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SONY COMPUTER ENTERTAINMENT AMERICA LLC (erroneously sued as "Sony Computer Entertainment America Inc.")

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)

REPLY IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE REGARDING MOTION TO DISMISS AND MOTION TO STRIKE

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

I. INTRODUCTION

In opposing defendant Sony Computer Entertainment America LLC's ("SCEA") Request for Judicial Notice, Plaintiffs raise three arguments: (i) the documents subject to the Request for Judicial Notice are not referenced in or central to their allegations; (ii) SCEA failed to authenticate or otherwise show that the documents are reliable; and (iii) "the references to the exhibits in the Ott Declaration are replete with unsupported factual assertions [and] personal characterizations of documents."[1]

But they make no effort to point to anything supporting their third argument.[2] They admit that, in their second argument, they are only referring to six of the twenty-four separate documents attached to the Ott Declaration, and only because the Internet archive (located at web.archive.org) was used to obtain these documents. And these documents consist of prior versions of the System Software License Agreement ("SSLA") and PlayStation®Network Terms of Service and User Agreement (the "Terms of Use"), which are not materially different from current versions which they do not contest. Finally, Plaintiffs' first argument is directly refuted by the allegations in their Consolidated Complaint and the arguments in their opposition to SCEA's pending Motion to Dismiss and Motion to Strike.

Although Plaintiffs seek to portray the Request for Judicial Notice as involving a complicated array of numerous documents, in truth it is a simple request regarding three discrete categories of documents:

(1) The written agreements that define certain obligations and expectations relevant to Plaintiffs' claims. They are: (i) the express Limited Hardware Warranty for the PlayStation®3 (the "Warranty"); (ii) the SSLA for the PlayStation®3; and (iii) the Terms of Use

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[1] Opposition to Request for Judicial Notice (Docket #102), 1:18-21.
[2] In fact, the Ott Declaration merely states the titles of the documents attached for ease of identification. *See* Ott Declaration (Docket #98).

PlayStation®Network (the "PSN").[3] Also included is a document relating to the Open Platform feature, Exhibit H to the Ott Declaration ("Open Platform").[4] *See* Section II, *infra*.

(2) Internet postings and "public statements" from a message board that Plaintiffs heavily quote and reference in the Consolidated Complaint. The request to take judicial notice of these documents is a routine request to provide complete documents from which Plaintiffs have selectively and misleadingly quoted. *See* Section III, *infra*.

(3) The complaints from the predecessor actions to the above-captioned consolidated litigation, as well as the complaint and notice of removal from a related Wisconsin action. Judicial notice of such documents is routine. *See* Section IV, *infra*.

II. THE WARRANTY, THE SSLA, THE TERMS OF USE, AND OPEN PLATFORM DOCUMENT ARE CENTRAL TO PLAINTIFFS' ALLEGATIONS

It is beyond dispute that the Warranty, SSLA, the Terms of Use, and Open Platform are each referenced in the Consolidated Complaint and central to Plaintiffs' claims:

The Warranty. The Warranty is directly implicated in Plaintiffs' claims, including for Breach of Express Warranty,[5] Violation of the Magnuson-Moss Warranty Act,[6] Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose,[7] and for Violation of the California Consumer Legal Remedies Act.[8] Yet, Plaintiffs never attach the actual Warranty itself. Under such circumstances, federal courts in this District and others have found it appropriate to take judicial notice of both the existence and substance of written warranties.[9]

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[3] Plaintiffs make much of the fact that there are multiple versions of the SSLA and Terms of Use included in the Request for Judicial Notice. This is a red herring – multiple versions of each are included only to show that the relevant language did not change throughout the purchase period at issue. The merit of the Request for Judicial Notice is unaffected, or is even enhanced by that fact. *See* Motion to Dismiss (Docket #97), 5-6; fn. 14, 17, 18.

[4] Consolidated Complaint ¶ 70.

[5] Consolidated Complaint ¶¶ 78-81.

[6] Consolidated Complaint ¶¶ 134-39.

[7] Consolidated Complaint ¶¶ 82-99.

[8] Consolidated Complaint ¶¶ 100-25. For example, paragraph 113 of the Consolidated Complaint states "Defendant performed the acts herein alleged in connection with the design, marketing, advertising, warranty, and/or sale of the PS3 with a knowledge and intent to defraud and deceive Plaintiffs and the Class." (emphasis added).

