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11 (erroneously sued as "Sony Computer Entertainment America  
Inc.")  
12

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16  
17  
18 In re SONY PS3 "OTHER OS"  
LITIGATION

CASE NO. 3:10-CV-01811 RS (EMC)

19 **DEFENDANT'S NOTICE OF MOTION**  
20 **AND MOTION TO DISMISS;**  
**MEMORANDUM OF POINTS AND**  
21 **AUTHORITIES**

22 Date: May 12, 2011  
23 Time: 1:30 p.m.  
24 Judge: Hon. Richard Seeborg  
25 Courtroom: 3

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1 **NOTICE OF MOTION; MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 12, 2011 at 1:30 p.m., or as soon thereafter as  
4 counsel may be heard in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate  
5 Avenue, San Francisco, California, defendant Sony Computer Entertainment America LLC  
6 (“SCEA”) will, and hereby does, move for dismissal of Plaintiffs’ claims for relief asserted in the  
7 First Amended Consolidated Class Action Complaint (the “FAC”) (Docket #165) in this matter.

8 This motion is brought pursuant to Fed. R. Civ. P. (“Rule”) 12(b)(6) and 23, and is based  
9 on this Notice of Motion and Motion; the Memorandum of Points and Authorities, *infra*; the  
10 FAC; the complete file and record in this action; the argument of counsel; and such other and  
11 further evidence and argument as the Court may choose to entertain.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 Stripped to its essence, Plaintiffs’ eighty-four-page, 341-paragraph FAC fails to allege the  
15 one thing repeatedly demanded by this Court – an explicit promise by SCEA to Plaintiffs that the  
16 “Other OS” feature of the PlayStation®3 game console (“PS3”) would be available  
17 unconditionally and in perpetuity. Absent such a promise, Plaintiffs’ claims – no matter how  
18 prolix – remain legally and factually deficient.

19 The undisputed facts remain unchanged. SCEA introduced the PS3 in 2006. At that time,  
20 the PS3 included Other OS functionality that allowed users to install Linux as an alternative  
21 operating system. It offered many other features and functions, including use of the PlayStation®  
22 Network (“PSN”), the ability to play music, games and movies, and view photos. Use of the PS3  
23 and PSN were subject to the terms of SCEA’s System Software License Agreement (“SSLA”) and  
24 Terms Of Service And User Agreement (“Terms of Service”), both of which cautioned that  
25 SCEA may issue updates that disable certain functions of the PS3 due to security or other  
26 concerns.<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> SCEA references without repeating the Factual and Procedural Background set forth in its  
Motion to Dismiss Plaintiffs’ Initial Consolidated Complaint. *See* Docket #97, 3:3-9:10.

1 Plaintiffs, through Mr. Ventura, have already explicitly conceded that SCEA was  
2 “concern[ed] that the Other OS feature might be used by ‘hackers’ to copy and/or steal gaming  
3 and other content.” As Mr. Ventura averred:

4 Indeed it is no coincidence that the release of Update 3.21 came quickly on the  
5 heels of an announcement by a hobbyist named Geohot that he was able to use the  
6 Other OS feature along with a bit of soldering in a manner that gave him more  
control over the PS3 hardware than Sony had intended.<sup>2</sup>

7 In response to these publicized hacking efforts, SCEA issued Update 3.21 on April 1,  
8 2010, which if installed, would disable the Other OS feature. Users had the choice to install  
9 Update 3.21 with full knowledge of the consequences. Some Plaintiffs installed it, some did not.

10 While Plaintiffs are understandably disappointed by the introduction of Update 3.21, they  
11 are not entitled to relief. Plaintiffs’ units were fully operable with the Other OS feature during the  
12 applicable one-year warranty and, based on the terms thereof, Plaintiffs had no reasonable  
13 expectation that they could enjoy all features of the PS3 in perpetuity. Certainly they have  
14 offered no express promise that the Other OS feature in particular would be available beyond the  
15 one-year-warranted term.

16 At best, Plaintiffs offer a purported promise by another entity, not SCEA, that the Other  
17 OS feature would not be disabled. The referenced statement is alleged to have been made in the  
18 Fall of 2009, several years after Plaintiffs purchased their consoles and their warranties expired,  
19 months before the hacking efforts were discovered, and more than six months before Update 3.21.

20 Plaintiffs also offer now, almost a year into this litigation, supposed promises by SCEA  
21 that the PS3 would last for ten years. Notably, only one such statement pre-dates the Plaintiffs’  
22 PS3 purchases, and the statement is a quote from an interview with Kaz Hirai, chairman of  
23 SCEA, in a CNET article, months before the PS3 was released for sale, speaking of his future  
24 intent for the market lifecycle of the PS3, not a promise to purchasers of how long any particular  
25 hardware or software feature or function would be supported. Such a generalized statement of  
26 puffery, were it even actionable, says nothing about the functionality of Plaintiffs’ particular units

27 <sup>2</sup> *Ventura* Complaint (Docket #1), ¶ 25 (emphasis added); see *Pennsylvania R. Co. v. City of*  
28 *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”).

1 at the time they were purchased. It merely sets an expectation that SCEA will still be selling  
2 PS3s – as opposed to a PS4 or some replacement technology – in 2016, nothing more, nothing  
3 less. Significantly, it should not be lost on this Court that none of the Plaintiffs could recall such  
4 “promises” in their prior pleadings. Nor can Plaintiffs argue that such singular statement of  
5 future intent was seen and relied upon by all PS3 purchasers – to the contrary, Messrs. Baker and  
6 Stovell implicitly admit they did not see or rely on any such statement.<sup>3</sup>

7 The law does not require software to be accessible and functional forever, nor does the  
8 law ignore standard language existing in virtually every software license that the licensor may be  
9 required to alter the functionality due to security and intellectual property issues. Update 3.21  
10 was released in response to serious hacking concerns, as Plaintiffs conceded in their prior  
11 pleadings. Plaintiffs now suggest that SCEA did so to save money, but offer only conjecture and  
12 speculation in support.<sup>4</sup> In any event, those Plaintiffs who downloaded Update 3.21 did so  
13 knowingly and voluntarily and with full consent and no claim for relief exists based on the  
14 alleged facts.

15 Finally, in addition to their new theories, Plaintiffs offer three new class definitions.  
16 However, Plaintiffs have made class certification even more impossible – the classes proposed all  
17 lack ascertainability as membership cannot be readily determined – but would require extensive  
18 fact finding and individualized inquiries. And, because of the admissions by Messrs. Ventura,  
19 Baker and Stovell, Plaintiffs lack a representative for two of the three new class definitions.

20 The FAC should be dismissed with prejudice.

## 21 **II. PLEADING STANDARDS**

22 Under Rule 12(b)(6), a claim may be dismissed because of a “failure to state a claim upon  
23 which relief can be granted.”<sup>5</sup> A dismissal under Rule 12(b)(6) may be based on the lack of a  
24 cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal

---

25 <sup>3</sup> FAC (Docket #165), ¶¶ 21 and 23.

26 <sup>4</sup> In light of the Plaintiffs’ prior judicial admissions that the Other OS feature was disabled for  
27 security reasons, all of the Plaintiffs (and, in particular, plaintiff Ventura) should be precluded  
28 from now alleging, based on nothing more than rank speculation, that Update 3.21 was released,  
not for security reasons, but to save money.

<sup>5</sup> Fed. R. Civ. P. 12(b)(6).

