SCEA to the PSN, subject to the Terms of Use; that SCEA allegedly issued firmware updates that PS3 users could download; and that SCEA issued a user manual.[25] Of course, all of these postdate the sale of their PS3s. More importantly, none of these interactions approximates the pre-sale direct dealings in *US Roofing – i.e.*, one-on-one negotiations and partial direct payment of the purchase

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[20] Motion to Dismiss (Docket #97), 13:12-18; Opp. to Motion to Dismiss (Docket #104), 10:24-26.
[21] *In re Sony PS3 Litig.*, 2010 WL 3324941, at *2-3 (N.D. Cal. Aug. 23, 2010).
[22] 228 Cal. App. 3d at 1442.
[23] *Id.* at 1438.
[24] *See Fieldstone Co. v. Briggs Plb. Prods., Inc.*, 54 Cal. App. 4th 357, 371 n.12 (1997) (superseded by statute on other grounds); *All West Elec., Inc. v. M-B-W, Inc.*, 64 Cal. App. 4th 717, 723-27 (1998); *cf., Cardinal Health 301, Inc. v. Tyco Elec. Corp.*, 169 Cal. App. 4th 116, 142-43 (2008) (upholding vertical privity where manufacturer "has essentially taken the place of the party that had negotiated the initial deal").
[25] Opp. to Motion to Dismiss (Docket #104), 11:3-18.

price.[26]

Plaintiffs also contend that the vertical privity requirement has been "satisfied" where an express warranty is issued by the manufacturer, based only on *Atkinson v. Elk Corp. of Texas*, 142 Cal. App. 4th 212 (2006).[27] First, as several courts have noted, the relevant language in *Atkinson* is dicta.[28] Second and more important, the *Atkinson* plaintiff specifically alleged that he had actually relied upon a specific express written 30 year warranty.[29] In contrast, Plaintiffs here do all they can to ignore the Warranty – which is limited to one year. Finally, "*Atkinson* appears to be an anomaly in that it contravenes the well-established principle under California law that privity is required in cases alleging breach of an implied warranty."[30] Plaintiffs' implied warranty claim also fails because they concede there was no defect at the time the PS3s were sold or delivered.[31] They try to end-run this fatal fact by arguing that "the subsequent firmware updates were an understood part of the original purchase."[32] But that changes nothing – they admit that their PS3s were capable of utilizing other operating systems until and unless they downloaded Update 3.21 on or after April 1, 2010, *i.e.*, years after their purchases.[33]

Plaintiffs' implied warranty of merchantability claim also fails because that warranty only "provides for a minimum level of quality."[34] They concede that their PS3s have not failed completely and even admit they continue to perform computer functions following download of Update 3.21. Plaintiffs can do everything but run an alternative operating system following the

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[26] *See In re Sony PS3 Litig.*, 2010 WL 3324941, at *2-3.
[27] Opp. to Motion to Dismiss (Docket #104), 11:19-12:4.
[28] *See Hartless v. Clorox Co.*, 2007 WL 3245260, at *2 (S.D. Cal. Nov. 2, 2007); *Postier v. Louisiana-Pacific Corp.*, 2009 WL 3320470, at *6 (N.D. Cal. Oct. 13, 2009); *Ward v. IPEX, Inc.*, 2009 WL 2634842, at *4 (C.D. Cal. Feb. 4, 2009).
[29] *Atkinson*, 142 Cal. App. 4th at 217 ("Based on the written warranty he saw in the brochure, Atkinson instructed Pacific to use Elk Prestique I shingles to re-roof his home."); *see also Zabit v. Ferretti Group, USA*, 2006 WL 3020855, at *6 (N.D. Cal. Oct. 23, 2006) ("The *Atkinson* court's holding was based upon the fact that the manufacturer had issued a written warranty and . . . that the plaintiff relied on that warranty when he instructed his contractor to use the defendant's roofing shingles."); *Postier*, 2009 WL 3320470, at *6; *Ward*, 2009 WL 2634842, at *4.
[30] *Postier*, 2009 WL 3320470, at *6.
[31] Motion to Dismiss (Docket #97), 14:1-8.
[32] Opp. to Motion to Dismiss (Docket #104), 12:9-10.
[33] Motion to Dismiss (Docket #97), 16:20-17:8; Opp. to Motion to Strike (Docket #103), 14:5-7; Opp. to Motion to Dismiss (Docket #104), 19:14-15. They cannot assert two different and contradictory theories of liability and wait to see which one is more successful. *See Unical Ent., Inc. v. Am. Ins. Co.*, 2005 WL 6133910, at *7 (C.D. Cal. Sept. 12, 2005).
[34] Motion to Dismiss (Docket #97), 14:9-10.

download of Update 3.21. Conversely, they can play their existing library of games, movies and music; browse the Internet; and utilize Linux or other alternative platforms (if they forewent the download).[35] Plaintiffs' new assertion that the PS3 has lost some of its "core" functionality because of Update 3.21 is irrelevant in light of this admission in the Consolidated Complaint.

