

EXHIBIT D

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9 **UNITED STATES DISTRICT COURT**
10 **IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA**

cv 10 1975

12 KEITH WRIGHT, on behalf of himself and all
others similarly situated,

Case No. _____

13 Plaintiff(s),

**CLASS ACTION COMPLAINT FOR
VIOLATION OF CALIFORNIA'S
BUSINESS AND PROFESSIONS CODE
SECTION 17200 ET SEQ., BREACH OF
CONTRACT, BREACH OF THE
IMPLIED COVENANT OF GOOD
FAITH AND FAIR DEALING, UNJUST
ENRICHMENT, VIOLATION OF
CALIFORNIA'S CONSUMER LEGAL
REMEDIES ACT, AND EQUITABLE
RELIEF**

14 v.

15 SONY COMPUTER ENTERTAINMENT
AMERICA INC.; and SONY COMPUTER
16 ENTERTAINMENT AMERICA, LLC.

17 Defendants.
18
19
20

[Demand for Jury Trial]

1 Plaintiff Keith Wright ("Plaintiff"), on behalf of himself and all those similarly situated,
2 hereby complains and alleges against defendant Sony Computer Entertainment America, Inc.
3 ("Sony CEA") and defendant Sony Computer Entertainment America, LLC ("Sony CEA LLC")
4 (collectively, "Defendants"), upon information and belief as to all allegations except those
5 allegations pertaining to Plaintiff personally:

6 **INTRODUCTION**

7 1. This action is brought as a nationwide class action pursuant to Rule 23 of the
8 Federal Rules of Civil Procedure, on behalf of a nationwide class of persons who owned one of
9 the non-"Slim" models of the Sony CEA Playstation 3 video-game console (collectively, the
10 "PS3") during the period of November 17, 2006 to March 27, 2010 and who did not sell their
11 PS3 before March 27, 2010 (the "Class members"). As more fully set forth below, this action
12 seeks damages, restitution, injunctive relief, attorneys' fees and costs of this suit for Plaintiff and
13 each Class member.

14 2. When Sony CEA launched the PS3, it advertised and marketed the PS3 as having
15 additional non-gaming features and capabilities that set it apart from its competitors. One of
16 these features was ability to install another operating system, such as the Linux operating system,
17 in addition to the primary PS3 system software (the "Other OS" feature). Although the Other OS
18 feature was a major selling point for many of its customers, Sony CEA has now intentionally
19 disabled this and other valuable functionalities of the PS3.

20 3. Sony CEA's removal of these features constitutes an unfair and deceptive
21 business practice under California law, constitutes a breach of the sales contract between Sony
22 CEA and its PS3 purchasers, and constitutes a breach of the covenant of good faith and fair
23 dealing. It is also a violation of California's Consumer Legal Remedies Act.

24 **PARTIES & CAPACITIES**

25 4. Plaintiff is, and at all material times was, a resident of the State of California, and
26 the County of San Diego. Plaintiff purchased a PS3 from Fry's Electronics in San Diego on or
27 about December 20, 2008 for \$399.99 plus tax.

1 12. Plaintiff purchased a PS3 for the additional capabilities Sony CEA was
2 advertising. Plaintiff also utilized the Other OS feature to install Linux on his PS3. This allowed
3 Plaintiff to use his PS3 as a home computer.

4 13. In addition, by using the PS3 for all of these different functions, Plaintiff and the
5 Class members have saved money by avoiding the need to purchase other electronic devices.

6 14. Despite prior representations that it would support the Other OS feature, on
7 March 28, 2010, Sony CEA announced that its next software update (the "Update") would
8 disable that feature. Sony CEA described the Update on its playstation.com website as follows:

9 The next system software update for the PlayStation 3 (PS3) system will be
10 released on April 1, 2010 (JST), and will disable the "Install Other OS" feature
11 that was available on the PS3 systems prior to the current slimmer models,
12 launched in September 2009. This feature enabled users to install an operating
13 system, but due to security concerns, Sony Computer Entertainment will
14 remove the functionality through the 3.21 system software update.

