

# EXHIBIT Y

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE RICHARD SEEBORG

IN RE SONY PS3 "OTHER OS" )  
LITIGATION, )  
\_\_\_\_\_ )

No. C 10-1811 RS

San Francisco, California  
Thursday  
November 4, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(Appearances continued on next page)

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*Official Reporter - U.S. District Court*

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P R O C E E D I N G S

NOVEMBER 4, 2010

1:47 P.M.

**THE CLERK:** C 10-1811, Anthony Ventura, et al. versus  
Sony Computer Entertainment America, Incorporated.

Please come forward and state your appearances.

**MR. QUADRA:** Good afternoon, Your Honor. James  
Quadra on behalf of plaintiff.

**THE COURT:** Good afternoon.

**MR. PIZZIRUSSO:** James Pizzirusso on behalf of the  
plaintiffs.

**THE COURT:** Good afternoon.

**MS. RIVAS:** Good afternoon. Rosemary Rivas on behalf  
of the plaintiffs.

**THE COURT:** Good afternoon.

**MR. WARSHAW:** Good afternoon, Your Honor. Daniel  
Warshaw, Pearson Simon Warshaw Penny, for plaintiffs.

**THE COURT:** Good afternoon.

**MS. SACKS:** Good afternoon, Your Honor. Luanne Sacks  
and Carter Ott, DLA Piper, on behalf of defendant Sony  
Computer.

**THE COURT:** Good afternoon.

Let me go through with you my initial impressions in  
this matter, having read through what you submitted.

This is a motion to dismiss the consolidated class

1 any obligation to keep it in effect.

2           What the Court said in *Kelly* was that the sticker  
3 contained no temporal element, so the words on it themselves  
4 don't guarantee a performance over a specified period of time;  
5 and, therefore, it doesn't comply with the Magnuson-Moss  
6 Warranty Act.

7           **THE COURT:** This is your Section 16 C.F.R. argument?

8           **MS. SACKS:** Yes, Your Honor. And that case also  
9 responds directly to plaintiffs' argument that that regulation  
10 only applies to certain enumerated consumer goods and,  
11 therefore, is very narrow in its application. Obviously,  
12 courts are applying it to computer cases also.

13           I think, Your Honor, I've covered all of the issues  
14 that you had questions about. If there's anything else the  
15 Court would like to hear on, I would be happy to speak to it.

16           **THE COURT:** Thank you.

17           **MS. SACKS:** Thank you.

18           **THE COURT:** Who on plaintiffs' side?

19           **MR. PIZZIRUSSO:** Your Honor, James Pizzirusso for the  
20 plaintiffs.

21           We have broken up the argument into a few pieces, so  
22 some of my colleagues will be addressing different bits of it.  
23 There were several motions, several claims. And I'm --

24           **THE COURT:** I do have other matters, so I didn't  
25 devote the entire afternoon to it.

1           **MR. PIZZIRUSSO:** I understand, Your Honor. But the  
2 defendants have raised many issues which we feel like we need  
3 to address.

4           **THE COURT:** Okay.

5           **MR. PIZZIRUSSO:** And, certainly, you had some  
6 impressions that we want to address, as well.

7           **THE COURT:** Right away.

8           **MR. PIZZIRUSSO:** I'm going to be dealing with the  
9 warranty claims and the Computer Fraud Abuse Act.

10           But just to start back again at the beginning of what  
11 we have here, it is unique. And there aren't a lot of cases  
12 about it, like this, because there aren't a lot of cases where  
13 a consumer buys a product from a retailer and then has an  
14 ongoing relationship with the manufacturer, where they say, "To  
15 ensure functionality, we are going to give you updates to the  
16 software that you're going to download. It's going to make  
17 sure that your PlayStation keeps running well."

18           And so it's -- it's very unique in that regard. I  
19 haven't found another case where that's been an issue in any  
20 consumer protection and warranty case in California or anywhere  
21 else in the country. This is a unique situation that is  
22 created by the PlayStation here.

23           So Sony says:

24           We are going to sell you a PlayStation that has, at  
25 the very least, four core functionalities, four core features

1 that come with it. One is, you're going to be able to play  
2 games. Two is, you are going to be able to play Blu-ray DVDs.  
3 Three is, you are going to be able to play those games online.  
4 And four is, you are going to be able to install Linux or  
5 another operating system, and use programming --

6 **THE COURT:** They say that's only on the website.

7 **MR. PIZZIRUSSO:** That's wrong, Your Honor.

8 **THE COURT:** Where else is it?