1 theory.<sup>6</sup> In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are taken  
2 as true and construed in the light most favorable to the non-moving party.<sup>7</sup> The Court, however,  
3 is not required “to accept as true allegations that are merely conclusory, unwarranted deductions  
4 of fact, or unreasonable inferences.”<sup>8</sup> Although they may provide the framework of a complaint,  
5 legal conclusions are not accepted as true and “[t]hreadbare recitals of elements of a cause of  
6 action, supported by mere conclusory statements, do not suffice.”<sup>9</sup>

7 Additionally, Rule 9(b) requires that “[i]n allegations of fraud or mistake, a party must  
8 state with particularity the circumstances constituting fraud or mistake.” To satisfy the rule, a  
9 plaintiff must allege the “who, what, where, when, and how” of the charged misconduct.<sup>10</sup> In  
10 other words, “the circumstances constituting the alleged fraud must be specific enough to give  
11 defendants notice of the particular misconduct so that they can defend against the charge and not  
12 just deny that they have done anything wrong.”<sup>11</sup>

13 **III. PLAINTIFFS ONCE AGAIN FAIL TO ALLEGE ANY WRITTEN PROMISE**  
14 **REGARDING THE UNCONDITIONAL AND PERPETUAL AVAILABILITY OF**  
15 **THE OTHER OS FEATURE**

16 Under California law, to plead a breach of express warranty claim a plaintiff must  
17 properly allege that (1) the seller’s statements constitute an affirmation of fact or promise, or a  
18 description of the goods; (2) the statement was part of the basis of the bargain; and (3) the  
19 warranty was breached.<sup>12</sup>

20 In dismissing their initial express warranty claim, the Court concluded that none of the  
21 various representations Plaintiffs cited in marketing materials, interviews, and brochures “can  
22 reasonably be characterized as a ‘promise,’ and it is difficult to discern exactly what ‘affirmation

23 <sup>6</sup> *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*,  
250 F.3d 729, 732 (9th Cir. 2001).

24 <sup>7</sup> *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008); *Vignolo v. Miller*, 120  
F.3d 1075, 1077 (9th Cir. 1999).

25 <sup>8</sup> *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1056-57 (9th Cir. 2008); *Sprewell v. Golden State*  
*Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

26 <sup>9</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550  
U.S. 544, 555 (2007).

27 <sup>10</sup> *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

28 <sup>11</sup> *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003).

<sup>12</sup> *Weinstat v. Dentsply Intern. Inc.*, 180 Cal. App. 4th 1213, 1227 (2010); California Uniform  
Commercial Code § 2313; *Keith v. Buchanan*, 173 Cal. App. 3d 13, 20 (1985));

1 of fact' or 'description of the goods' those statements comprise that plaintiffs contend constitutes  
2 the warranty."<sup>13</sup> Furthermore, the Court recognized the fatal temporal flaw in Plaintiffs' claim in  
3 that the Other OS feature was available at the time of purchase. As such, the Court concluded  
4 that, to state a claim for express warranty, "Plaintiffs must ... allege that [SCEA] made some  
5 express representations as to the *continued* availability of [the Other OS] feature."<sup>14</sup>

6 In response, Plaintiffs' amended claim for breach of express warranty in Count I of the  
7 FAC lists only three statements that they purport to be express warranties:

8 Defendant expressly warranted via its advertising, statements, brochures, website  
9 information, public statements, owner's manuals, console, and other  
10 representations

11 *that the PS3 would be able to operate as a computer and install Linux through  
12 the "Other OS" feature.*

13 *that the PS3 would be able to access the PSN and play games online, as well as  
14 the newest DVDs and games.*

15 *that the PS3 would be upgraded through Firmware Updates and last ten years  
16 or more.*<sup>15</sup>

17 None of these statements meet the Court's requirements. The first two statements say nothing  
18 about the continued availability of any feature, including the Other OS, and thus suffer from the  
19 same deficiencies as those statements previously rejected by the Court. Regarding the last  
20 statement, the Plaintiffs engage in an illogical leap. Plaintiffs manufacture a "promise" from the  
21 following quotes projecting the marketplace lifecycle of the PS3 – only one of which pre-dates  
22 their PS3 purchases – that their PS3s would "last 10 years or more":

23 "We look at our products having a 10-year life cycle, which we've proven with  
24 the PlayStation. Therefore, the PlayStation 3 is going to be a console that's going  
25 to be with you again for 10 years." (August 2006 CNET News)

26 "Last time I checked, [Microsoft] never had a console that's been on the market  
27 for more than four or five years and we've committed to a ten year life cycle, so  
28 you do the math." (2009 Official PlayStation Magazine)

<sup>13</sup> Order Granting Motion to Dismiss (Docket #161), 4:11-21.

<sup>14</sup> *Id.* The Court alternatively held that Plaintiffs "will have to show both that there were implied representations as to continued availability and that an express warranty claim may legally proceed even where it is based in part on such implied representations." *Id.* As set forth in Section IV, Plaintiffs have failed to allege any actionable claim for breach of implied warranty."

<sup>15</sup> FAC (Docket #165), ¶¶ 212-214 (emphasis added).

1 “[W]e firmly believe that the PS3 will not only be around in 10 years but it’ll be  
2 driving the business – driving this industry. I don’t know if our competitors’  
3 platforms will still be viable in 10 years; I do know that the PlayStation 3 will  
be.” (Spring 2009, unidentified publication)

4 “. . . Both the original PlayStation and PlayStation 2 had lifecycles of more than  
5 10 years, and the PlayStation 3 will as well. The 10-year life cycle is a  
6 commitment we’ve made with every PlayStation consumer to date and is part of  
7 our philosophy that we provide hardware that will stand the test of time providing  
that fun experience you get from day one for the next decade. . . .”<sup>16</sup> (February 14,  
2011, *i.e.*, after Update 3.21 was issued).

8 Notwithstanding Plaintiffs’ specious assertions to the contrary, these statements of  
9 lifecycle expectations, *i.e.*, how long SCEA will continue to sell PS3s, surely cannot be contorted  
10 into a promise that all *PS3 features and functions* will be supported, unconditionally and in the  
11 identical manner for ten years. Indeed, none of these statements says anything about any software  
12 feature, let alone the ability to run Linux as an alternative operating system.

13 Only two of the four named Plaintiffs avers having seen any statement regarding a ten  
14 year lifecycle.<sup>17</sup> Moreover, all but the first statement post-dated the Plaintiffs’ purchase of the  
15 PS3 and therefore could not possibly be part of a basis for the Plaintiffs’ bargain. And with  
16 respect to the remaining statement in 2006, the only way this statement could possibly be false  
17 would be if in fact SCEA ceases sale of the PS3 before year 2016. Any such claim has yet to  
18 accrue. Thus, Plaintiffs’ amended express warranty claims fare no better than their previous  
19 attempt, and should be dismissed with prejudice.

20 **IV. PLAINTIFFS’ AMENDED IMPLIED WARRANTY CLAIMS CONTINUE TO  
LACK THE REQUISITE VERTICAL PRIVACY AT THE TIME OF SALE**

21 Counts II and III of the FAC allege that SCEA breached the implied warranties of  
22 merchantability and fitness for a particular purpose.<sup>18</sup> Under California law, a plaintiff may assert  
23 breach of an implied warranty only against the party from whom he or she directly purchased –  
24 “[v]ertical privity is a prerequisite in California.”<sup>19</sup> For example, the Ninth Circuit held that

25 \_\_\_\_\_  
26 <sup>16</sup> FAC (Docket #165), ¶¶ 122-125.