Plaintiffs' claim of implied warranty of fitness for a particular purpose also fails because SCEA had no "reason to know" of their special intended purpose – *i.e.*, to use the PS3 in perpetuity for all advertised functions including the Other OS.[36] No representation they offered promises that any PS3 function, including the Other OS feature, would be available for the "life" of the PS3 (whatever that phrase might mean in this context).[37] To the contrary, the only representation that SCEA made concerning the durability of the PS3 is set forth in the Warranty, which promises that SCEA will repair or replace defective units for one year from the date of purchase. Thus, as the *Daughtery* and *Bardin* courts acknowledged, the only reasonable expectation that consumers could have had was that their PS3 would function as warranted for that period.[38] Plaintiffs concede in the Consolidated Complaint that indeed their PS3s did function as represented for that period. Notably, Plaintiffs contend that consumer expectations are "a factual question to be resolved by the jury," and not susceptible to resolution at the pleading stage.[39] However, courts have ruled on reasonable consumer expectations as a matter of law at the pleading stage regarding warranty language.[40]

IV. PLAINTIFFS CANNOT SUCCEED ON THEIR CLRA CLAIM

The CLRA only provides a cause of action for a consumer suffering damage "as a result of the use or employment…of a method, act or practice declared to be unlawful by section 1770."[41] Plaintiffs fail to allege that any representation by SCEA regarding the PS3 was untrue at

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[35] Motion to Dismiss (Docket #97), 14:16-15:2.
[36] Motion to Dismiss (Docket #97), 15:3-17.
[37] *See* Opp. to Motion to Dismiss (Docket #104), 13:3-9.
[38] *See Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255 (2006) and *Daughtery v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824 (2006).
[39] Opp. to Motion to Dismiss (Docket #104), 13:13-16.
[40] *Hoey v. Sony Elec. Inc.*, 515 F. Supp. 2d 1099, 1104-05 (N.D. Cal. Oct. 10, 2007).
[41] Cal. Civ. Code § 1780. The three subsections of the CLRA that Plaintiffs assert SCEA violated are: "(5) Representing that good or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have…; (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or

the time it was made, and thus have not pled the requisite causal connection. To the contrary, Plaintiffs concede that SCEA's representations were true at the time they were made and remained true until late March 2010, when SCEA announced issuance of Update 3.21. Thus, to the extent that Plaintiffs are complaining about the issuance of Update 3.21, years after their PS3 purchases, they cannot premise their claims on the alleged three sections of California Civil Code section 1770, which relate to untrue representations made at the time of sale.

Plaintiffs do point to one supposed violation of the CLRA not related to representations at the time of sale: the insertion of an unconscionable term in a contract, which is proscribed by Civil Code section 1770(a)(19). They attack language in the SSLA that confirms that the system software, as SCEA's property, is merely licensed to PS3 users on terms that may be modified by SCEA. But contrary to Plaintiffs' bare conjecture, there is nothing "hidden" about this language. It has been available on the SCEA hosted website that the Plaintiffs supposedly reviewed prior to their PS3 purchases; referenced on the PS3 packaging and in the user manual, which Plaintiffs cite to in support of their express warranty claims; and referenced in SCEA's Warranty, which Plaintiffs also cite to in their opposition briefs. Numerous courts have concluded that clickwrap agreements, like the SSLA and Terms of Use, are not unconscionable, and have done so without the assistance of a jury, contrary to Plaintiffs' arguments.[42] *Leong v. Square Enix of America Holdings, Inc.*, is not distinguishable as Plaintiffs contend – the issue was whether the licensor could, pursuant to its clickwrap agreement, delete the "in-game characters" and "game account" created by the user.[43] Indeed, trial courts have concluded that "clickwrap agreements" are not unconscionable as a matter of law.[44] Lastly, Plaintiffs argue that the three year statute of

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model, if they are of another; (9) Advertising goods or services with intent not to sell them as advertised." Cal. Civ. Code § 1770.