[9] *Datel Holdings Ltd. v. Microsoft Corp.*, --- F. Supp. 2d ----, 2010 WL 1691790, **6-7 (N.D. Cal. April 23, 2010) (taking judicial notice of "Xbox 360 'Limited Warranty and Return Information,' which includes the Xbox 360 software license; [] the Xbox Live Terms of Use; and [] a portion of the Xbox 360 console packaging. The first two documents are publicly available online and the third is available in any Xbox 360 console packaging."); *Berenblat v. Apple, Inc.*, 2009 WL 2591366 at *1, n. 3 (N.D. Cal. Aug. 21, 2009) ("[defendant's] Request for Judicial

The SSLA and Terms of Use. The Plaintiffs explicitly and substantively cite SSLA and the Terms of Use on numerous occasions in the Consolidated Complaint.[10] These are not passing references. For instance, Plaintiffs specifically invoke both the SSLA and Terms of Use in paragraph 41: "Defendant's right to remove the 'Install Other OS' feature is not specifically disclosed in Defendant's Terms of Service or System Software License Agreement." Indeed, Plaintiffs devote ten paragraphs over two pages to a claim that the SSLA is "unconscionable," complete with selective block quotations and inaccurate descriptions of font-size and headings.[11] Yet, again, Plaintiffs never attach any version of the SSLA or the Terms of Use themselves, and now resist their introduction.

The Open Platform document. Plaintiffs cite to the Open Platform throughout the Consolidated Amended Complaint.[12] Yet, Plaintiffs never attach the copy of the document explaining this feature.

Pursuant to Federal Rule of Evidence 201, courts may take judicial notice of facts "not subject to reasonable dispute" because they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[13] Furthermore, as Plaintiffs concede, in ruling on pleading challenges, courts may take judicial notice, under the incorporation by reference doctrine, of "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading" if (i) the

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Notice of the terms of the express warranty is granted, as the FAC references the warranty and at least two of the [] Plaintiffs exercised their rights under the express warranty."); *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig.*, 2008 WL 5451024, at *4 n. 2 (D.N.J. Dec. 31, 2008) ("In the Amended Complaint, Plaintiffs specifically acknowledge the existence of warranty information in each Player's packaging. Those documents are integral to Plaintiffs' Amended Complaint, as the warranty language serves, as a matter or law, to either support or erode Plaintiffs' claims. As a result, this Court will consider the warranty information, without converting Defendant's motion to dismiss into one for summary judgment.").

[10] *See* Consolidated Complaint ¶¶ 41, 114, 115, 116 (x3), 119, 121.

[11] *Id.*, ¶¶ 114-123.

[12] Consolidated Complaint ¶¶ 36, 45, 70; fn 1, 4.

[13] *Blasko v. Washington Mutual Bank*, 2010 U.S. Dist. LEXIS 90020 at * 4 (S.D. Cal. Aug. 30, 2010).

complaint refers to such document; (ii) the document is central to the plaintiff's claim; and (iii) no party questions the authenticity of the copy submitted.[14]

Plaintiffs' attempt to construe the criteria stated above as a "narrow exception" is misleading and inapposite, as illustrated by the easily distinguished case law cited by Plaintiffs – in this case, specific Ninth Circuit and other applicable case law governs the judicial notice of the documents at issue. Plaintiffs cite *Marder v. Lopez*, 450 F.3d 445 (9th Cir. 2006), for the general criteria stated above and their purported "narrowness." But Marder, only distinguishes between documents which are central to the complaint (which are judicially noticeable) and documents which cannot be central because they post-date the filing of the complaint.[15] Here, all of the documents referenced in the Request for Judicial Notice are central and pre-date the Consolidated Complaint. In addition, *Lussier v. Runyon* does not support Plaintiffs' assertion that "courts have tended to apply Rule 201(b) stringently."[16] In that case, the matter subject to judicial notice was "the sort of disputed adjudicative fact for which the adversarial truth finding process is well suited."[17] By contrast, the service terms and agreements at issue here are publicly available and such documents have been the recent subject of judicial notice in this District.[18]

Notably, Plaintiffs fail to provide explanation for why the legal authority cited in the Request for Judicial Notice is not controlling. For example, they imply that the court in *Datel Holdings Ltd. v. Microsoft Corporation* did not analyze the substance of the judicially noticed game console warranty, terms of use and packaging information. However, that court did take

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[14] *Knievel v. ESPN, Inc.*, 393 F.3d 1068, 1076 (9th Cir. 2005) (judicial notice appropriate where the plaintiff's claim depends on the contents of a document, stating: "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint."); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1281, fn. 16 (11th Cir. 1999); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2d Cir. 2002).

[15] *Id.* at 448-49.

[16] Opposition to the Request for Judicial Notice (Docket #102), 3:20-4:2 (citing to *Lussier v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995)).