<sup>17</sup> *Id.*, ¶¶ 21,23.

<sup>18</sup> *Id.*, ¶¶ 82-99.

<sup>19</sup> *United States Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal. App. 3d 1431, 1441 (1991)  
(citing *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 695-96 (1954); *Osborne v. Subaru of  
28 America, Inc.*, 198 Cal. App. 3d 646, 656 (1988)).

1 where an end-consumer buys a product from a retailer, the consumer has no claim for breach of  
2 implied warranty as against the product’s manufacturer.<sup>20</sup> Here, there is no dispute that Plaintiffs  
3 purchased their PS3s from independent retailers, not SCEA. Thus, the Plaintiffs have no vertical  
4 privity with SCEA, and cannot assert a breach of implied warranty claim against SCEA as a  
5 matter of law. It is for this precise reason that the Court dismissed the implied warranty claims in  
6 the prior pleading. Indeed, the Court, in permitting leave to replead, recognized that “it is not  
7 clear how plaintiffs may be able to cure the privity problem.”<sup>21</sup>

8 In their FAC, Plaintiffs do not attempt to allege, and cannot credibly allege, that they  
9 made any direct payments to SCEA for the purchase of the PS3. Instead, they essentially restate  
10 the same “direct dealings” arguments that the Court already rejected, in both this and other  
11 firmware cases.<sup>22</sup> Specifically, Plaintiffs allege that they have privity with SCEA because some  
12 class members – post-sale – had “direct financial and other dealings” with SCEA when they  
13 downloaded SCEA updates, accessed the PSN and purportedly paid money for access to the  
14 PlayStation® Store and Qore.<sup>23</sup> The “direct dealings” exception to vertical privity has been  
15 recognized only where a consumer negotiates or pays consideration directly to the manufacturer  
16 pre-sale.<sup>24</sup> No privity exception exists for post-sale dealings with a manufacturer, and the Court  
17 has already stated its refusal to create such an additional, temporally-flawed exception:

18 Plaintiffs argue that at least in some cases they pay monies directly to [SCEA] in  
19 connection with using PSN. That would not, however, support a conclusion that  
20 [SCEA] was the seller in the transactions by which plaintiffs acquired their PS3  
systems.<sup>25</sup>

21 Plaintiffs further allege that SCEA “is in direct privity with Plaintiffs and members of the Class  
22 by reasons of its express written warranty, TOS, and SSLA.”<sup>26</sup> This Court, however, has already  
23 rejected this allegation, recognizing “clear California precedent that privity remains a requirement

24 <sup>20</sup> *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (citing *Anunziato v.*  
25 *eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. Nov. 10, 2005); *Osborne*, 198 Cal. App.  
3d at 656 fn. 6).

26 <sup>21</sup> See Docket #161, 7:13-14.

27 <sup>22</sup> *In re Sony PS3 Litig.*, 2010 WL 3324941, at \*2-3 (N.D. Cal. Aug. 23, 2010).

28 <sup>23</sup> FAC (Docket #165), ¶¶ 14, 225-227

<sup>24</sup> See *U.S. Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal. App. 3d 1431 (1991).

<sup>25</sup> Docket #161, p. 6, note 3

<sup>26</sup> FAC (Docket #165), ¶ 211

1 in implied warranty claims even though it has been eliminated in express warranty claims.”<sup>27</sup>

2 Vertical privity must be established between the consumer and the manufacturer at the time of  
3 purchase, not afterwards, and the FAC, like its predecessor, fails to establish such privity.

4 **V. PLAINTIFFS’ FAILURE TO PLEAD AN EXPRESS OR IMPLIED WARRANTY**  
5 **CLAIM DOOMS THEIR MAGNUSON-MOSS WARRANTY ACT CLAIM**

6 The Magnuson-Moss Warranty Act, 15 U.S.C. section 2301 *et seq.*, provides a federal  
7 private right of action for state law warranty claims (18 U.S.C. § 2301(d)(1)), but does not expand  
8 those state law rights: “dismissal of the state law claims requires the same disposition with respect  
9 to any associated [Magnuson-Moss] claim.”<sup>28</sup> As in their Initial Complaint, the Magnuson-Moss  
10 Act claim Plaintiffs aver in their FAC is based entirely on their express and implied warranty  
11 claims.<sup>29</sup> With regard to this claim alleged in the Initial Complaint, the Court concluded that,  
12 “[w]ith exceptions not implicated here, ‘disposition of the state law warranty claims determines  
13 the disposition of the Magnuson-Moss Act claims.’ Accordingly, the Magnuson-Moss Act count  
14 will be dismissed, with leave to amend.”<sup>30</sup> The same reasoning compels dismissal of the  
15 Magnuson-Moss Act claim in the FAC.

16 This claim also fails for another reason: for a written representation to constitute a  
17 “written warranty” under the Magnuson-Moss Act, it must relate for a specific period of time:

18 Certain representations, such as energy efficient ratings for electrical appliances,  
19 care labeling of wearing apparel, and other product information disclosures may  
20 be express warranties under the Uniform Commercial Code. However, these  
21 disclosures alone are not written warranties under the Act. Section 101(6)  
22 provides that a written affirmation of fact or a written promise of a specified level  
of performance must relate to *a specified period of time* in order to be considered  
a “written warranty.” A product information disclosure without a specified time  
period to which the disclosure relates is therefore not a written warranty.<sup>31</sup>

23 In their FAC, Plaintiffs fail to cite any written warranty regarding the promised duration of any  
24 software feature or function, including the Other OS, and the SSLA states precisely the

25 <sup>27</sup> Docket #161, 6:17-22; *see also* Docket #162 (further addressing privity arguments).

26 <sup>28</sup> *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, \*9 (N.D. Cal. 2009); B. Clark & C.  
Smith, *The Law of Product Warranties* (Thompson-West 2d ed.), § 14:1.

27 <sup>29</sup> FAC (Docket #165), ¶¶ 309 and 313.

28 <sup>30</sup> Docket #161, 7:16-22.

<sup>31</sup> 16 C.F.R. § 700.3 (emphasis added); *see also Skelton v. General Motors Corp.*, 660 F.2d 311,  
316 fn. 7 (7th Cir. 1981) (same).



1 opposite.<sup>32</sup> In fact, the only amended allegation Plaintiffs can offer is corporate puffery in the  
2 form of responses to interview questions that the PS3 is expected to have a ten-year presence in  
3 the marketplace – which is certainly not a written “product information disclosure.” As set forth  
4 above, that is not a written warranty at all. *See* Section III, *supra*. On this additional basis, their  
5 Magnuson-Moss Act claim fails.