[42] Motion to Dismiss (Docket #97), 18:15-19:5; *see also Berenblat v. Apple, Inc.*, 2010 WL 1460297, at *4-5 (N.D. Cal. Apr. 9, 2010).

[43] 2010 WL 1641364, at *1 (C.D. Cal. Apr. 20, 2010). Also contrary to Plaintiffs' representations, *Meridian Project Sys., Inc. v. Hardin Const. Co., LLC*, 426 F. Supp. 2d 1101 (E.D. Cal. Apr. 6, 2006), did not involve parties of "equal bargaining power." Opp. to Motion to Dismiss (Docket #104), 21:21-22:1; *Meridian Project*, 426 F. Supp. 2d at 1104 (defendant could return the entire product if it did not agree with the End User License Agreement). In addition, although Plaintiffs are correct that the underlying agreement in that case did not contain the same language as the agreements at issues in this case, the relevance of the decision was that it was an enforceable clickwrap agreement similar to the agreements in this case. 426 F. Supp. 2d at 1107.

[44] *Leong*, 2010 WL 1641364, at *10; *Meridian Project*, 426 F. Supp. 2d at 1107.

limitations applicable to their CLRA claims did not commence until the issuance of Update 3.21 on April 1, 2010. But such an assertion is inconsistent with their contention that SCEA violated the CLRA based on its pre-sale misrepresentations regarding the PS3.[45]

V. PLAINTIFFS' UCL CLAIM SHOULD BE DISMISSED

A. Plaintiffs Admit Their Allegations Do Not Support Restitution

Plaintiffs concede they have paid no money to SCEA.[46] And they concede that what they are seeking in this lawsuit is "compensa[tion] for the loss of advertised functions"[47] because the console they purchased is "less valuable" following issuance of Update 3.21.[48] But loss of value is not a restitutionary concept, but rather damages not afforded by the UCL. As this Court held in another case regarding PS3 firmware updates, Plaintiffs have failed to allege what they have paid to SCEA that it should be required to restore to them.[49] Plaintiffs contend that "[t]he availability of injunctive relief is sufficient grounds to deny SCEA's motion without addressing the appropriateness of a restitutionary remedy."[50] However, as demonstrated in SCEA's opening brief and below, Plaintiffs have not stated a viable claim for injunctive relief under the UCL and even if Plaintiffs state some viable injunctive relief claim, the Court should nonetheless dismiss their class claim for restitution under the UCL.[51]

B. Plaintiffs' Unlawful And Unfair Claims Fail

In their opposition, Plaintiffs concede that their UCL unlawful claims stand or fall with their other alleged common law and statutory claims. Thus, Plaintiffs' UCL unlawful prong claim should be dismissed. Their sole argument in support of their unfair prong UCL claim is that SCEA cannot rely upon its Warranty, SSLA and Terms of Use because of a recent Northern

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[45] Opp. to Motion to Dismiss (Docket #104), 5:13-7:8, 18:24-19:15.
[46] Motion to Dismiss (Docket #97), 19:20-20:17; Opp. to Motion to Dismiss (Docket #104), 14:15-16:8.
[47] Opp. to Motion to Dismiss (Docket #104), 10:12-13.
[48] Opp. to Motion to Strike (Docket #103), 15:8.
[49] *In re Sony PS3 Litig.*, 2010 WL 3324941, at *3.
[50] Opp. to Motion to Dismiss (Docket #104), 15:14-16.
[51] *G&C Auto Body Inc. v. GEICO Gen. Ins. Co.*, 2007 WL 4350907, at *3 (N.D. Cal. Dec. 12, 2007) ("Accordingly, the Court finds that Plaintiffs cannot obtain monetary relief in connection with their Section 17200 claim…."). Plaintiffs fail to address SCEA's argument regarding dismissal of their demand for "disgorgement" of profits and thereby concede it is appropriate for dismissal. Motion to Dismiss (Docket #97), 20 n.111.

California district court decision, *In re Facebook PPC Advertising Litigation*. However, *Facebook* is wholly inapposite – it involved claims against Facebook by companies posting advertisements on Facebook webpages pursuant to written agreements among the commercial entities. Nowhere in the Court's decision did it comment on any allegedly "hidden disclaimer" in any contract among the parties, as Plaintiffs suggest in their Opposition.[52]

Plaintiffs try to muddy the water further by suggesting that SCEA misled purchasers regarding the nature of firmware updates. In support of this new theory, Plaintiffs point to statements that are clearly puffery: "don't [] worry about your PlayStation®3 system becoming outdated or missing out on cool new features."[53] Alternatively, Plaintiffs offer incomplete statements drawn from the SSLA.[54] But this is all distraction – it does not change the fact that the Consolidated Complaint fails to plead a viable claim under the UCL.

