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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re SONY PS3 "OTHER OS" LITIGATION

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

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

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

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NOTICE OF MOTION; MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 4, 2010 at 1:00 p.m. or as soon thereafter as counsel may be heard in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, defendant Sony Computer Entertainment America LLC ("SCEA") will, and hereby does, move for dismissal of Plaintiffs' claims for relief asserted in the Consolidated Class Action Complaint ("Consolidated Complaint") (Docket #76) in this matter.

This motion is brought pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6) and is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities, *infra*; the Declaration of Carter Ott and Request for Judicial Notice, submitted herewith; the Consolidated Complaint; the complete file and record in this action; the argument of counsel; and such other and further evidence and argument as the Court may choose to entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' problem in this case is simple: the facts they have averred do not, and cannot as a matter of law, support any of the causes of action they have pled. The Consolidated Complaint alleges that SCEA sold millions of PlayStation®3 ("PS3") "advanced video gaming and computer entertainment systems" between 2006 and 2009. SCEA advertised a wide array of features and functions of the PS3, including the ability to play games and movies, view photographs, access the "unified online gaming service called the PlayStation Network" ("PSN"), and utilize alternative operating systems, like Linux ("Other OS"). The Consolidated Complaint asserts eight causes of action against SCEA premised on the notion that SCEA misrepresented or failed to disclose that it "might" alter or disable features or functions in the future.

On April 1, 2010, SCEA issued Firmware Update 3.21. If a user downloaded Update 3.21, he would be able to use all currently available PS3 functions except the Other OS. If the user chose not to download, then the Other OS feature would remain uninterrupted; however, access to the PSN and to certain future games and features would be negatively impacted.

/////

According to the Consolidated Complaint, Update 3.21 injured all PS3 owners because it deprived them of advertised PS3 features and functions. In truth, however, and as the Consolidated Complaint concedes, there was nothing wrong with SCEA's firmware update. As the Consolidated Complaint concedes, the update was issued to protect "the intellectual property of the content offered on the PS3 system"[1] and was issued consistent with the very terms of the System Software License Agreement that Plaintiffs conceded implicitly they accepted. This is precisely the reason why Plaintiffs have not and cannot aver facts that support any viable claim for relief under federal or California law.

As an initial matter, Plaintiffs' primary theory of liability underlying the Consolidated Complaint – that SCEA advertised and later improperly deprived PS3 users of software features – is contradicted by the explicit terms of all applicable contracts between SCEA and Plaintiffs., *i.e.*, SCEA's written express warranty, the System Software License Agreement and the PSN Terms of Service. These contracts specifically provide PS3 purchasers with a license, *not* an ownership interest, in the software and in the use of the PSN, and provide that SCEA has the right to disable or alter software features or terminate or limit access to the PSN, including by issuing firmware updates. Plaintiffs therefore cannot succeed in any of their claims because SCEA's alleged alteration/disablement of PS3 features, including the Other OS, was entirely proper and authorized.

In addition, the Consolidated Complaint is devoid of the requisite specificity regarding SCEA's supposed misrepresentations mandated by Fed. R. Civ. P. 9(b) – *i.e.*, the "who, what where, when and how" – and this failure to plead with specificity pervades all of the asserted claims for relief. Similarly, the required allegation of privity for Plaintiffs' implied warranty claim is also lacking. Moreover, the inherent admission throughout the Consolidated Complaint that SCEA's alleged representations regarding PS3 features and functions were absolutely true and correct at the time of sale is fatal to Plaintiffs' warranty, UCL and CLRA claims. Indeed, the vast majority of the supposed representations of fact are nonactionable puffery.

In sum, Plaintiffs' kitchen sink approach to averring claims cannot obscure the fact that

[1] Consolidated Complaint, ¶ 63.

Plaintiffs' allegations fail, as a matter of law, to establish liability under any asserted theory. Accordingly, SCEA respectfully requests the Court enter an order dismissing Plaintiffs' claims.

II. SUMMARY OF ALLEGATIONS

A. The PS3 And Other OS Feature

The PS3 is an advanced video gaming and computing system.[2] At the time of its launch on November 17, 2006, the PS3 was sold with a number of features, including the ability play video games, movies, music, Blu-ray discs; view photographs; and use SCEA's online gaming service, the PlayStation®Network ("PSN").[3] In addition, unlike many other video game consoles, the PS3's software is updated via periodic software updates called "firmware."[4]

The PS3's features also included an "Other OS" feature which enabled users to install and run the Linux operating system in addition to the PS3 native operating system.[5] Plaintiffs assert that the Other OS feature "provide[d] users with an excellent platform to develop applications for the PS3 or as a jumping off point for deployments to other products, including those from IBM, Sony, or Mercury"[6]; "allowed Cell programming[7] and the operation of supercomputer clusters…. [it] essentially allowed users to operate the PS3 like a computer rather than simply a gaming console."[8]