15 In addition, disabling the "Other OS" feature will help ensure that PS3 owners
16 will continue to have access to the broad range of gaming and entertainment
17 content from SCE and its content partners on a more secure system.

18 Consumers and organizations that currently use the "Other OS" feature can
19 choose not to upgrade their PS3 systems, although the following features will no
20 longer be available;

- 21 • Ability to sign in to PlayStation Network and use network features that
22 require signing in to PlayStation Network, such as online features of PS3
23 games and chat
- 24 • Playback of PS3 software titles or Blu-ray Disc videos that require PS3
25 system software version 3.21 or later
- 26 • Playback of copyright-protected videos that are stored on a media server
27 (when DTCP-IP is enabled under Settings)
- 28 • Use of new features and improvements that are available on PS3 system
software 3.21 or later.

15. Although PS3 owners are not required to install the Update, failing to do so
means those owners will lose access to additional valuable features, including, among others, the
ability to: (1) watch new Blu-ray videos; (2) play PS3 games online; (3) play new PS3 games;

1 and (4) access the Playstation network (collectively, the "Additional Features"). Sony CEA
2 unlawfully forced PS3 owners to give up either the Other OS feature or the Additional Features.
3 Plaintiff did not want to lose the Other OS feature, so he has not installed the Update. But this
4 has caused Plaintiff to lose access to the Additional Features, which he has used prior to April 1,
5 2010.

6 **CLASS ACTION ALLEGATIONS**

7 16. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this
8 action on his own behalf and on behalf of a nationwide class, including all United States
9 territories, of all persons who owned a PS3 during the period of November 17, 2006 to March
10 27, 2010 and who did not sell their PS3 before March 27, 2010.

11 17. Excluded from the class are Defendants, any parent, subsidiary, or affiliate of
12 Defendants, any entity in which Defendants have or had a controlling interest and any officer,
13 director, employee, legal representative, predecessor, successor, or assignee of Defendants.

14 18. This action satisfies the criteria for certification under Federal Rule of Civil
15 Procedure 23 and applicable case law:

16 (a) The Class members are numerous, numbering in the millions. Thus, joinder of all
17 members is impracticable;

18 (b) There are questions of law or fact common to the Class members that
19 predominate, including:

20 (i) whether Defendants violated California's Unfair Competition Law by
21 forcing PS3 purchasers to choose between the Other OS feature and the Additional Features after
22 originally using the Other OS feature to maximize Defendants' sales and by failing to inform the
23 PS3 purchasers that they could not avoid making the choice;

24 (ii) whether Defendants violated California's Consumer Legal Remedies Act
25 by inserting unconscionable terms into their Software Licensing Agreement and disabling
26 valuable features from the PS3 that they used to market the product and indicated they would
27 continue to support;

1 (iii) whether Defendants violated contractual covenants by issuing the Update
2 for the purpose of materially impairing Plaintiff's and Class members' ability to use the PS3
3 functionalities;

4 (iv) whether Defendants were unjustly enriched by retaining the entire sales
5 proceeds for the PS3 despite having disabled valuable features; and

6 (v) whether the Class members have sustained damages and/or other
7 compensable losses/injuries;

8 (c) The claims asserted by Plaintiff are typical of the claims of the Class members;

9 (d) Plaintiff will fairly and adequately protect the interests of the Class members, and
10 Plaintiff has retained attorneys experienced in consumer class actions and complex litigation;

11 (e) A class action is superior to other available methods for the fair and efficient
12 adjudication of the controversy because joinder of all Class members is impractical. A class
13 action will permit an orderly and expeditious administration claims, promote judicial economy
14 and avoid inconsistent judgments. In addition, a class action is superior because Plaintiff seeks
15 injunctive relief that applies to all Class members.