6 **VI. PLAINTIFFS CANNOT SUCCEED ON THEIR CLRA CLAIM**

7 **A. Plaintiffs Have Failed To Establish SCEA Made Any Misrepresentation At  
8 Or Before The Time Of Sale**

9 Plaintiffs have retained their allegation that SCEA violated three provisions of the  
10 Consumer Legal Remedies Act (“CLRA”) – Civil Code subsections 1770(a)(5), (7), and (9),  
11 which prohibit “representing” or “advertising” goods or services in ways that are false or  
12 misleading.<sup>33</sup> In dismissing their prior CLRA claim, the Court concluded that they “must address  
13 the fact that none of the representations they have thus far identified include any *express* promise  
14 that the Other OS feature would be available indefinitely or of any particular period of time.”<sup>34</sup>  
15 Once again, in their FAC, Plaintiffs have failed to do this. They premise their CLRA claim on the  
16 allegation that “[SCEA] advertised, promoted, marketed, warranted, and represented that the PS3  
17 operates like a computer through the ability to download operating systems such as Linux,” “that  
18 the PS3 can play online games and access other features through the PSN,” “that the PS3 has a  
19 lifespan of 10 years,” and that “downloading and installing updates would update the PS3’s  
20 operating system to include additional settings and features.”<sup>35</sup> However, all of the underlying  
21 statements were true when made. *See* Sections III, *infra*. And Plaintiffs’ mischaracterization of  
22 the one pre-sale statement, in August 2006, regarding the intended “lifespan,” *i.e.* the marketplace  
23 lifecycle of the PS3, is anything but an “*express* promise” regarding the Other OS feature. *See*  
24 Sections III and IV, *infra*. Stated differently, Plaintiffs’ CLRA claim fails for the same reason as  
25 does their express warranty claim.

25 /////

26 <sup>32</sup> *See* Section III, *supra*. In fact, only the express written warranty – which is limited to the  
27 hardware – states a specified period. *See* Docket #97, Section II(B).

28 <sup>33</sup> FAC (Docket #165), ¶ 285.

<sup>34</sup> Docket #161, 8:4-6 (emphasis in original).

<sup>35</sup> FAC (Docket #165), ¶¶ 269-272.

1           Moreover, the FAC fails to plead the requisite causal connection between a misstatement  
2 and acquisition of the goods at issue. The CLRA only provides a cause of action for a consumer  
3 who “suffers any damage **as a result of** the use or employment...of a method, act or practice  
4 declared to be unlawful by section 1770.”<sup>36</sup> The FAC asserts violations of the CLRA in  
5 connection with purchases of PS3s in 2006 and 2007.<sup>37</sup> However, the basis for their claims,  
6 launch of Update 3.21, which if accepted by a user disabled the Other OS function, did not occur  
7 until April 1, 2010. Thus, there is not, nor can there be, any causal connection between the  
8 challenged act and Plaintiffs’ PS3 purchases.<sup>38</sup>

9           Indeed, to the extent Plaintiffs are attempting to assert CLRA claims based on  
10 misrepresentations or omissions at the time of sale, those who purchased their PS3 on or before  
11 April 27, 2007, like Messrs. Huber and Baker, have no CLRA claims due to the application of the  
12 three year statute of limitations. Cal. Civil Code § 1783. And of course, neither Mr. Stovell nor  
13 Baker averred ever seeing a representation of a ten year life span, and for that further reason  
14 cannot state a CLRA claim.

15           In addition, in dismissing Plaintiffs’ initial CLRA claim, the Court concluded that  
16 Plaintiffs had failed to “clearly identify the particular representations on which they rely, and  
17 articulate why they are false or misleading. Such specificity is all the more important here,  
18 because the CLRA claims sound in fraud, thereby implicating Rule 9(b).”<sup>39</sup> Numerous supposed  
19 misrepresentations are referenced, but in each instance the allegations are inadequate under Rule  
20 9(b)’s heightened pleading requirement. *See* Section IX(C), *infra*.

21           Furthermore, only detailed factual representations are actionable under the CLRA – not  
22 sales boasts or “puffery.”<sup>40</sup> “Advertising that amounts to ‘mere’ puffery is not actionable because  
23 no reasonable consumer relies on puffery.”<sup>41</sup> Most of the representations cited by Plaintiffs –

24 <sup>36</sup> Civil Code § 1780 (emphasis added).

25 <sup>37</sup> FAC (Docket #165), ¶¶ 17-24.

26 <sup>38</sup> This issue aside, Plaintiffs have admitted that their PS3s are “personal computers,” as they  
purport the relevant representations state.

27 <sup>39</sup> Order Granting Motion to Dismiss (Docket #161), 7:27-8:4 (citing *Vess v. Ciba-Geigy Corp.*,  
317 F.3d 1097, 1103-04 (9th Cir. 2003)).

28 <sup>40</sup> *See Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 fn. 3  
(2003).

<sup>41</sup> *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994); *see also Consumer Advocates*,

1 particularly the one pre-purchase comment – in August 2006 – regarding the intended ten-year  
2 lifecycle of the PS3, are just that – inactionable puffery.

3 Finally, the FAC asserts SCEA violated the CLRA as well as the Unfair Competition Law  
4 (“UCL”), California Business & Professions Code section 17200 *et seq.*, and the False  
5 Advertising Act (“FAA”), California Business & Professions Code section 17500 *et seq.*, based  
6 on an omission theory. But nowhere in the FAC do Plaintiffs allege an “omission [] contrary to a  
7 representation actually made by [SCEA], or an omission of fact [SCEA] was obliged to disclose,”  
8 which is the prerequisite for viable claims under the CLRA, as well as the UCL and FAA.<sup>42</sup>  
9 Based on the representations presented to the Court, “the only expectations buyers could have  
10 had...was that [the PS3] would function properly for the length of” the one-year express  
11 warranty.<sup>43</sup> Plaintiffs attempt to end-run this conclusion by averring that their “reasonable  
12 expectation” was that the Other OS feature would last for the “useful life” of the PS3.<sup>44</sup> But  
13 numerous courts, at the pleading stage, have explicitly declined to accept the notion that a  
14 plaintiff’s alleged expectation that a product would last longer than the express warranty can save  
15 an omission-based claim.<sup>45</sup> In addition, not one of the Plaintiffs avers that he was unaware the

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16 113 Cal. App. 4th at 1361 (representation that satellite television system provided “crystal clear”  
17 digital video or “CD quality” audio were “not factual representations that a given [industry]  
18 standard was met,” but merely “boasts, all-but-meaningless superlatives,” akin to “mere puffing,”  
19 and “which no reasonable consumer would take as anything more weighty than an advertising  
20 slogan.”); *Baba v. Hewlett-Packard Co.*, 2010 WL 2486353, \*4 (N.D. Cal. June 16, 2010) (ruling  
with regard to marketing of computers as “tablets”: “[t]he word ‘tablet’ merely describes the  
product being sold and does not constitute a representation of the quality of the product....”);  
*Long v. Hewlett-Packard Co.*, 2007 WL 2994812, \*7 (N.D. Cal. July 27, 2007) (same ruling with  
regard to “notebook” computers).

21 <sup>42</sup> See *Hoey v. Sony Electronics, Inc.*, 515 F. Supp. 2d 1099, 1103-04 (N.D. Cal. 2007) (quoting  
*Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006)); see also *In re*  
*Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, --- F. Supp.  
22 2d ---, 2010 WL 4892114, \*\*5 & 11 (S.D. Cal. Nov. 30, 2010) (dismissing CLRA claim based  
23 on omission theory, in part, because “[p]laintiffs have not sufficiently alleged that those  
representations were untrue or misleading at the time they were made.”; “Plaintiffs have not  
24 alleged that Sony has made any representations contrary to omitted information....”); *Berenblat v.*  
*Apple, Inc.*, 2009 WL 2591366, \*\*6-7 (N.D. Cal. Aug. 21, 2009).

25 <sup>43</sup> *Daugherty*, 144 Cal. App. 4th at 838; see also *In re Sony Wega*, 2010 WL 4892114, \*5 & 11.

26 <sup>44</sup> See, e.g., FAC (Docket #165), ¶¶ 119.