B. The Applicable Warranty, License And Terms Of Use Agreements Authorized SCEA to Issue Firmware Update 3.21

1. Limited Hardware Warranty And Liability

SCEA issues a Limited Hardware Warranty And Liability (the "Warranty") with every PS3 sold new at retail, which states:

> [SCEA] warrants to the original purchaser that the PS3™ hardware shall be free from material defects in material and workmanship for a period of one (1) year from the original date of purchase (the "Warranty Period")….. This warranty does not apply to any system software that is pre-installed in the PS3™ hardware, or is subsequently provided via update or upgrade releases. **Such system**

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[2] Consolidated Complaint, ¶ 30.
[3] Consolidated Complaint, ¶ 36.
[4] Consolidated Complaint, ¶ 33.
[5] Consolidated Complaint, ¶ 36.
[6] Consolidated Complaint, ¶ 49.
[7] Plaintiffs explain that "Cell is a microprocessor which facilitates software development." Consolidated Complaint, fn. 5.
[8] Consolidated Complaint, ¶ 37.

> **software is licensed to you under the terms and conditions of a separate end user license agreement….**[9]

A separate section of the Warranty titled "Service Policy" underscores that modifications or enhancements to PS3's software or firmware may be required and that such changes may alter the settings of the PS3 after purchase:

> You understand and acknowledge that any time SCEA services your PS3™ system (either within the Warranty Period or under a separate service arrangement), it may become necessary for SCEA to provide certain services to your PS3™ system to ensure it is functioning properly in accordance with SCEA guidelines. **Such services may include the installation of the latest software or firmware updates, or service or replacement of the PS3™ hard disk or the PS3™ system with a new or refurbished product. You acknowledge and agree that some services may change your current settings, cause a removal of cosmetic stickers or system skins, cause a loss of data or content, or cause some loss of functionality.**[10]

2. System Software License Agreement

The PS3 System Software License Agreement (the "SSLA") is made available to PS3 users electronically. Plaintiffs acknowledge in their Consolidated Complaint that they accepted the SSLA.[11] An agreement like the SSLA is commonly referred to in the industry as a "clickwrap" license. Under California law, a "clickwrap" license

> presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.[12]

The SSLA unequivocally confirms that the PS3's system software is merely licensed to purchasers: "You do not have any ownership rights or interests in the System Software."[13]

The SSLA also makes clear that software updates may be made automatically by SCEA and whether automatic or available for download by users, may disengage or alter some functions:

> From time to time, SCE may provide updates, upgrades or services to your PS3™ system to ensure it is functioning properly in accordance with SCE guidelines or

---

[9] *See* Ott Decl., ¶ 2, Ex. A (Warranty). Judicial notice of these documents is appropriate. *See* Request for Judicia Notice; *Caldwell v. Caldwell*, 2006 WL 618511, **3-4 (N.D. Cal. Mar. 13, 2006).

[10] *See* Ott Decl., ¶ 2, Ex. A (Warranty), at 2.

[11] *See* Ott Decl., ¶ 3, Ex. B (SSLA Version 1.4).

[12] *Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 22 n4 (2d Cir. 2002) (applying California law).

[13] *See* Ott Decl., ¶ 3, Ex. B (SSLA Version 1.4), at 1.

> provide you with new offerings. **Some services may be provided automatically without notice when you are online, and others may be available to you through SCE's online network or authorized channels.** Without limitation, **services may include the provision of the latest update or download of new release that may include security patches**, **new technology or revised settings and feature which may prevent access to unauthorized or pirated content, or use of unauthorized hardware or software in connection with the PS3™ system**. Additionally, you may not be able to view your own content if it includes or displays content that is protected by authentication technology**. Some services may change your current settings, cause a loss of data or content, or cause some loss of functionality.** It is recommended that you regularly back up any data on the hard disk that is of a type that can be backed up. [14]

3. Terms Of Service And User Agreement

Those that access and use the PSN (which the Consolidated Complaint Plaintiffs all allege they did) do so subject to a separate Terms of Service And User Agreement (the "Terms of Service").[15] If the user clicks the "Do Not Accept" dialogue box, the user will not be able to access the PSN. There have been several different versions of the Terms of Service, the most recent being version 7.0.[16]

The "General License Restrictions and Terms" section provides in relevant part:

> Except as stated in this Agreement, all content and software provided through Sony Online Services are licensed non-exclusively and revocably to you[17]

In addition, similar to the Warranty and SSLA, the "Maintenance and Upgrades" section of the Terms of Service reaffirms that,

> From time to time, it may become necessary for SCEA to provide certain content to you to ensure that Sony Online Services and content offered through Sony Online Services, your PlayStation3™ computer entertainment system, the PSP™ (PlayStation Portable) system or other SCEA-authorized hardware is functioning properly in accordance with SCEA guidelines. Some content may be provided 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.[18]