16 **FIRST CLAIM FOR RELIEF**
17 **(California Business and Professions Code § 17200 et seq.)**

18 19. Plaintiff incorporates by reference all allegations in the prior paragraphs as if fully
19 set forth here.

20 20. A major selling point for the PS3, which Defendants advertised and marketed
21 extensively, was the Other OS feature. Yet Defendants no longer support that feature, and now
22 require PS3 purchasers to give up either the Other OS feature or the Additional Features.
23 Plaintiff and the Class members therefore have been deprived of the benefit of their bargain.

24 21. Defendants' actions are a violation of California's Business and Professions Code
25 section 17200, et seq., which prohibits any "unlawful, unfair or fraudulent business act or
26 practice." Moreover, Defendants' advertisements relating to the PS3 were false, deceptive,
27 and/or fraudulent. Defendants' unlawful conduct emanates from California and extends to the
28 entire United States and its territories.

1 22. Had Plaintiff and the Class members known all of the material facts, they would
2 not have purchased the PS3. As a direct and proximate consequence of Defendants' unlawful
3 conduct, Plaintiff and the Class members suffered an ascertainable loss of money, including the
4 purchase price of their PS3s.

5 23. For the above reasons, Defendants are liable to Plaintiff and the Class members
6 for restitution, including a sum equal to the amount of all monies expended by Plaintiff and the
7 Class members to purchase their PS3s or, alternatively, restitution of the full amount received by
8 Defendants from the sale of the PS3s.

9 **SECOND CLAIM FOR RELIEF**
10 **(Breach of Contract)**

11 24. Plaintiff incorporates by reference all allegations in the prior paragraphs as if fully
12 set forth here.

13 25. Among other things, Plaintiff and the Class members purchased their PS3s from
14 defendants for both the Other OS feature and the Additional Features, which they believed would
15 be available to them for the life of the product.

16 26. Plaintiff and the Class members have fulfilled their obligations under the sales
17 contract by paying the PS3 asking price.

18 27. Despite their performance, Defendants failed to fulfill their promises when they
19 forced PS3 owners to give up either the Other OS feature or the Additional Features.

20 28. By forcing purchasers to make that choice, Defendants have breached their
21 contract with Plaintiff and the Class members. As a direct and proximate result of Defendants'
22 conduct, Plaintiff and the Class members have suffered, and continue to suffer, harm.

23 **THIRD CLAIM FOR RELIEF**
24 **(Breach of the Covenant of Good Faith and Fair Dealing)**

25 29. Plaintiff incorporates by reference all allegations in the prior paragraphs as if fully
26 set forth here.

27 30. By forcing Plaintiff and the Class members to make that choice, Defendants have
28 breached the covenant of good faith and fair dealing.

1 31. As a direct and proximate result of Defendants' actions, Plaintiff and the Class
2 members have suffered harm.

3 **FOURTH CLAIM FOR RELIEF**
4 **(Unjust Enrichment)**

5 32. Plaintiff incorporates by reference all allegations in the prior paragraphs as if fully
6 set forth here.

7 33. By paying the PS3 purchase price, Plaintiff and the Class members conferred a
8 substantial benefit upon Defendants.

9 34. Even though Defendants accepted these benefits, Defendants have unlawfully
10 forced PS3 owners to choose between the Other OS feature and the Additional Features.

11 35. Defendants' unlawful conduct has unjustly enriched them at the expense of
12 Plaintiff and the Class members and they are required to compensate Plaintiff and the Class
13 members for harm they have caused.

14 36. As a direct and proximate result of Defendants' unjust enrichment, Plaintiff and
15 the Class members have suffered injury and are entitled to reimbursement, restitution, and
16 disgorgement by Defendants of the benefits conferred upon them by Plaintiff and the Class
17 members.

18 **FIFTH CLAIM FOR RELIEF**
19 **(California's Consumer Legal Remedies Act)**

20 37. Plaintiff incorporates by reference all allegations in the prior paragraphs as if fully
21 set forth here.