C. Plaintiffs Fail To Satisfy Rule 9(b)

Plaintiffs argue they are relieved of pleading requirements of Rule 9(b) by virtue of the California Supreme Court's holding in *In re Tobacco II Cases.* Nothing in the California Supreme Court's holding in that case alleviates Plaintiffs' pleading obligations regarding fraud based claims.[55] Furthermore, this District has made clear that "Rule 9(b) applies not only to claims in which fraud is an essential element, but also to claims grounded in allegations of fraudulent conduct."[56] Therefore, Plaintiffs must satisfy Rule 9(b) even if their "[UCL] claims are not solely based on allegations of fraud."[57]

Notably absent from both their Consolidated Complaint and opposition is an explicit statement of the supposed misrepresentation(s) Plaintiffs saw and relied upon in their purchase

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[52] Opp. to Motion to Dismiss (Docket #104), 17:1-4; *see Facebook*, 709 F. Supp. 2d 762 (N.D. Cal. Apr. 22, 2010). *See Berenblat*, 2010 WL 1460297, at *10 (allegations that Apple was secretly planning to retire the line of products do not meet the heightened pleading requirements for claims sounding in fraud).

[53] Opp. to Motion to Dismiss (Docket #104), 16 n.4.

[54] Plaintiffs describe the SCEA's agreements as stating that "any updates or services will be performed to 'ensure' that the PS3 is 'functioning properly[.]'" Opp. to Motion to Dismiss (Docket #104), 9:20-21. What Plaintiffs deleted from that sentence was the words "in accordance with SCEA guidelines." Motion to Dismiss (Docket #97), 3:16-5:24.

[55] Opp. to Motion to Dismiss (Docket #104), 17:7-14.

[56] *Hoey v. Sony Elec. Inc.*, 515 F. Supp. 2d 1099, 1102-03 (N.D. Cal. Oct. 10, 2007).

[57] Opposition to Motion to Dismiss (Docket #104), 17:6-23.

decisions.[58] Moreover, although Plaintiffs make multiple generic references to the "PS3's product packaging" as a source of supposed misrepresentations, Plaintiffs fail to quote anything from the packaging referencing the Other OS feature. Accordingly, they cannot rely on the product packaging to support their UCL and other fraud-based claims.

VI. PLAINTIFFS' MAGNUSON-MOSS WARRANTY ACT CLAIM IS NOT VIABLE

Plaintiffs take issue in their Opposition with SCEA's reliance on 16 C.F.R. section 700.3, which requires that an express warranty include a temporal limitation. This regulation was issued by the FTC and has been adopted by numerous federal and state courts, including the Seventh Circuit Court of Appeals.[59] Plaintiffs offer no contrary legal authority; accordingly, the weight of established law compels the inclusion of a time limit in any written warranty under the Act.

Section 700.3(a) makes clear that the "specified period of time" limitation applies to any "written affirmation of fact or a written promise of a specified level of performance" that a party asserts is a "written warranty" under the Act.[60] The regulation's reference to energy-efficiency ratings and care labeling are included only by way of example.[61] Indeed, courts have applied the "specified period of time" limitation in the context of various types of consumer products including the software functionality of personal computers.[62] *See Kelley v. Microsoft Corp.*, 2007 WL 2600841, at *5 (W.D. Wash. Sept. 10, 2007) ("Plaintiffs stretch [the Act] too far. The three words that Plaintiffs point to-'Windows Vista Capable'-contain no temporal element. Although a consumer might *interpret* the words to mean, 'when Microsoft releases Vista, your computer will be able to run it,' the words *themselves* do not contain a promise of a certain level of performance

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[58] Consolidated Complaint, ¶¶ 38, 39, & 45; *see Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citing *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged" and *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994).