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[14] *See* Ott Decl., ¶ 3, Ex. B. Substantially similar language appears in versions 1.0, 1.1, 1.2 and 1.3. *See* Ott Decl., ¶¶ 4, 5, 20 & 21, Exs. C, D, S & T.
[15] *See* Ott Decl., ¶ 6, Ex. E.
[16] *See* Ott Decl., ¶ 6, Ex. E.
[17] *See* Ott Decl., ¶ 6, Ex. E. Substantially similar language appears in versions 1.0, 2.0, 3.0, 4.0, 5.00, and 6.0. *See* Ott Decl., ¶ 7, 8, 22-25, Ex. F, G, U-X.
[18] *See* Ott Decl., ¶ 6, Ex. E. Substantially similar language appears in versions 1.0, 2.0, 3.0, 4.0,

C. Firmware Update 3.21

On March 28, 2010, SCEA announced that it would soon release Update 3.21, which if downloaded by a PS3 user, "would disable the [Other OS] feature."[19] As the Consolidated Complaint and complaints in the underlying consolidated actions concede, SCEA released Update 3.21 for "security reasons" *i.e.*, to protect its intellectual property from unauthorized access by hackers.[20]

PS3 owners were not required to install Update 3.21.[21] But according to Plaintiffs, "if a user failed to download Update 3.21, he or she would lose the following features: (1) the ability to sign in to the PSN; (2) the ability to use online features that require a user to sign in to the PSN, such as chat; (3) the ability to use the online features of PS3 format software; (4) playback of new PS3 software or Blu-ray discs that require Update 3.21 or later; (5) playback of copyright-protected videos that are stored on a media server; (6) use of new features and improvements that are available on PS3 Update 3.21 or later."[22] Those that installed Update 3.21 lost use of the Other OS feature.[23]

D. Commencement Of These Consolidated Class Actions

This case is the result of the consolidation of seven class actions prosecuted by 14 individuals: Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker, and Elton Stovell – the named plaintiffs in the Consolidated Complaint(collectively, the "Consolidated Complaint Plaintiffs") and Sean Bosquett, Frank Backman, Paul Graham, Paul Vannatta, Todd Densmore, Keith Wright, Jeffrey Harper, Zachary Kummer, and Rick Benavides (collectively, the "Underlying Complaint Plaintiffs").[24]

5.00, and 6.0. *See* Ott Decl., ¶ 7, 8, 22-25, Ex. F, G, U-X.

[19] Consolidated Complaint, ¶ 52.

[20] Consolidated Complaint, ¶¶ 4 & 53. Plaintiffs specifically allege that SCEA stated that this "update was released in order to 'protect the intellectual property of the content offered on the PS3 system.'" Consolidated Complaint, ¶ 63. In fact, SCEA explained: "To protect the intellectual property of the content offered on the PS3 system as well as to provide a more secure system for those users who are enjoying games and other entertainment content on the PS3 system, we have decided to delete the feature to address security vulnerability of the system." Ott Decl., ¶ 19, Ex. R.

[21] Consolidated Complaint, ¶ 53.

[22] Consolidated Complaint, ¶ 53.

[23] Consolidated Complaint, ¶ 54.

[24] Consolidated Complaint, ¶¶ 10-19; Docket #1; Ott Decl., ¶¶ 10-15, Exs. I-N.

The Consolidated Complaint Plaintiffs assert claims for (1) Breach of Express Warranty; (2) Breach of Implied Warranty of Merchantability; (3) Breach of Implied Warranty of Fitness for a Particular Purpose; (4) Violation of the California Consumer Legal Remedies Act; (5) Violation of the Computer Fraud and Abuse Act; (6) Violation of the Magnuson-Moss Warranty Act; (7) Violation of California's False Advertising Law; (8) Violation of California's Unfair Competition Law; (9) Conversion; and (10) Unjust Enrichment for themselves and a class defined as "[a]ll persons who purchased, in the United States and its territories, a new PS3 with the Open Platform feature for personal use and not for resale and continued to own the PS3 on March 27, 2010."[25] Based on these claims, they seek injunctive relief; compensatory, consequential, punitive, and statutory damages; restitution and restitutionary disgorgement; interest; and attorney's fees and costs.[26]

1. Relevant Representations

The Consolidated Complaint does not point to any statements made by SCEA on the PS3 packaging or in any mass media advertising campaign that it alleges was untrue. Instead, it includes a mix of quotes drawn from obscure articles and unrelated third party publications, and a smattering of out of context and incomplete references to a few pages of SCEA's website and user manual. However, a review of those statements readily demonstrates that none of them is or was untrue and that indeed most if not all of them are inactionable puffery.[27]

> "We believe that the PS3 will be the place where our users play games, watch films, browse the Web, and use other computer functions. The PlayStation 3 is a computer. We do not need the PC."[28]

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[25] Consolidated Complaint, ¶ 70. Before consolidating this action, all of the named plaintiffs but Huber and Stovell alleged claims for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing, and Messrs. Densmore and Herz alleged a claim for Trespass. *Ventura* Complaint (Docket #1), ¶¶ 35-45; Ott Decl., ¶ 10, Ex. I (*Baker* Complaint), ¶¶ 36-46; Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶¶ 41-54; Ott Decl., ¶ 12, Ex. K (*Wright* Complaint), ¶¶ 24-31; Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 76-81; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶¶ 29-33 and 44-47. But they dropped these claims in the Consolidated Complaint.