[17] *Id.*

[18] *See Datel Holdings Ltd. v. Microsoft Corporation*, 2010 U.S. Dist. LEXIS 40021 (N.D. Cal. Apr. 23, 2010).

judicial notice of those documents because, as here, they were central to the claims at issue, and analyzed their substance in ruling on the defendant's pleading challenge.[19]

Plaintiffs also attempted to distinguish *In re Samsung Electronics America,, Inc. Blu-Ray Class Action Litigation*[20] by pointing out that those plaintiffs specifically acknowledged the existence of the applicable warranty information in each Player's packaging.[21] This is a meaningless distinction where, as here, Plaintiffs (i) acknowledge in their Consolidated Complaint that they accepted the SSLA (and, indeed, attack it);[22] (ii) do not dispute that, in order to use the PSN, they must accept the Terms of Use;[23] and (iii) do not dispute that the Warranty was issued with every console, just like the warranty in *In re Samsung.*[24] Thus, as in *In re Samsumg*, "[t]hose documents are integral to Plaintiffs' Amended Complaint, as the warranty language serves, as a matter of law, to either support or erode Plaintiffs' claims," and this Court should grant judicial notice of documents in considering the pending motions.[25]

Finally, Plaintiffs' attempt to distinguish *Berentblat v. Apple, Inc.*[26] in fact demonstrates how similar that case is to the present. In *Berentblat*, the court granted defendant's request for judicial notice of the terms of the express warranty "as the FAC references the warranty and at least two of the [] Plaintiffs exercised their rights under the express warranty."[27] Similarly, the Warranty is implicated in at least five of the claims in the Consolidated Complaint, its existence and authenticity are not seriously disputed, and Plaintiffs cannot sidestep the Warranty by seeking to ignore it and allege a different, contradictory express warranty.

III. THE INTERNET POSTINGS ARE APPROPRIATE FOR JUDICIAL NOTICE

To support their substantive claims and allegations that certification is appropriate, Plaintiffs rely heavily on Internet postings by members of their proposed class in their

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[19] *Id.* at **6, 8, 15-16.
[20] 2008 WL 5451024 (D.N.J. Dec. 31, 2008).
[21] Opposition to the Request for Judicial Notice (Docket #102), 5:17-20.
[22] *See* Motion to Dismiss (Docket #97), 4:12-14.
[23] *Id.*, 5:8-12.
[24] *Id.*, 3:19-21.
[25] *In re Samsung Elecs.*, supra, at *4, n. 2.
[26] Opposition to the Request for Judicial Notice (Docket #102), 5:20-25.
[27] 2009 WL 2591366 at *1, n. 3 (N.D. Cal. Aug. 21, 2009).

Consolidated Complaint.[28] But other postings on the same chat strings directly respond to Plaintiffs' selected postings, and admit that the author did not review any such representations, had no idea that the PS3 ever had an Other OS function, and/or downloaded Update 3.21 because they had no interest in the Other OS feature.[29] Because these postings react to and directly contradict the postings which Plaintiffs have made central to the allegations in their Consolidated Complaint, the Court may take judicial notice of them.

In seeking to exclude these, Plaintiffs again rely on inapposite legal authority and, importantly, fail to distinguish SCEA's cited authority, including *Knievel v. ESPN, Inc.*, which is controlling and directly on point.[30] Indeed, Plaintiffs actually cite *Knievel* for the general proposition that in a motion to dismiss the court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party."[31] But Plaintiffs fail to even address the key holdings of that case. In *Knievel*, a defamation suit against ESPN for posting on its website a picture and a commentary about a sports celebrity and his wife, plaintiffs attached just the picture and its accompanying caption, without reference to the contents of the surrounding pages.[32] In the ensuing motion to dismiss, defendants sought judicial notice of the pages surrounding the photograph. The court ruled that these surrounding pages – whose content was neither alleged nor described in the complaint – were incorporated by reference in the complaint and thus were proper for consideration.[33] The court even noted that viewers of the photograph and its caption would inevitably encounter the surrounding text that was the subject of defendant's request for judicial notice.[34]

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[28] Consolidated Complaint (Docket #76), ¶ 45.
[29] *See* Request for Judicial Notice (Docket #99), 5:1-11 and Motion to Strike (Docket #96), 8:8-17, 10:8-11:1, 11:20-12:5.
[30] 393 F.3d at 1076.
[31] Opposition to the Request for Judicial Notice (Docket #102), 2:9.
[32] 393 F.3d at 1076.
[33] *Id.*
[34] *Id.* at 1076-77. *See also, United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005); *Caldwell v. Caldwell***,** 2006 WL 618511 (N.D. Cal. Mar. 13, 2006); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007); *Highfields Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 971-72 (N.D. Cal. 2005) (taking judicial notice of message posted on Internet message board); *Ligotti v. Garofalo*, 562 F. Supp. 2d 204, 212 (D.N.H. 2008) (taking judicial notice of four comments made on Internet blog). Chat rooms and message boards are generally considered "websites." *See* http://en.wikipedia.org/wiki/Websites.