27 <sup>45</sup> See *In re Sony Grand WEGA*, 2010 WL 4892114, at \*15 (“While the *Hicks* exception may  
28 make sense for goods-such as the foundation of a home-that consumes may reasonably expect to  
last for decades, applying such an exception to consumer goods-such as televisions or other  
electronics-about which consumer-expectations will be highly subjective and will vary widely  
‘would eliminate term limits on warranties, effectively making them perpetual or at least for the  
‘useful life’ of the product.”) (quoting *Oestreicher*, 544 F. Supp. 2d at 972); see also *Hoey*, 515

1 Other OS feature would be disabled if he downloaded Update 3.21. To the contrary, they admit  
2 that they independently decided whether or not to download Update 3.21 depending on the  
3 associated known consequences, which were fully disclosed by SCEA at the time of issuing the  
4 Update.<sup>46</sup> Thus, no injury has been alleged from this supposed nondisclosure.<sup>47</sup>

5 **B. Plaintiffs' "Unconscionability" Claim Also Fails**

6 Plaintiffs also allege SCEA violated Section 1770(a)(19) because the following term of  
7 the SSLA is supposedly unconscionable:

8 Some services may change your current settings, cause a loss of data or content,  
9 or cause some loss of functionality.

10 SCE, at its sole discretion, may modify the terms of this Agreement at any time,  
11 including any terms in the PS3™ systems documentation or manual, or at  
12 <http://www.scei.co.jp/ps3-license/index.html>. Please check back on this website  
from time to time for changes to this Agreement. Your continued access to or use  
of the System Software will signify your acceptance of any changes to this  
Agreement.<sup>48</sup>

13 The FAC alleges that this term is unconscionable because it was imposed by SCEA after purchase  
14 of the PS3, presenting buyers with no choice but to accept it, and because it unreasonably  
15 reallocated risk between SCEA and PS3 buyers.<sup>49</sup> But Plaintiffs supposedly reviewed the SCEA  
16 website prior to purchase, and thus were informed of and had access to the terms of the SSLA at  
17 the time of their buying decision.<sup>50</sup>

18 //

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19 F. Supp. 2d at 1105 ("In fact, the California Supreme Court has stated the general public policy  
20 that a consumer can be 'fairly charged with the risk that the product will not match his economic  
21 expectations unless the manufacturer agrees that it will.'" (quoting *Seely v. White Motor Co.*, 63  
Cal. 2d 9, 18 (1965) (citing *Wyatt v. Cadillac Motor Car Div.*, 145 Cal. App. 2d 423, 426 (1956),  
disapproved on other grounds *Sabella v. Wisler*, 59 Cal. 2d 21, 31 (1963); *Trans World Airlines v.*  
*Curtiss-Wright Corp.*, 148 N.Y.S. 2d 284, 290 (1955)); *Daugherty*, 144 Cal. App. 4th at 830-32.

22 <sup>46</sup> Consolidated Complaint (Docket #76), ¶¶ 10-19; FAC (Docket #165), ¶¶ 17-24.

23 <sup>47</sup> See Civil Code § 1780 ("suffers any damage **as a result of** the use or employment...of a  
method, act or practice declared to be unlawful by section 1770.") (emphasis added); see  
24 *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 37 (1975) (CLRA claim properly  
stated when plaintiff alleged reliance on alleged misrepresentations); *Hall v. Time, Inc.*, 158 Cal.  
25 App. 4th 847, 855 (2008) ("The phrase 'as a result of' in its plain and ordinary sense means 'caused  
by' and requires a showing of a causal connection or reliance on the alleged misrepresentation.");  
26 *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993) (holding no material  
misrepresentation was made to plaintiff suing under the CLRA because he did not believe or rely  
on the allegedly misleading statement).

27 <sup>48</sup> FAC (Docket #165), ¶¶ 286-294

28 <sup>49</sup> *Id.*

<sup>50</sup> *Id.*, ¶¶ 17-24.

1           Moreover, these allegations are truly inadequate as they are thinly-veiled conclusory  
2 recitations of the legal elements of an unconscionability theory, and thus inadequate under *Iqbal*.  
3 Indeed, California courts reviewing similar “clickwrap” licenses have approved of them, finding  
4 they are neither procedurally or substantively unconscionable.<sup>51</sup> Thus, an end-user-license  
5 agreement is not invalid even if a consumer receives it for the first time after purchase of the  
6 software.<sup>52</sup> Nor is it unconscionable merely because it affords the licensor the right to limit or  
7 revoke the license, and unconscionability claims based on facts Plaintiffs allege here have been  
8 dismissed at the pleading stage.<sup>53</sup> Clauses allowing a software licensor to terminate or alter the  
9 scope of its services are not “sufficiently shocking;”<sup>54</sup> indeed, as the Central District Court of  
10 California concluded when reviewing terms of a video game software license and subscription  
11 agreement, “[i]f such a clause were unconscionable, [defendant] and all of its competitors would  
12 be forced to make their games available in perpetuity or face class actions suits for loss of data.”<sup>55</sup>

13           The FAC also avers that the allegedly unconscionable terms were written in “small-type,  
14 prolix form; disguised...under nebulous heading; and buried...among sundry other unrelated  
15 contractual terms.”<sup>56</sup> These conclusory allegations are contradicted by the actual terms of the  
16 SSLA: the challenged verbiage is in the same font size as the rest of the Agreement and appears  
17 under the headings “Services and Updates” and “General Legal.” The SSLA is less than two and  
18 half pages (when printed) and, as such, it is hard to imagine any terms being “buried” or in  
19 “prolix form” in such a short document.<sup>57</sup>

20           Finally, the three year statute of limitations would also bar the unconscionability claim  
21 with regard to PS3 purchases prior to April 27, 2007.<sup>58</sup>

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22  
23 <sup>51</sup> See e.g., *Meridian Project Systems, Inc. v. Hardin Const. Co. LLC.*, 426 F. Supp. 2d 1101,  
24 1107 (E.D. Cal. 2006) (shrinkwrap license not unconscionable); *Leong v. Square Enix of Am.*  
25 *Holdings, Inc.*, 2010 WL 1641364 at \*10 (C.D. Cal. Apr. 20, 2010) (clickwrap license not  
26 unconscionable).

27 <sup>52</sup> 426 F. Supp. 2d at 1107.

28 <sup>53</sup> *Id.* at \*1.

<sup>54</sup> *Id.* \*10.

<sup>55</sup> *Id.*

<sup>56</sup> FAC (Docket #165), ¶ 289.

<sup>57</sup> Ott Decl. (Docket #98), ¶ 3, Ex. B.

<sup>58</sup> *Purdum v. Holmes*, 2010 WL 2951617, \*5 (Cal. App. July 29, 2010) (CLRA statute of  
limitations is “three years from commission of method, act or practice.”).

1 **VII. PLAINTIFFS' AMENDED COMPUTER FRAUD AND ABUSE ACT CLAIM**  
2 **FAILS TO ESTABLISH AN "UNAUTHORIZED" ACT**

3 The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.*, was enacted to  
4 address hacking, *i.e.*, trespass into computers in the course of computer fraud.<sup>59</sup> Count V of the  
5 Amended Complaint alleges that SCEA, through Update 3.21, violated the CFAA by "knowingly  
6 caus[ing] the transmission of a program, information, code, or command, and as a result of such  
7 conduct, intentionally caus[ing] damage without authorization, to a protected computer." See 18  
8 U.S.C. § 1030(a)(5). The Ninth Circuit has defined "without authorization" under the CFAA to  
9 mean "without permission."<sup>60</sup> Thus, to plead a Section 1030(a)(5) CFAA claim, Plaintiffs must  
10 allege that Update 3.21 was downloaded without permission.