[26] Consolidated Complaint, Prayer for Relief. On or about July 28, 2010, an action based on similar allegations was commenced in a Wisconsin state court on behalf of a class of Wisconsin PS3 owners. *See* Motion to Strike, Section III(A). On August 27, 2010, SCEA removed that action to the United States District Court for the Eastern District of Wisconsin pursuant to the Class Action Fairness of 2005.

[27] Consolidated Complaint, ¶ 45.

[28] Plaintiffs attribute this quote to Phil Harrison some time in "May 2006" and cite an Internet story purportedly quoting him at

* * * * *

"Because we have plans for having Linux on board [the PS3], we also recognize Linux programming activities ... Other than game studios tied to official developer licenses, we'd like to see various individuals participate in content creation for the PS3."[29]

* * * * *

"One of the most powerful things about the PS3 is the 'install other OS' option."[30]

* * * * *

"Speaking about the PS3, we never said we will release a game console. It is radically different from the previous PlayStation. It is clearly a computer…. [the PS3] is radically different from the previous PlayStation. It is clearly a computer. Indeed, with a game console, you need to take out any unnecessary elements inside the console in order to decrease its cost… This will of course apply to the PS3 as well….. lowering costs is important but more important is its capacity to evolve…. Everything has been planned and designed so it will become a computer. The previous PlayStation had a memory slot as its unique interface. In contrast, the PS3 features PC standard interfaces. Because they are standard, they are open.[31]

* * * * *

"In addition to playing games, watching movies, listening to music, and viewing photos, you can use the PS3™ system to run the Linux operating system. By installing the Linux operating system, you can use the PS3™ system not only as an entry-level personal computer with hundreds of familiar applications for home and office use, but also as a complete development environment for the Cell Broadband Engine™ (Cell/B.E.)."[32]

* * * * *

"Install other system software on the hard disk. For information on types of

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http://ww.gamasutra.com/view/news/9547/Harrison_We_Do_Not_Need_The_PC.php. Consolidated Complaint, ¶ 45, sixth bullet point.

[29] Plaintiffs contend that Izumi Kawanishi, then head of Sony's Network System Development Section, said this some time in "May 2006" and cite an Internet story purportedly quoting him at http://www.gamasutra.com/php-bin/news_index.php?story=9290. Consolidated Complaint, ¶ 45.

[30] Plaintiffs contend that Phil Harrison, then President of Sony Computer Entertainment Worldwide Studios, said this some time in "February 2007" and cite an Internet story purportedly quoting him at http://kotaku.com/235049/20-questions-with-phil-harrison-at-dice. Consolidated Complaint, ¶ 39.

[31] Plaintiffs contend that Ken Kutaragi, CEO and President of Sony Computer Entertainment, said this some time in "June 2006" and cite an Internet story purportedly quoting him at http://www.edge-online.com/news/kutaragi-details-ps3-computer-claim. Consolidated Complaint, ¶¶ 38 & 45, fifth bullet point. Plaintiffs also contend that a Sony Corporation software engineer named Geoffrey Levand stated, sometime in "August 2009," (i.e., after all Plaintiffs had purchased their PS3s) "[p]lease be assured that SCE is committed to continue the support for previously sold models that have the 'Install Other OS' feature and that this feature will not be disabled in future firmware releases." Consolidated Complaint, ¶ 45, tenth bullet point.

[32] Plaintiffs attribute this to the "PS3 Open Platform" from "2006-2010" and cite http://www.playstation.com/ps3-openplatforrn/index.html. Consolidated Complaint, ¶ 45, first bullet point.

> compatible system software and obtaining the installer, visit Open Platform for Play Station®3."[33]
>
> * * * * *
>
> "The PlayStation 3 provides an option for third-party system software to be installed on the PS3™ system instead of the system software provided by Sony Computer Entertainment Inc. Such third-party system software is referred to as an 'Other OS'."[34]
>
> * * * * *
>
> "The Linux Distributor's Starter Kit provides information, binary and source codes to Linux Distribution developers who wants to make their distro (sic) support PS3."[35]
>
> * * * * *
>
> [o]n the PS3's product packaging, [SCEA] also touted the PS3's features through affirmative representations and symbols. [SCEA] represented that the PS3 had a built-in Blu-ray Disk drive for high-definition games and entertainment, and broadband connectivity with access to the PSN, among other things.[36]

III. APPLICABLE LEGAL STANDARD

A. Standard For Dismissal Under Rule 12(b)(6)

Rule 12(b)(6) requires dismissal if a complaint lacks sufficient facts to support a claim or fails to assert a cognizable legal theory.[37] The Court's review is limited to the face of the complaint, documents referenced in it, and matters subject to judicial notice.[38] The Court is not required to accept unwarranted or unreasonable inferences, legal conclusions cast in the form of factual averments, or allegations contradicted by judicially noticed facts.[39] The complaint must plead "enough facts to state a claim to relief that is plausible on its face."[40] "[B]are

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[33] Plaintiffs attribute this to the "PS3 Manual" from "2006-2010" and cite http://manuals.playstation.net/document/de/ps3/current/settings/osinstall. Consolidated Complaint, ¶ 45, second bullet point.