[59] *See* Opp. to Motion to Dismiss (Docket #104), 13:23-25; *see also* 16 C.F.R. § 700.3(a); *Skelton v. GMC*, 660 F.2d 311, 316 (7th Cir. 1981); *Kelley v. Microsoft Corp.*, 2007 WL 2600841, at *3-5 (W.D. Wash. Sept. 10, 2007); *States v. BFG Electro. & Mfg. Co., Inc.*, 1989 WL 222722, at *10 (W.D. Pa. Oct. 18, 1989); *Goodman v. Perlstein*, 1989 WL 83452, at *2 (E.D. Pa. Jul. 21, 1989); *Simmons v. Taylor Childre Chevrolet-Pontiac, Inc.*, 629 F. Supp. 1030, 1032 (M.D. Ga. Mar. 4, 1986); *Schreib v. Walt Disney Co.*, 2006 WL 573008, at *4 (Ill. App. 2006).

[60] 16 C.F.R. § 700.3(a).

[61] *Id.*

[62] *Skelton*, 660 F.2d at 316 (automobiles); *Simmons*, 629 F. Supp. at 1032 (same); *Schreib*, 2006 WL 573008, at *4 (videotapes); *Goodman v. Perlstein*, 1989 WL 83452, at *2 (diamonds); *BFG Electroplating*, 1989 WL 222722, at *10 (cement blocks).

'over a specified period of time.' [Citation omitted]. [T]o be a 'written warranty,' the warrantor's guarantee must contain language that specifically identifies the duration of the warranty. Because that type of language is absent here, the Court cannot conclude that the words 'Windows Vista Capable' are a written guarantee under [the Act].").

Plaintiffs again try to distract the Court by suggesting that SCEA is attempting to limit its Magnuson-Moss liability to an unreasonable duration and in an unconscionable manner.[63] Plaintiffs should not be permitted to avoid dismissal by crafting new allegations and theories of liability in their opposition that are not asserted in their pleading.[64] But more importantly, the case they cite, *Berenblat v. Apple,* fails to support their assertion – Judge Fogel ultimately concluded in that case that the warranty limitations were not unreasonable or unconscionable. [65]

VII. PLAINTIFFS' COMPUTER FRAUD AND ABUSE ACT CLAIM FAILS

Plaintiffs acknowledge that CFAA liability requires the transmission of a program that intentionally damages a protected computer without the user's authorization. They also concede that three of the five Plaintiffs downloaded Update 3.21, *i.e.*, they authorized its installation on their PS3s; and two declined the download. In an attempt to avoid the obvious effect of their voluntary actions, they argue in their opposition that "they had no choice but to download and install Firmware 3.21, otherwise they would lose the PS3's other important advertised functions."[66] But this is not what the CFAA is intended to regulate – indeed it outrageously distorts the civil and criminal goals of the statute.

Plaintiffs exacerbate their distortion of the intended scope and effect of this statute by contending that SCEA secured authorization for the download of Update 3.21 by

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[63] Opp. to Motion to Dismiss (Docket #104), 14:6-14.

[64] *See Ruiz v. Laguna*, 2007 WL 1120350, at *26 (S.D. Cal. Mar. 28, 2007) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)); *see also Barbera v. WMC Mortgage Corp.*, 2006 WL 167632, at *2 n.4 (N.D. Cal. Jan. 19, 2006).

[65] The Court granted the defendant's motion to dismiss where it was alleged that the subject product – personal computers – failed to fully function as advertised after the expiration of the express limited warranty offered by Apple. *See* 2010 WL 1460297. As the court noted, "[r]epresentations by Apple that memory can be expanded to 'accommodate up to 2GB,'" which the plaintiffs contended was not in fact possible after the expiration of the one year express limited warranty, did not "suffice" to state a claim under the UCL. *Id.*, at *9.

[66] Opp. to Motion to Dismiss (Docket #104), 23:1-2.

"misrepresentation and oppression."[67] The two cases they cite bear no resemblance to the facts at bar. In *Multiven,* the defendant used a Cisco employee's confidential login and password to gain access to a secure Cisco network without the company's knowledge or approval.[68] In *In re Apple*, the plaintiffs alleged that they had authorized a software update, but without understanding that it could disable completely their iPhones, *i.e*., turn them into "bricks."[69] Neither of these circumstances bears any resemblance to the facts alleged in the Consolidated Complaint – that the named Plaintiffs knew and understood the consequences of downloading Update 3.21, and acted at their own volition based on that information.