9 **MR. PIZZIRUSSO:** It's in the manual. The manual that  
10 comes in the box that comes with the PlayStation says you can  
11 install the other OS feature on this. "Go to our website."  
12 And there's a whole website devoted to how to do this.

13 So it is in the manual that comes with every single  
14 PlayStation. And what is on the box are all those other  
15 representations, that it can access the PSN Network, that you  
16 can play Blu-ray DVDs.

17 **THE COURT:** Well, but that's not the essence of your  
18 lawsuit.

19 **MR. PIZZIRUSSO:** But it's part of it.

20 **THE COURT:** How so?

21 **MR. PIZZIRUSSO:** Because they keep saying you have a  
22 choice. You have a choice. You don't have to download 3.21.

23 It's not a choice. It's a Hobson's choice, because  
24 you either get some -- you lose some functionality if you  
25 download it. You lose some functionality if you --

1           **THE COURT:** Again, your argument is not with respect  
2 to the ability to play DVDs.

3           **MR. PIZZIRUSSO:** Yes, it is. Because --

4           **THE COURT:** Because you can play DVDs.

5           **MR. PIZZIRUSSO:** Well, no.

6           **THE COURT:** So it may be at the cost of you not  
7 having the operating system functionality, but there is no  
8 question that they are precluding you from doing that if you go  
9 along with the upgrades.

10           **MR. PIZZIRUSSO:** You also cannot play any new Blu-ray  
11 DVDs. Defendants were a little wishy-washy about that. When  
12 you do not download 3.21, any new DVDs that come out that  
13 require the newer firmware, you cannot play.

14           **THE COURT:** Well, but, again, I don't -- unless I'm  
15 missing something, that's not your claim here. The answer is,  
16 you elect to, therefore, download the upgrade --

17           (Simultaneous colloquy between the Court and  
18 Counsel.)

19           **THE COURT:** -- the DVD.

20           **MR. PIZZIRUSSO:** That is the core of our argument,  
21 Your Honor. You lose either way. Either way --

22           **THE COURT:** No, no.

23           (Simultaneous colloquy between the Court and  
24 Counsel.)

25           **THE COURT:** Where I'm not following you is, their



1 argument is that -- and the user manual was in partial answer  
2 to my question.

3           But their argument is, there isn't any representation  
4 with regard to the operating system alternative function. So  
5 when the upgrade comes out and the upgrade then allows you to  
6 go ahead and continue to use the DVD functionality, their  
7 argument is, "We haven't made any representation." They said  
8 it was on the website. You say also in the user manual.  
9 You're not -- there's no representation with respect to the  
10 operating system alternative.

11           **MR. PIZZIRUSSO:** Your Honor, we identified over a  
12 dozen representations in the complaint that deal with the  
13 representation that you will be able to use the PlayStation,  
14 paragraph 45 --

15           **THE COURT:** Right.

16           **MR. PIZZIRUSSO:** -- representation you will be able  
17 to use the PlayStation as a personal computer through the other  
18 OS function. They said it in press releases. They said it in  
19 articles.

20           **THE COURT:** I know. I don't think that provides a  
21 basis, at least, for express warranty.

22           **MR. PIZZIRUSSO:** Well, first of all, let's talk about  
23 *Blennis*, which the defendants pretty much raise their entire  
24 argument on.

25           Because I went back and I said, okay, let's look at

1 understand that part of your argument. What other arguments do  
2 you have on the privity issue on implied warranty?

3           **MR. PIZZIRUSSO:** Well, let's look at one of the  
4 exhibits to Carter Ott's declaration in support of this motion.  
5 It's Exhibit B, Your Honor. Exhibit B says this is the system  
6 software license agreement between the plaintiffs and the  
7 defendants --

8           **THE COURT:** Okay.

9           **MR. PIZZIRUSSO:** -- that they say controls here.  
10 We've said -- they have said, "Take judicial notice." We  
11 oppose that.

12           But to the extent the Court is going to take judicial  
13 notice, you should read the whole thing. Because, what it says  
14 is this agreement between a consumer -- I'm reading. The  
15 "between a consumer" part isn't in there. But this agreement  
16 is a contract with SCE. So the license agreement that Sony  
17 contends applies here, they say is a contract between them and  
18 the plaintiff. So if you're in a contract with Sony, we think  
19 that's privity.

20           Then they say, "SCE and its licensors reserve the  
21 right to bring legal action in the event of a violation of this  
22 agreement." So they're saying, "We can sue you, but you can't  
23 sue us because we're not in privity." That's one.