[34] Plaintiffs attribute this to the "PS3 Knowledge Center" from "2006-2010" and cite http://us.playstation.com/support/answer/index.htm?a_id=469. Consolidated Complaint, ¶ 45, third bullet point.

[35] Plaintiffs attribute this to the "PS3 Linux Distributor's Starter Kit" from "2006-2009" and cite http://www.kernel.org/pub/linux/kernel/people/geoff/cell/ps3-linux-docs/ps3-linux-docs-08.06.09. Consolidated Complaint, ¶ 45, eight bullet point.

[36] Consolidated Complaint, ¶ 45, fourth bullet point.

[37] *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

[38] *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991).

[39] *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

[40] *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007).

assertions…amount[ing] to nothing more than a 'formulaic recitation of the elements'" are not entitled to an assumption of truth on a motion to dismiss.[41] Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[42] Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences to be drawn from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."[43]

B. Claims Based On Misrepresentation Or Deception Are Subject To The Heightened Pleading Standard Of Rule 9(b)

Rule 9(b) provides that in "alleging fraud…, a party must state with particularity the circumstances constituting fraud."[44] A complaint meets this standard if it alleges "the time, place and content of the alleged fraudulent representation or omission, the identity of the person engaged in the fraud; and 'the circumstances indicating falseness' of 'the manner in which [the] representations [or omissions] were false and misleading.'"[45] Mere conclusory allegations of fraud are insufficient.[46] Rule 9(b) requires "an explanation as to why the statement or omission complained of was false or misleading" when made.[47] Put simply, Rule 9(b) demands that averments of fraud must be accompanied by "the who, what, when, where, and how" of the misconduct charged.[48]

Rule 9(b) applies to all claims for relief sounding in fraud and to all allegations that "necessarily describe fraudulent conduct."[49] This is true whether the claims are grounded in federal or state law. As this Court previously held, in *Oestreicher v. Alienware*, "[i]t is well established that Rule 9(b)'s requirement that allegations of fraud be pled with particularity applies

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[41] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).
[42] *Id.* at 1949.
[43] *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).
[44] Fed. R. Civ. P. 9(b).
[45] *Genna v. Digital Link Corp.*, 25 F. Supp. 2d 1032, 1038 (N.D. Cal. 1997) (brackets in original); *see also In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).
[46] *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).
[47] *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1404.
[48] *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).
[49] *Vess*, 317 F.3d at 1103-04 & 1108.

to state-law causes of action before a federal court."[50] Rule 9(b) also governs claims based on misrepresentation that are not intentional, such as claims for negligent misrepresentation or claims that do not require a showing of scienter at all.[51]

IV. PLAINTIFFS CANNOT SUCCEED ON THEIR EXPRESS WARRANTY CLAIM

In their first claim for relief, Consolidated Complaint Plaintiffs contend that SCEA violated the express warranty that came with their PS3s.[52] Specifically, they contend that "[SCEA] expressly warranted via its advertising, statements, brochures, website information, public statements, owner's manuals, and other representations that the functionality of the PS3 would include both the 'Other OS' and the various other advertised functions."[53] This claim, however, fails on several grounds.

A. Consolidated Complaint Plaintiffs Have Failed To Identify The Warranty

"An express warranty is a contractual term relating to the title, character, quality, identity or condition of the sold goods."[54] "To make out a breach of express warranty claim, a plaintiff must show that the seller: '(1) made an affirmation of fact or promise or provided a description of its goods; (2) the promise or description formed part of the basis of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to the plaintiff.'"[55] In addition, to plead a claim for breach of express warranty, "'one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury.'"[56]

Consolidated Complaint Plaintiffs have failed to adequately plead this claim. They "have not identified [one] specific warranty provision [or representation] upon which they allegedly

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[50] *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 968 (N.D. Cal. 2008) (citing *Vess*, 317 F.3d at 1103 and *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir. 1996)).
[51] *Glenn Holly Entm't, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093-95 (C.D. Cal. 1999) (citing *In re GlenFed Inc. Sec. Litig.*, 42 F.3d at 1547-48).
[52] Consolidated Complaint, ¶¶ 78-81.
[53] Consolidated Complaint, ¶ 79.
[54] *Blennis v. Hewlett-Packard Co.*, 2008 WL 818526, *2 (N.D. Cal. Mar. 25, 2008).
[55] *Blennis*, 2008 WL 818526, *2.
[56] *Blennis*, 2008 WL 818526, *2 (quoting *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (1986)).