22 38. Defendants violated California's Consumer Legal Remedies Act by stating that
23 the PS3 would support the Other OS feature and the Additional Features without telling the
24 purchasers that they eventually would have to choose one or the other. Defendants' unlawful
25 conduct emanates from California and extends to the entire United States and its territories.

26 39. Defendants also violated Civil Code §1770(19) by including the following
27 unconscionable terms in the System Software License Agreement (the "License Agreement"):
28 (1) "Some services may change your current settings, cause a loss of data or content, or cause

1 some loss of functionality”; and (2) “SCE, at its sole discretion, may modify the terms of this
2 Agreement at any time, including any terms in the PS3™ system documentation or manual, or
3 at <http://www.scei.co.jp/ps3-license/index.html>. Please check back on this website from time to
4 time for changes to this Agreement. Your continued access to or use of the System Software will
5 signify your acceptance of any changes to this Agreement.”

6 40. Those terms are procedurally unconscionable because PS3 purchasers only
7 received the License Agreement after they had purchased their PS3. Therefore, they had no
8 meaningful choice whether to accept or reject those terms. Moreover, the terms were buried in
9 the Licensing Agreement and were disguised by small-type.

10 41. Those terms are substantively unconscionable because they permit Defendants to
11 unilaterally alter the PS3’s functionality whenever they want and for whatever reason without
12 regard for the rights and expectations of its customers. This provides Defendants with an unfair
13 advantage over their customers.

14 42. The Licensing Agreement is therefore unconscionable and oppressive.
15 Accordingly, Defendants should be enjoined from relying on it as a defense to this action. In
16 addition, Defendants should be enjoined from forcing consumers to choose between the Other
17 OS and the Additional Features.

18 **PRAYER FOR RELIEF**

19 **WHEREFORE**, Plaintiff prays for judgment on behalf of himself and the Class
20 members against Defendants as follows:

21 1. Certifying this action as a nationwide class action, including all United States
22 territories, pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, with a
23 class as defined in paragraph 1, above;

24 2. Regarding the First Claim for Relief, awarding Plaintiff and the Class members
25 all appropriate equitable remedies, including restitution of all the money Plaintiff and the Class
26 members paid for the purchase of their PS3s during the class period;

27 3. Regarding the Second Claim for Relief, awarding Plaintiff and the Class members
28 all appropriate remedies, including damages as well as consequential and incidental damages;

1 4. Regarding the Third Claim for Relief, awarding Plaintiff and the Class members
2 all appropriate remedies, including restitution and disgorgement of all profits unjustly obtained
3 by Defendants;

4 5. Regarding the Fourth Claim for Relief, awarding Plaintiff and the Class members
5 all appropriate remedies, including restitution and disgorgement of all profits unjustly obtained
6 by Defendants;

7 6. Regarding the Fifth Claim for Relief, awarding Plaintiff injunctive relief only;

8 7. Awarding Plaintiff and the Class members pre-judgment interest, their costs and
9 attorneys' fees; and

10 8. Awarding Plaintiff and the Class members such other and further relief as this
11 Court deems just and proper.

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13 DATED: May 6, 2010

CALVO & CLARK, LLP

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16 By: 

James A. Quadra

Attorneys for Plaintiff
KEITH WRIGHT

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CLASS ACTION COMPLAINT

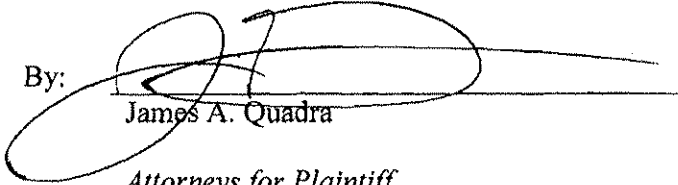
DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a jury trial on any issue triable as right by a jury.

DATED: May 6, 2010

CALVO & CLARK, LLP

By:



James A. Quadra

Attorneys for Plaintiff
KEITH WRIGHT

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