11 Plaintiffs' CFAA claim fails for two reasons. First, Update 3.21 was not forcibly or  
12 automatically installed on a user's PS3 – it could be transmitted to a PS3 only by manual  
13 acceptance, *i.e.*, with permission. This is indisputable, as some of the Plaintiffs elected *not* to  
14 manually download the update, and hence Update 3.21 was not installed on their PS3. Thus, it is  
15 implausible to allege that any individual manual download was "unauthorized" by the PS3 user.  
16 Indeed, "[v]oluntary installation runs counter to the notion that ... the alleged act was 'without  
17 authorization.'"<sup>61</sup>

18 In the FAC, Plaintiffs begrudgingly concede that "SCEA told users that they would not  
19 have to download Update 3.21 if they did not wish to do so." As Mr. Ventura admitted: "PS3

20 ////

21 ////

22 ////

23 \_\_\_\_\_  
24 <sup>59</sup> *US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1193 (D. Kan. 2009); *Egilman v. Keller*  
25 *& Heckham, LLP*, 401 F. Supp. 2d 105, 110 (D.D.C. 2005). Plaintiffs' reliance on an anti-  
hacking statute is ironic in light of the fact that Update 3.21 was released to prevent an  
unauthorized hacking of the PS3.

26 <sup>60</sup> *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133-35 (9th Cir. 2009)

27 <sup>61</sup> *In re Apple and ATM Antitrust Litig.*, 2010 WL 3521965 at \*7 (N.D. Cal. Jul. 8, 2010).  
28 Plaintiffs also allege that they were "forced" to download Update 3.21 or lose certain  
functionality. Plaintiffs specifically refer to it as a "Hobson's Choice." For purposes of the  
CFAA, an alleged Hobson's choice is nevertheless a "choice."

1 owners are not technically required to install Update 3.21.”<sup>62</sup> Plaintiffs further concede that users  
2 “authorized” installation of Update 3.21 when they manually downloaded it:

3 Although Plaintiffs and Class members *may have authorized* a firmware update  
4 for security reasons, they did not authorize the disabling of the “Install Other OS”  
feature to [sic] Defendant money.<sup>63</sup>

5 While SCEA disputes Plaintiffs’ unsupported allegation that SCEA issued Update 3.21 to “save  
6 money,” it does not matter for purposes of dismissal – SCEA’s alleged business motivations are  
7 irrelevant for purposes of Section 1030(a)(5). Under the plain language of the CFAA, if a user  
8 “authorized” installation of Update 3.21, knowing that doing so would disable the Other OS  
9 feature, there can be no statutory violation as a matter of law, regardless of SCEA’s intent in  
10 issuing the update.

11 Second, as a condition to using the PS3, users gave advance permission to receiving  
12 updates that may disable a software feature. In fact, certain users gave this permission to SCEA  
13 on more than one occasion. For example, Plaintiffs acknowledge in the FAC that they accepted  
14 the SSLA.<sup>64</sup> The SSLA makes clear that software updates may be made automatically by SCEA  
15 (which Update 3.21 was not) or for manual download, and whether automatic or available for  
16 manual download by users, may “cause some loss of functionality”:

17 Some services may change your current settings, cause a loss of data or content,  
18 or cause some loss of functionality. SCE, at its sole discretion may modify the  
19 terms of this Agreement at any time, including any terms in the PS3™ systems  
20 documentation or manual, or at <http://www.scei.co.jp/ps3-license/index.html>.  
Please check back on this website from time to time for changes to this  
21 Agreement. Your continued access to or use of the System Software will signify  
22 your acceptance of any changes to this Agreement.<sup>65</sup>

23 In addition, those who use the PSN which, according to the FAC, includes all of the  
24 Plaintiffs, must first agree to a Terms of Service.<sup>66</sup> There have been several different versions of  
25 the Terms of Service, the most recent being version 7.0.<sup>67</sup> Similar to the SSLA, the “Maintenance

26 <sup>62</sup> Ventura Complaint (Docket #1), ¶ 26 (emphasis added).

27 <sup>63</sup> FAC (Docket #165), ¶ 304.

28 <sup>64</sup> FAC (Docket #165), ¶¶ 17-24, 184-192, and 286-294; *see also One Beacon Ins. Co. v. Crowley Marine Servs.*, 2010 WL 1463451, \*5 (S.D. Tex. April 12, 2010) (“The fact that a party chooses not to review a contract, or terms and conditions, when they had the opportunity does not negate the fact that they are bound by those Terms and Conditions.”).

<sup>65</sup> See Ott Decl. (Docket #98), ¶ 3, Ex. B (SSLA Version 1.4).

<sup>66</sup> See Ott Decl. (Docket #98), ¶ 6, Ex. E.

<sup>67</sup> See Ott Decl. (Docket #98), Exs. E, F, and G.

1 and Upgrades” section of the Terms of Service reaffirms that updates may cause loss of  
2 functionality and, more importantly, change the current “operating system:”

3 From time to time, it may become necessary for SCEA to provide certain content  
4 to you to ensure that Sony Online Services and content offered through Sony  
5 Online Services, your PlayStation3™ computer entertainment system, the PSP™  
6 (PlayStation Portable) system or other SCEA-authorized hardware is functioning  
7 properly in accordance with SCEA guidelines. Some content may be provided  
8 automatically without notice when you sign in. **Such content may include  
automatic updates or upgrades which may change your current operating  
system, cause a loss of data or content or cause a loss of functionalities or  
utilities. Such upgrades or updates may be provided for system software for  
your PlayStation3™ computer entertainment system,** the PSP™ (PlayStation  
Portable) system, or other SCEA-authorized hardware.<sup>68</sup>

9 By such language, SCEA contemplated that circumstances, like security breaches, may occur that  
10 require it to disable certain functions of the PS3 or change the operating system. Because  
11 Plaintiffs consented at least twice to SCEA updates that could change the functionality of the  
12 PS3, they cannot plausibly argue that any subsequent download by them of Update 3.21 was  
13 unauthorized. “Simply put, a person cannot access a computer ‘without authorization’ if the  
14 gatekeeper has given them permission to use it.”<sup>69</sup>

## 15 **VIII. PLAINTIFFS’ UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW** 16 **AND FACT**

17 In their prior pleading, Plaintiffs’ unjust enrichment claim was based on a theory that  
18 SCEA somehow unjustly benefitted “from the sales of PS3s with the ‘Other OS’ function which  
19 it then forced purchasers to either disable or forgo other important PS3 functions.”<sup>70</sup> The Court,  
20 in dismissing this claim, recognized that “California law does not recognize a separate claim for  
21 ‘unjust enrichment.’”<sup>71</sup> Furthermore, the Court concluded that “[a]mong other things, plaintiffs  
22 have not adequately explained how [SCEA] has been wrongly ‘enriched’ or what payments they  
23 made to [SCEA] that should now be returned.”<sup>72</sup>

24 /////

25 <sup>68</sup> See Ott Decl. (Docket #98), ¶ 6, Ex. E (emphasis added). Substantially similar language  
26 appears in versions 1.0, 2.0, 3.0, 4.0, 5.00, and 6.0. See Ott Decl. (Docket #98), ¶ 7, 8, 22-25, Ex.  
F, G, U-X.