relied"[57] that was breached. Their generic assertions that SCEA "disseminated information to the general public, including Plaintiffs and the Class, that the PS3 could be used as a personal computer using the 'Other OS' function"[58] and "represent[ed] that [the PS3] was capable of performing both specified gaming and 'Other OS functions'" are woefully inadequate as statements of the "exact terms" of an express warranty.[59]

Similarly, they have not adequately alleged reliance on an express promise by SCEA regarding the OS feature "that formed the basis of the bargain" and that has been breached – instead they claim only that "[SCEA]'s representations about the PS3's features, including the 'Other OS' feature, played a substantial factor in influencing [their] decision to purchase a PS3."[60]

Finally, SCEA's reference to the PS3 as a "personal computer" does not constitute an express warranty that has been breached.[61] Plaintiffs concede that those who downloaded Update 3.21 (and thereby disabled the Other OS) continue to use their PS3s to play video games, movies, music, Blu-ray discs; browse the Internet; view photographs; and access the PSN. And those that did not download Update 3.21 continue to utilize the Other OS function on their PS3s to develop software applications, to create "supercomputer clusters," and run "more than 1,000 applications." In both circumstances, the subject PS3s are functioning as "personal computers."

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[57] *Blennis*, 2008 WL 818526, *2.
[58] Consolidated Complaint, ¶ 79.
[59] *See Blennis*, 2008 WL 818526, *2 (dismissing express warranty claim where plaintiff did not identify source of warranty); *see also Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, *24 (E.D.N.Y. July 21, 2010) ("[P]laintiffs have failed to plead a claim for violation of an express warranty. The Second Amended Complaint states that 'Defendants provided Plaintiffs and other members of the Class with written and express warranties, including, but not limited to, warranties that their vitamin water beverages were beneficial and had particular beneficial characteristics as set forth above.' Plaintiffs do not allege that any bottle of vitamin water contains the word 'beneficial,' do not state which words they allege to have created an express warranty, and do not clarify what is referred to by the words 'as set forth above.' Such conclusory language … does not adequately plead a claim for breach of an express warranty under state law.") (quoting *Twombly*, 550 U.S. at 555; *and citing Blennis*, 2008 WL 818526 *and Simmons v. Stryker Corp.*, 2008 WL 4936982, *2 (D.N.J. Nov. 17, 2008) (dismissing express warranty claim where plaintiff did not identify source of warranty)); *Clemens v. DaimlerChrysler*, 530 F.3d 852, 861-62 (9th Cir. 2008) (plaintiff "cannot proceed on his express warranty claim because he has not alleged that [the product] failed to perform as expressly warranted"), *amended on other grounds*.
[60] Consolidated Complaint, ¶¶ 10, 12, 14, 16, & 18.
[61] Consolidated Complaint, ¶ 79.

V. THE IMPLIED WARRANTY CLAIMS ALSO FAIL

The Consolidated Complaint also asserts that SCEA breached the implied warranties of merchantability and fitness for a particular purpose.[62] Specifically, in support of both of these claims, Plaintiffs contend that

> [SCEA] impliedly warranted that the PS3 could utilize other operating systems (such as Linux) and be used as [a] personal computer…. [SCEA]'s Update 3.21 breached the implied warranty of merchantability because it eliminated the 'Other OS' feature and the ability to use the PS3 as a personal computer. In addition, without Update 3.21, Plaintiffs and the Class lose access to the PSN which includes playing online games and access to other online features.[63]

Under California law, the implied warranties of merchantability and fitness for a particular purpose arise from two statutory sources – the Song-Beverly Consumer Warranty Act and the Uniform Commercial Code (the "UCC").[64] Here, Plaintiffs identify the UCC as the basis for this claim,[65] but fail to plead facts supporting its requisite elements.

A plaintiff may assert breach of an implied warranty only against the party from whom he or she directly purchased – "[v]ertical privity is a prerequisite in California."[66] Thus, in *Clemens v. DaimlerChrysler Corp.*, the Ninth Circuit Court of Appeals held that an "end consumer" who "buys from a retailer" has no claim for breach of implied warranty as against the manufacturer of a product.[67] Here, none of the Plaintiffs allege that they purchased their PS3s directly from SCEA.[68] In fact, several of the Underlying Complaint Plaintiffs admitted that they did not.[69] As a result, they have no claim against SCEA under the UCC.[70]