24           Number two, you know, I'm not in the other  
25 PlayStation case. I don't know what they alleged in terms of

1 the direct dealings. But here we allege there are many. As  
2 part of the package that you buy when you buy the PlayStation,  
3 you are buying firmware updates; you are contacting Sony; you  
4 are going onto the PlayStation Network.

5 **THE COURT:** There is no further transfer of funds.

6 **MR. PIZZIRUSSO:** There is. And we allege that, as  
7 well, Your Honor.

8 **THE COURT:** All right. Where do you allege it?

9 **MR. PIZZIRUSSO:** In paragraph 59. There are  
10 consumers who do access the PlayStation Network. You put money  
11 directly paid to Sony into the PlayStation Network, where you  
12 can download games. You can download what's called wallpaper  
13 and pictures. You can download TV shows.

14 And, in fact, one of our specific elements of damage  
15 here is that those consumers who did not download 3.21 lost the  
16 money that they paid to Sony to access features of the  
17 PlayStation Network.

18 **THE COURT:** Not to jump into the class arguments, but  
19 you're talking about all sorts of disparate -- disparate  
20 consumers doing very different things. Some are upgrading.  
21 Some are not. Some are buying. Some are not.

22 How can you have a class?

23 **MR. PIZZIRUSSO:** Well, Your Honor, if we have to  
24 subclass -- we haven't gone through discovery. And you  
25 yourself has recognized that you can certainly plead a broad

1 class, and when you get to class certification you may have to  
2 subclass. And we're not sure, but we allege everybody here is  
3 injured because whether you did or you didn't, you lost  
4 functionality.

5           So just to be clear, Your Honor, we allege there's  
6 privity in the express warranty which creates privity in  
7 implied warranty. We allege that there are direct dealings  
8 between Sony, including the transfer of funds. And we elect  
9 that their own documents that they say control here create a  
10 privity. They say we are in contract with you.

11           **THE COURT:** Okay.

12           **MR. PIZZIRUSSO:** So that's privity.

13           To address briefly, as well, the other warranty  
14 issues that appear to trouble the Court, in terms of the  
15 temporalness on the implied warranty claim -- I'm sorry, on the  
16 Magnuson-Moss claim, you know, they cite one case, *Kelly vs.*  
17 *Microsoft*, that is [sic] even in this Circuit. They can't cite  
18 a single California case that has evaluated this CFAA. They  
19 can't cite a single Ninth Circuit case.

20           It's not our burden here. It's their burden. It's  
21 their motion to dismiss. So on that ground alone, relying on  
22 an unpublished case from the District of Washington to argue  
23 that we need a temporal element here is tenuous, at best, Your  
24 Honor.

25           **THE COURT:** If the CFR provision provides for a

1 9(b) standard.

2 And I looked at some of the cases she cited. For  
3 example --

4 **THE COURT:** They didn't say "all." But, okay, go  
5 ahead.

6 **MR. WARSHAW:** They cited some cases. I don't  
7 necessarily agree with that standard across the board.

8 There's another case that's very important regarding  
9 Hobson's choice, Your Honor. It's *Rubio vs. Capital One*. In  
10 this case, Capital One credit card company solicited consumers  
11 to get a credit card with a fixed annual percentage rate.  
12 Plaintiff applied for one. Got one. Made purchases. Got into  
13 debt. Made payments. At some point in the future Capital One  
14 changed the interest rate to, obviously, a higher rate.

15 And the Court in that case held that the consumer is  
16 faced with a Hobson's choice. They are faced with a choice of  
17 either canceling the credit card and losing money or  
18 property -- i.e. the credit extended to the consumer -- or  
19 paying the higher rate. And that's no choice at all.

20 And it's very analogous to the situation here, where  
21 the consumers have the opportunity to download 3.21, and lose  
22 the functionality advertised and stated -- as we allege in our  
23 complaint -- or not download 3.21, and lose the Linux feature.

24 With respect to the Unfair Competition law, Your  
25 Honor, that obviously dovetails into what the Court is inclined

1 to do with respect to the predicate unlawful violations.

2 But when we talk about unfair, Sony marketed,  
3 advertised, publicized this product as having computer  
4 capabilities. It differentiated itself from its competitors,  
5 saying you can use this as a personal computer.

6 The cost of the product was higher than its  
7 competitors. People bought the product relying on those  
8 statements.

9 So it's a question of fairness. Whether at some  
10 point in the future Sony can take away one of the four core  
11 values in that product, we feel, violates the unfair prong of  
12 17200 as well.