IV. THE PREDECESSOR COMPLAINTS ARE ALSO APPROPRIATE FOR JUDICIAL NOTICE

Plaintiffs offer only two grounds for why the Court should disregard complaints filed in the predecessor actions to this consolidated matter: they are not relevant to the pending motions and consideration of these pleadings would be improper because they have been superseded by the Consolidated Complaint.[35] Although Plaintiffs are correct that those complaints have been replaced by the Consolidated Complaint for the purpose of the pleadings, the statements made in those complaints are admissible as party admissions.[36] In addition, as the source of much of the factual grounds for the pending Motion to Dismiss and Motion to Strike, these pleadings are clearly relevant to those motions.[37]

V. PLAINTIFFS RAISE NO QUESTION OF AUTHENTICITY

Although Plaintiffs contend that there are questions regarding the authenticity and reliability of the documents subject to the Request for Judicial Notice, they fail to point to or reference any documents or any basis for this concern other than the use of "a third-party Internet archive website as opposed to discovery materials from [SCEA's counsel's] client's files."[38] But Plaintiffs provide absolutely no grounds for why this source, an archive of Internet websites, located on the Internet at web.archive.org, and easily accessible and verifiable by the parties and

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Plaintiffs' reliance on *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088 (N.D. Cal. 2007); *Contino v. BMW of North America, LLC*, 2008 US. Dist. LEXIS 59027 (D.N.J. July 25, 2008); and *Henderson v. Volvo Cars of North America, LLC*, 2010 U.S. Dist. LEXIS 73624 (D.N.J. July 21, 2008), are irrelevant as they did not involve a request for judicial notice.

[35] Opposition to Request for Judicial Notice (Docket #102), 7:4-18.

[36] *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).

[37] In addition, the legal authority Plaintiffs rely on provides no support for their arguments. *In re Commercial Tissue Products*, 183 F.R.D. 589, 591 (N.D. Fla. 1998), the court agreed with the arguments made herein that a plaintiffs' prior allegations may be "be used to contradict plaintiffs' theory of the case on the merits." *Id.* at 592. In *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 979 (E.D. Cal. 2000), the pleadings at issue did not relate to the underlying action; *Snyder v. Pascack Valley Hospital*, 303 F.3d 271, 276 (3d Cir. 2002), involved a completely unrelated issue of statutory time limits; *Emcore Corp. v. PriceWaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 264 (D.N.J. 2000), related to the contradiction of a subsequently-alleged statements by a prior, deleted allegation.

[38] Opposition to Request for Judicial Notice (Docket #102), 1:6-7, 1:18-24, and 5:5-17.

the Court, is improper.[39] Nor do they provide any legal authority supporting their argument. The only legal authority Plaintiffs cite – *Best Buy Stores, L.P.*, 2010 U.S. Dist. LEXIS 47193 (E.D. Cal. May 12, 2010) and *Fant v. Residential Services Validated Pub.*, 2007 U.S. Dist. LEXIS 23010 (E.D. Cal. March 16, 2007) – are not controlling here. In *Fant*, the district court refused to take judicial notice because the source of the underlying article was questionable.[40] Here, the Internet website that is the source of this document, via the Internet archive, is not questioned; and Plaintiffs have not proffered any reason to question it. In *Best Buy*, the district court provided no explanation why it concluded not to notice the documents on authenticity grounds.[41] There is no basis to conclude that that case is controlling here.

In addition, this Internet archive website was used to obtain only six of the documents attached to the Ott Declaration, and these are prior versions of the SSLA and Terms of Use that are materially the same as the current versions – Plaintiff neither contests the current versions nor that the prior versions are materially the same. Plaintiffs' argument regarding these documents is therefore largely irrelevant.

Dated: October 21, 2010

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[39] *See Knievel v. ESPN, Inc.*, 393 F.3d 1068, 1076 (9th Cir. 2005) (opponent of request for judicial notice, if opposing on grounds of doubtful authenticity, must actually dispute the authenticity of the document), *Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir. 2001) (same); *Allen v. United Financial Mortg. Corp.,* 660 F. Supp. 2d 1089, 1093 (N.D. Cal. 2009) (granting request for judicial notice and overruling authenticity objection as plaintiff offered only "perfunctory challenges" to the documents, none of which raised "reasonable dispute" with respect to the documents' authenticity); In *Curcio v. Wachovia Mortg. Corp.,* 2009 WL 3320499, *2 (S.D. Cal. Oct. 14, 2009) (same; plaintiff provided no actual reason why the accuracy of the documents (including website printouts) could reasonably be questioned).

[40] 2007 U.S. Dist. LEXIS 23010, *11.

[41] 2010 U.S. Dist. LEXIS 47193.