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[62] Consolidated Complaint, ¶¶ 82-99.
[63] Consolidated Complaint, ¶¶ 84, 86, 94, & 95.
[64] Cal. Civil Code § 1790 *et seq.*; Cal. Commercial Code §§ 2314 & 2315.
[65] Consolidated Complaint, ¶¶ 83 & 92.
[66] *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 America, Inc.*, 198 Cal. App. 3d 646, 656 (1988)).
[67] *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (citing *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. Nov. 10, 2005); *Osborne*, 198 Cal. App. 3d at 656 fn. 6).
[68] Consolidated Complaint, ¶¶ 10-19, 85 & 94.
[69] Ott Decl., ¶ 12, Ex. K (*Wright* Complaint), ¶ 4 ("[Wright] purchased a PS3 from Fry's Electronics…."); Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 5 ("[Benavides] purchased a PS3 from Game Stop….").
[70] *In re Sony PS3 Litigation*, No. C 09-4701 RS, 2010 WL 3324941, **1-2 (N.D. Cal. Aug. 23, 2010) (denying implied warranty claim against SCEA based in part on lack of privity; "Here, there is no dispute that plaintiffs purchased their PS3 systems from retailers, and that at no point did they make any direct payments to Sony. Accordingly, [*U.S. Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal. App. 3d 1431 (1991)] aids them little."); *see also Clemens*, 534 F.3d at 1023-24

Additionally, the warranties implied by the UCC are breached only if a defect existed at the time the product was sold or delivered – the product is either merchantable and/or fit for a particular purpose or it is not (and a breach of the implied warranty occurs or not) only at the time of delivery.[71] Here, Plaintiffs do not complain of any problem at the time of sale. Instead, they assert that problems began much later when SCEA released Update 3.21 – an independent event occurring at least a year after the purchases at issue. Because Plaintiffs' PS3s were merchantable and fit for the particular purpose at the time of delivery, they have no claim for breach of implied warranty.[72]

Furthermore, the UCC implied warranty of merchantability only "provides for a minimum level of quality."[73] In other words, "the implied warranty of merchantability can be breached only if the [product] manifests a defect that is so basic it renders the [product] unfit for its ordinary purpose."[74] If a product works, but just not as well as the purchaser hoped, no claim arises – the implied warranty "does not impose a general requirement that goods precisely fulfill the expectation of the buyer."[75] Consequently, the implied warranty "[does] not encompass… 'loss of resale value claims.'"[76]

In this case, Plaintiffs do not allege that their PS3s failed completely, but rather that they cannot use some subset of software features depending on whether or not they downloaded

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(upholding 12(b)(6) dismissal of implied warranty claim under California law).

[71] 1 White & Summers, Uniform Commercial Code (5th ed. 2006), section 9-12, pp. 657-658; *Makuc v. American Honda Motor Co.*, 835 F.2d 389, 392-93 (1st Cir. 1987); *Walsh v. Restoration Hardware, Inc.*, 122 Fed. Appx. 28, 31 (4th Cir. 2005); *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663, 665 (Miss. 1987); U.C.C. § 2725(2)).

[72] *See Hovsepian v. Apple, Inc.*, 2009 WL 2591445, at *8 fn. 7 (N.D. Cal. 2009) (citing *Larsen v. Nissan N. Am.*, 2009 WL 1766797, at *5 fn. 6 (Cal. Ct. App. 2009) (unpublished)).

[73] *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1295 (1995) (quoting *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1191 (N.D. Ill. 1980), rev'd on other grounds, 660 F.2d 311 (7th Cir. 1981)).

[74] *Id.* (citing *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982); *Carlson v. General Motors Corp.*, 883 F.2d 287, 297-298 (4th Cir. 1989); *Taterka v. Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653 (1978); *Skelton*, 500 F. Supp. at 1191)).

[75] *Id.* (internal quotation and citation omitted).

[76] *Id.* at 1297 (citing *Carlson*, 883 F.2d at 297-298); *see also In re Sony PS3 Litigation*, No. C 09-4701 RS, 2010 WL 3324941, *2 (N.D. Cal. Aug. 23, 2010) ("While it seems likely that something less than a 'total inoperable' system could give rise to an implied warranty claim (assuming the other elements are satisfied), [SCEA] is correct that not every performance issue would necessarily constitute a breach of implied warranties, any more than similar problems would give rise to such a claim were a consumer to encounter them straight out of the box.").

Update 3.21. Thus, they admit that their consoles are still operative and merchantable. For this further reason, they have no claim for breach of implied warranty.[77]

Finally, Plaintiffs' claim for implied warranty of fitness for a particular purpose also fails because they have not established the basic elements of that claim. To establish the implied warranty of fitness existed, Plaintiffs must allege that SCEA had "reason to know" of their special purpose, i.e., to use the PS3 in perpetuity for all advertised features and functions including the Other OS; that Plaintiffs relied on SCEA's expertise; and that SCEA had "reason to know" of their reliance on the continued availability of all features and functions.[78] Plaintiffs have not only failed to allege these requisite facts, they indeed cannot due to the explicit language of SCEA's Warranty, SSLA, and Terms of Service. Specifically, because SCEA had the right to terminate or alter any feature or function, it had no reason to believe that Plaintiffs purchased their PS3s particularly with the expectation and belief that all features, including the Other OS, would be available for the "life" of the PS3. Stated differently, Plaintiffs could not have relied on SCEA with regard to perpetual availability of features and functions -- SCEA had expressly reserved the right to alter or discontinue features and functions, particularly in the instance of "unauthorized or pirated content, or use of unauthorized hardware or software", *i.e.*, to protect its intellectual property.