Finally, Plaintiffs assert that the SSLA and Terms of Use do not allow changes in the PS3's functionality as a supposed premise for their CFAA claim.[70] But they cite nothing to support this contention. In fact, the language of the SSLA and Terms of Use permit such a change.[71] Plaintiffs also contend that the SSLA and Terms of Use are "ambiguous" and therefore "must be construed against SCEA."[72] But they offer no explanation of what renders these ambiguous in any way material to this motion.[73] Plaintiffs make yet another effort to confuse the issues by attacking SCEA's justification for allegedly issuing Update 3.21.[74] However, Plaintiffs run up against their own Consolidated Complaint, in which they conceded that Update 3.21 "was released in order to 'protect the intellectual property of the content offered on the PS3 system.'"[75] Of course, SCEA's internal justification for issuing Firmware is irrelevant to any of the pleading requirements of CFAA.

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[67] Opp. to Motion to Dismiss (Docket #104), 23:4-5.
[68] *Multiven, Inc. v. Cisco Systems, Inc.*, 2010 WL 2889262, at *3 (N.D. Cal. Jul. 20, 2010).
[69] 596 F. Supp. 2d 1288, 1295-96 & 1308 (N.D. Cal. Oct. 1, 2008).
[70] Opp. to Motion to Dismiss (Docket #104), 22:12-15.
[71] Motion to Dismiss (Docket #97), 3:17-5:24.
[72] Opp. to Motion to Dismiss (Docket #104), 22:14-18.
[73] Motion to Dismiss (Docket #97), 3:16-5:24. The legal authority Plaintiffs cite also provides no support to their argument. In *Badie v. Bank of America*, 67 Cal. App. 4th 779 (1998), the court did not conclude that an ambiguous contract provision must be construed against the drafting party. Opp. to Motion to Dismiss (Docket #104), 22:15-18. Rather, the court in that case utilized the rules of contract interpretation to assess the parties' mutual intent in their agreement. 67 Cal. App. 4th at 798. *Badie* also is not relevant because the relevant terms of the SSLA and Terms of Use are not ambiguous. In fact, this is another transparent effort by the Plaintiffs to block resolution of matters that are appropriate for the Court to rule on at this stage until after discovery and/or jury consideration.
[74] Opp. to Motion to Dismiss (Docket #104), 22:22-23:1.
[75] Consolidated Complaint (Docket #76), ¶ 63.

VIII. PLAINTIFFS CANNOT ALLEGE A CONVERSION CLAIM

Plaintiffs contend in their opposition that "Firmware 3.21 caused a significant loss of functionality and injury to Plaintiffs' undisputed property interest in their PS3s."[76] Notably, they fail to provide any factual support for this argument. But to the extent that Plaintiffs contend they have an ownership in the PS3 system software, or the PSN, their assertion is indisputably controverted by the SSLA and Terms of Use, both of which Plaintiffs accepted and both of which unequivocally disavow any such ownership right.[77] Furthermore, Plaintiffs' conversion claim is inconsistent with their own admissions in the Consolidated Complaint that they continue to use their PS3s, notwithstanding the issuance of Update 3.21.[78]

Once again, Plaintiffs argue that the Court may not consider SCEA's SSLA or Terms of Use in ruling on the motion to dismiss.[79] But this argument is contrary to the law,[80] and is absurd in light of the fact that these documents are central to their claims, as Plaintiffs implicitly concede both in their Consolidated Complaint and their Opposition briefs.

IX. PLAINTIFFS' UNJUST ENRICHMENT CLAIM IS NOT VIABLE

Plaintiffs' unjust enrichment claim fails just as the same claim failed when asserted against SCEA in a case pending before this Court regarding other PS3 firmware updates - *In re Sony PS3 Litigation*.[81] Specifically, nowhere do Plaintiffs explain how SCEA "has been wrongfully 'enriched' or what they have paid to [SCEA] that it should now be required to restore to them."[82] Accordingly, the unjust enrichment claim should be dismissed.

X. CONCLUSION

Defendant Sony Computer Entertainment America LLC respectfully requests that the Court enter an order dismissing Plaintiffs' claims for relief.

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[76] Opp. to Motion to Dismiss (Docket #104), 24:1-4.
[77] Consolidated Complaint (Docket #76), ¶¶ 165-166.
[78] Consolidated Complaint (Docket #76), ¶¶ 10-19.
[79] Opp. to Request for Judicial Notice (Docket #102), 4:3-6:4.
[80] *See* RJN (Docket #99), 2:22-4:12; Reply ISO Request for Judicial Notice, 3:1-7:22.
[81] Motion to Dismiss (Docket #97), 23:14-24:4;
[82] *In re Sony PS3 Litig.*, 2010 WL 3324941, *3.

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