27 <sup>69</sup> *AtPac, Inc. v. Aptitude Solutions, Inc.*, 730 F. Supp. 2d 1174, 1180 (E.D. Cal. 2010).

28 <sup>70</sup> Initial Consolidated Complaint (Docket #76), ¶¶ 169-174.

<sup>71</sup> Docket #161, 8:10-13.

<sup>72</sup> Docket #161, 8:12-16.



1 In Count IX of the FAC, Plaintiffs tacitly acknowledge that they could not offer the  
2 allegations required by the Court on behalf of their entire class of PS3 purchasers. Consequently,  
3 they now assert that one singular plaintiff, Mr. Baker, and “some” members of a new “Class 3,”  
4 paid money for PSN services that they can purportedly no longer use:

5 Plaintiff Baker and the [sic] some members of Class 3 have directly conferred  
6 benefits on SCEA by paying money for PSN-related services, such as the  
7 PlayStation Store, PlayStation Plus, pre-paid money into the PSN Wallet, and  
8 Qore subscriptions. After failing to download Update 3.21, these individuals  
were no longer able to access these features and items for which they had directly  
paid sums to SCEA as SCEA prohibited them from accessing the PSN....<sup>73</sup>

9 Putting aside the unchanged fact that California does not recognize an independent cause of  
10 action for unjust enrichment, which alone ends the analysis, Mr. Baker fails to state any facts  
11 entitling him to relief. First, Mr. Baker does not allege the amount, if any, that he paid to SCEA;  
12 nor is there any explanation of what specific service or services Mr. Baker supposedly purchased.  
13 Rather, Mr. Baker simply bundles his claim with “some” phantom, absent members of “Class 3,”  
14 which falls well short of applicable standing and pleading requirements. *See Ashcroft v. Iqbal*,  
15 129 S. Ct. 1937, 1949-50 (2009) (legal conclusions are not accepted as true and “[t]hreadbare  
16 recitals of elements of a cause of action, supported by mere conclusory statements, do not  
17 suffice.”); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Pence v. Andrus*,  
18 586 F.2d 733, 736-37 (9th Cir. 1978) (“[I]n class actions, the named representatives must allege  
19 and show that they personally have been injured, not that injury has been suffered by other,  
20 unidentified members of the class to which they belong and which they purport to represent.”); *In*  
21 *re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 504 (S.D.N.Y. 1996) (“[A] plaintiff  
22 may not use the procedural device of a class action to bootstrap himself into standing he lacks  
23 under the express terms of the substantive law.”). Moreover, for a justiciable controversy to exist,  
24 Mr. Baker must allege that he was denied a refund for any pre-paid services. The pleading fails  
25 to state whether he even *asked* for a refund. Mr. Baker’s claim for unjust enrichment fails as both  
26 a matter of law and fact.

27  
28 <sup>73</sup> FAC (Docket #165), ¶¶ 337-341.

1 **IX. PLAINTIFFS CANNOT SUCCEED ON THEIR UCL AND FAA CLAIMS**

2 **A. Plaintiffs Lack Standing to Assert Claims Under the UCL and FAA**

3 Only individuals who suffer loss of money or property eligible for restitution have  
4 standing to bring claims under the UCL and FAA.<sup>74</sup> In *Korea Supply v. Lockheed Martin Corp.*,  
5 the California Supreme Court described the bounds of the restitutionary remedy available under  
6 the UCL, upholding a demurrer to a UCL claim because “[a]ny award that plaintiff would recover  
7 from defendants . . . would not replace any money or property that defendants took directly from  
8 plaintiff.<sup>75</sup> Applying *Korea Supply* here, Plaintiffs do not have a claim because they do not allege  
9 that they gave any money to SCEA, let alone as a result of wrongful conduct. The gravamen of  
10 the FAC is that Plaintiffs were harmed by Update 3.21 a year or more after they purchased their  
11 PS3s from third party retailers.<sup>76</sup> Plaintiffs therefore cannot seek restitution of their purchase  
12 price – it is temporally impossible for any causal connection to exist between Update 3.21 and  
13 Plaintiffs’ purchase.<sup>77</sup>

14 As this Court stated with regard to claims alleged against SCEA related to the PS3  
15 regarding other firmware updates: “plaintiffs have failed to allege sufficient facts showing how  
16 [SCEA] has been wrongfully ‘enriched,’ or what they have paid to [SCEA] that it should be  
17 required to restore them. Accordingly, this claim for relief is also dismissed....”<sup>78</sup> Plaintiffs’  
18 claim is a claim for damages – not restitution – and so they lack standing to bring any claim under  
19 the UCL or FAA.<sup>79</sup>

20 <sup>74</sup> *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22, (2009) (quoting  
21 *Buckland*, 155 Cal. App. 4th 798, 817 (2007) (“Because remedies for individuals under the [UCL  
22 and FAA] are restricted to injunctive relief and restitution, the import of the [loss of money or  
23 property] requirement is to limit standing to individuals who suffer losses of money or property  
24 that are eligible for restitution.”); *Walker v. GEICO Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir.  
2009) (upholding dismissal of UCL class action claims because the named plaintiff did not allege  
25 facts supporting restitution); *Walker v. USAA Casualty Ins. Co.*, 474 F. Supp. 2d 1168, 1172  
26 (E.D. Cal. 2007)).

24 <sup>75</sup> *Korea Supply*, 29 Cal. 4th 1134, 1149 (2003).

25 <sup>76</sup> Consolidated Complaint, ¶¶ 10-19, 52-61.

26 <sup>77</sup> See *Korea Supply*, 29 Cal. 4th at 1146 (“Any award that plaintiff would recover from  
27 defendants would not be restitutionary as it would not replace any money or property that  
28 defendants took directly from plaintiff.”); *Daugherty v. American Honda Motor Co., Inc.*, 144  
Cal. App. 4th 824, 837 fn. 6 (2006).

27 <sup>78</sup> See *In re Sony PS3 Litig.*, No. C 09-4701 RS, 2010 WL 3324941, \*4 (N.D. Cal. Aug. 23,  
2010).

28 <sup>79</sup> Plaintiffs’ request for “disgorgement” of profits received by SCEA (Consolidated Complaint, ¶

1           Moreover, with respect to the injunctive relief they purport to seek, they have not and  
2 cannot demonstrate that monetary relief, should they succeed on any claim affording damages, is  
3 inadequate. Indeed, Plaintiffs seek monetary relief in other Courts based on alleged diminution  
4 in value to their PS3 units. Plaintiffs cannot have it both ways for purposes of circumventing the  
5 UCL and FAA standing requirements.

6           **B. Plaintiffs Fail To Allege Any Unlawful Conduct**

7           To state a UCL claim under the UCL, Plaintiffs must properly allege that SCEA engaged  
8 in conduct that is (1) unlawful; (2) unfair; or (3) deceptive or fraudulent. Regarding the first  
9 prong, Plaintiffs allege in Count VIII that SCEA engaged in unlawful conduct to the extent it  
10 violated any statutes alleged in the FAC. As set forth herein, SCEA has not violated any such  
11 statutes and, therefore, it cannot be held liable under the UCL.