13 With respect to unlawful, obviously, it will be  
14 handled with the predicate wrongs. But if you find that CLRA  
15 is violated, it also can be a predicate wrong for the unlawful  
16 prong.

17 And we've already discussed fraud.

18 With respect to conversion, Your Honor, you had a  
19 question about what was being converted, what property.

20 **THE COURT:** Uh-huh.

21 **MR. WARSHAW:** The complaint alleges that when update  
22 3.21 was downloaded, the hard drive was partitioned into two  
23 sections. One for the native operating system, and one or the  
24 other OS. That hard drive has now lost the data for the Linux  
25 operating system and all the personal data each consumer had.

1           And, interestingly enough, that portion of the hard  
2 drive is no longer available for use. It's been blocked off.  
3 So, for example, if it's a 40 gigabyte hard drive, 30 was for  
4 the PlayStation operating system, 10 was for the other OS. You  
5 remove the other operating system. Now, you still only have  
6 30. You've lost those 10, as alleged in the complaint. So  
7 there is a claim for conversion.

8           If the Court has any other questions regarding these  
9 claims, I'm happy to address them.

10           **THE COURT:** How about the motion to strike?

11           **MR. WARSHAW:** My co-counsel is going to handle that,  
12 briefly.

13           **THE COURT:** Okay. Mr. Quadra, you are down to two  
14 minutes.

15           **MR. QUADRA:** Okay. And I'll start by saying that we  
16 agree with the Court's tentative ruling or tentative thoughts  
17 that the Court also expressed in the *Baba v. HP* case, which is  
18 that if it is clear that no class can proceed, that's the only  
19 time one of three motions to strike early on are appropriate.

20           I would ask the Court to look at *Sanders* because  
21 *Sanders* itself, that opposing counsel relies on, says, "Before  
22 a motion to strike is granted, the Court must be convinced that  
23 any questions of law are clear and not in dispute, and that  
24 there are no set of circumstances could the claim defense  
25 succeed.

1           **THE COURT:** I thought you guys just told me I wasn't  
2 supposed to look at *Sanders*. If I do, I should read that  
3 section?

4           (Laughter)

5           **MR. QUADRA:** For purposes of rebutting what they are  
6 proposing *Sanders* is, it's also distinguishable, Your Honor.  
7 In that case, the class definition was inappropriate. And  
8 that's why maybe the Court struck the class allegations.

9           Here, we fall squarely within Rule 23. It has been  
10 properly pled. The issues that counsel raised of  
11 ascertainability, of remedies, those are all Rule 23  
12 commonality/typicality issues that are appropriate for a fully  
13 briefed class certification motion after discovery is  
14 completed.

15           Here, we are at an early stage. No discovery. It  
16 would be completely inappropriate to strike those allegations.  
17 And what counsel was saying, strike it with leave to amend, is  
18 really a way of trying to limit our class definition before  
19 we've been able to do the discovery to appropriately define it.  
20 As the Court pointed out, you can start broadly there. Or you  
21 can actually then get discovery that supports your class  
22 definition. So, again, it's premature and inappropriate.

23           Quickly, on the ascertainability, if the Court is  
24 inclined to look at that, that issue is about self-identifying,  
25 not having the names of any class representative.



1           So, again, the cases cited by counsel that we give  
2 you alternative cases to look at in our motion clearly spells  
3 out ascertainability is about self-definition. Here, the class  
4 clearly defines who was a member. And so a person who  
5 purchased a PS3 clearly knows that they are a member of the  
6 class.

7           The issue of damages, all damages here flow from the  
8 taking away of the OS function. Because what it does is, it  
9 devalues the equipment and it denies part of its use. So  
10 that's going to apply against all of them.

11           And then the whole issue of reliance, Your Honor, I  
12 would point the Court to *Collins vs. GameStop*, wherein the  
13 Court found that *Sanders* does not preclude a national class,  
14 consumer national class, based on requirements of  
15 individualized reliance.

16           That is not the standard in the District. Nor do  
17 standards, according to *Collins*, stand for that proposition.

18           And you have a slew of cases that talk about fraud on  
19 the market or a common act against all consumers, where you  
20 infer and can imply that reliance. And there's also *Tobacco*  
21 *II*, which applies to the Unfair Competition law.

22           So, again, those are for an issue of a fully briefed  
23 class certification motion, not a motion to strike.

24           **THE COURT:** Okay.

25           **MS. SACKS:** May I have --