12           **C. Plaintiffs Fail To Satisfy Rule 9(b)**

13           Regarding the second prong, the Consolidated Complaint fails to provide the specificity  
14 required by Rule 9(b).<sup>80</sup> Additionally, courts have already concluded that “clickwrap” provisions  
15 that grant only a license for software are lawful when issued under circumstances comparable to  
16 those alleged in the Consolidated Complaint, and accordingly, the mere use of such a license is  
17 not inherently “unfair.”<sup>81</sup> On this additional basis, Plaintiffs’ UCL claim fails.

18           Regarding the third prong of Plaintiffs UCL claim – deceptive or fraudulent business  
19 practices or advertising, as well as their FAA claim, Plaintiffs have again run afoul of Rule 9(b)  
20 because these claims lack the requisite specific allegations of “the time, place and content of  
21 [any] alleged [misrepresentation],” the identity of the speaker, or “the manner in which [the]  
22 representations were false and misleading.” *Genna*, 25 F. Supp. 2d at 1038.<sup>82</sup>

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23           146) is similarly inappropriate. *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 127-  
24 28 (2000), *superseded on other grounds by statute*; *Korea Supply*, 29 Cal. 4th at 1148-49 (under  
UCL, an individual may recover profits unfairly obtained to the extent that these profits represent  
monies given to the defendant or benefits in which the plaintiff has an ownership interest).

25           <sup>80</sup> *Genna*, 25 F. Supp. 2d at 1039; *see* Section VIII(D), *infra*.

26           <sup>81</sup> *See* Section VIII(B), *infra*.

27           <sup>82</sup> *See, e.g.*, FAC (Docket #165), ¶¶ 77 (no date or location provided for alleged statements), 145  
28 (same), 73 (no location), 74 (same); *Vess*, 317 F.3d 1097, 1104-05 (9th Cir. 2003) (FAA subject  
to Rule 9(b)); *In re Sony Grand Wega*, 2010 WL 4892114, at \*9 (S.D. Cal. Nov. 30, 2010)  
(same). A FAA violation is automatically a UCL violation. *See Kasky v. Nike, Inc.*, 27 Cal. 4th  
939, 950-51 (2002); *see also People v. Orange County Charitable Services*, 73 Cal. App. 4th

1 **X. MEMBERSHIP IN PLAINTIFFS' AMENDED CLASSES IS NOT**  
2 **ASCERTAINABLE**

3 The Court did not order Plaintiffs to amend their class definition and indeed denied  
4 SCEA's motion to strike it. In re-casting their pleading, however, Plaintiffs apparently realized  
5 that their new theories and claims were not common to the individual representatives, let alone an  
6 entire class. In the FAC, Plaintiffs abandon their original class (as well as one of the named class  
7 representatives, Mr. Herz), and purport to offer three new classes:

8 **“Class 1** All persons in the United States who purchased a PS3 with the “Other  
9 OS” feature available (‘Fat’ model PS3s) and who accessed the PSN, and did not  
10 use the ‘Other OS’ feature.

11 **“Class 2** All persons in the United States who purchased a PS3 with the “Other  
12 OS” feature available (“Fat” model PS3s) and who accessed the PSN, used the  
13 “Other OS” feature, and downloaded Firmware Update 3.21.

14 **“Class 3** All persons in the United States who purchased a PS3 with the “Other  
15 OS” feature available (“Fat” model PS3s) and who accessed the PSN, used the  
16 “Other OS” feature, and did not download Firmware Update 3.21.<sup>83</sup>

17 Mr. Stovell seeks to represent Class 1, Mr. Huber seeks to represent Class 2, and Messrs. Ventura  
18 and Baker seek to represent Class 3.<sup>84</sup>

19 These newly-minted class definitions are fatally flawed in that they each propose an  
20 unascertainable class. Courts recognize that a proposed class must be “ascertainable,” *i.e.*, it must  
21 be possible to readily identify class member, so that the parties and courts in the future can  
22 evaluate those bound by any judgment under *res judicata* principles.<sup>85</sup> Thus, a proposed class  
23 definition must be precise, objective, and identifiable based on readily available criteria.<sup>86</sup>

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24 1054, 1075 (1999); *Committee on Children's Television*, 35 Cal. 3d 197,211 (1983) (superseded  
25 on other grounds by California Proposition 64, voter approved in Nov. 2, 2004 General Election).  
26 Conversely, statements or acts that do not violate the UCL by necessity cannot support a claim  
27 under the FAA.

28 <sup>83</sup> FAC (Docket #165), ¶ 202 (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> *See DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *see also Deitz v. Comcast Corp.*, 2007 WL 2015440, \*8 (N.D. Cal. July 11, 2007) (“The problem of ascertainability is the inability for future courts to ascertain who was and was not bound by the judgment.”); *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 267 (D. Conn. 2002) (“[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be *res judicata*.”).

<sup>86</sup> *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009); *Aiken v. Obledo*, 442 F. Supp. 628, 658 (E.D. Cal. 1977) (class definition must be “sufficiently definite so that it is administratively feasible for the court to determine whether an individual is a member.”).

1 Membership in the class may not turn on extensive fact-finding, a resolution of the merits of the  
2 claims, or the subjective belief of class members.<sup>87</sup>

3 Here, membership in each class is premised on whether individual PS3 purchasers  
4 engaged in certain conduct; specifically, whether they “accessed” the PSN and whether they  
5 “used” or did not “use” the Other OS feature.<sup>88</sup> To add to the factual complexity, membership in  
6 Classes 2 and 3 is further premised on whether individual class members “did” or “did not”  
7 download Update 3.21.<sup>89</sup> Notably, Plaintiffs do not aver the means by which membership will be  
8 objectively discerned and indeed, there is no ready, objective means for determining who  
9 “accessed” the PSN, who “used” or did not “use” the Other OS feature, or who “did” or “did not”  
10 download Update 3.21. Accordingly, membership in these classes is not readily ascertainable,  
11 and these classes are deficiently pleaded as a matter of law. Thus, in the event that any claim  
12 survives dismissal, which is highly unlikely, Plaintiffs’ new class allegations must be dismissed.

13 Specific flaws also exist with respect to Plaintiffs’ unjust enrichment claim in Count IX.  
14 It is axiomatic that no proposed class containing members lacking standing may be certified.  
15 Here, Plaintiffs allege their unjust enrichment claim only on behalf of “some members of Class  
16 3,” thereby conceding that members of that class lack standing to prosecute this claim. On this  
17 basis, which is separate from those set forth more fully above, the Court should dismiss the class  
18 allegations from Count IX should it survive dismissal.

## 19 **XI. CONCLUSION**

20 It is clear from the FAC that Plaintiffs are unable to cure the glaring flaws in their overall  
21 theory. Because no amendment can save their claims, they should be dismissed with prejudice.

22 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam)

23 ////

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24 \_\_\_\_\_  
25 <sup>87</sup> *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980) (class certification denied because of  
26 extensive fact finding necessary to identify members of class); *Benito v. Indymac Mortgage  
27 Servs.*, 2010 WL 2089297, \*2 (D. Nev. May 21, 2010) (“Defining the class is ‘of critical  
28 importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment,  
and (3) entitled under Rule 23(c)(2) to the ‘best notice practicable’ in a Rule 23(b)(3) action.”)  
(quoting Manual for Complex Litigation, § 21.222)).

<sup>88</sup> FAC (Docket #165), 56:8-19.

<sup>89</sup> *Id.*, 56:13-19.

1 (dismissal without leave to amend appropriate where amendment would be futile) (quoting  
2 *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

3

4 Dated: March 28, 2011

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SONY COMPUTER ENTERTAINMENT  
AMERICA LLC

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