VI. PLAINTIFFS CANNOT SUCCEED ON THEIR MAGNUSON-MOSS WARRANTY ACT CLAIM

In their seventh claim for relief, Plaintiffs contend that SCEA violated the Magnuson-Moss Warranty Act ("Magnuson-Moss"), 15 U.S.C. section 2301 *et seq.*[79] Magnuson-Moss provides a federal private right of action for state law warranty claims,[80] but does not expand those state law rights: "dismissal of the state law claims requires the same disposition with respect to an associated [Magnuson-Moss] claim."[81]

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[77] *Am. Suzuki Motor Corp.*, 37 Cal. App. 4th at 1297; *Carlson*, 883 F.2d at 297-98; *see also In re Sony PS3 Litigation*, No. C 09-4701 RS, 2010 WL 3324941, *2 (N.D. Cal. Aug. 23, 2010).
[78] Cal. Commercial Code § 2-315; B. Clark & C. Smith, The Law Of Product Warranties (2d ed. 2007), § 6.6.
[79] Consolidated Complaint, ¶¶ 134-139.
[80] 15 U.S.C. § 2301(d)(1).
[81] *Stearns v. Select Comfort Retail Corp.* 2009 WL 1635931 at *9 (N.D. Cal 2009); B. Clark & C.

Here, the Magnuson-Moss claim is dependent on Plaintiffs' claims for breach of express and implied warranties and thus it fails just as those claims do. But it fails for yet another reason: the FTC and courts have made clear that, for a written representation to constitute a "written warranty" under the Act, it must relate to a specific period of time:

> Certain representations, such as energy efficient ratings for electrical appliances, care labeling of wearing apparel, and other product information disclosures may be express warranties under the Uniform Commercial Code. However, these disclosures alone are not written warranties under the Act. Section 101(6) 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.[82]

In their Consolidated Complaint, Plaintiffs fail to cite any written warranty regarding the promised duration of any software feature or function, including the Other OS. In fact, the SSLA makes clear to the contrary.[83] On this additional basis, the Magnuson-Moss Act claim fails.

VII. PLAINTIFFS CANNOT SUCCEED ON THEIR CLRA CLAIM

A. Plaintiffs Have Failed To Establish SCEA Made Any Misrepresentation At Or Before The Time Of Sale And Thus their Claims Under Section 1770(a)(5), (7) and (9) are Fatally Deficient.

The Consolidated Complaint asserts SCEA violated three provisions of the CLRA – Civil Code subsections 1770(a)(5), (7), and (9), which prohibit "representing" or "advertising" goods or services in ways that are false or misleading.[84] Numerous supposed misrepresentations are referenced, but in each instance the allegations are inadequate under Rule 9(b)'s heightened pleading requirement, which the Ninth Circuit has confirmed applies to state law claims when asserted in federal court.[85] Moreover, the Consolidated Complaint fails to plead the requisite causal connection between a seller's misstatement and the buyer's acquisition of the goods at issue. The CLRA only provides a cause of action for a consumer who "suffers any damage **as a result of** the use or employment…of a method, act or practice declared to be unlawful by section

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Smith, The Law Of Product Warranties (Thompson-West 2d ed.), section 14:1.

[82] 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).

[83] *See* Section II(B)(2), *supra*. In fact, only the express warranty – which is limited to the hardware –states a specified period. *See* Section II(B)(1), *supra*.

[84] Complaint (Docket #76), ¶¶ 100-125.

[85] *Vess*, 317 F.3d at 1103 (applying Rule 9(b) to CLRA); *see* Section VIII(D), *infra*.

1770."[86] The Consolidated Complaint Plaintiffs assert violations of the CLRA in connection with purchases of PS3s between 2006 and 2009.[87] However, the basis for their claims, launch of Update 3.21, which if downloaded disabled the Other OS function, did not occur until April 1, 2010. Thus, there is not, nor can there be, any causal connection between the challenged act and Plaintiffs' PS3 purchases.[88] Indeed, to the extent Plaintiffs are attempting to assert CLRA claims based on misrepresentations or omissions at the time of sale, those who purchased their PS3 on or before April 27, 2007, like Messrs. Baker and Harper, have no CLRA claims due to the application of the three year statute of limitations. Cal. Civ. Code Section 1783.

Furthermore, only detailed factual representations are actionable under the CLRA – not sales boasts or "puffery."[89] "Advertising that amounts to 'mere' puffery is not actionable because no reasonable consumer relies on puffery."[90] Most of the representations cited by Plaintiffs are just that – inactionable puffery.[91]

Finally, the Consolidated Complaint asserts that SCEA violated the CLRA by "fail[ing] to adequately disclose that the Update 3.21 would disable the 'Other OS' feature when installed on a PS3."[92] But not one of the Consolidated Complaint Plaintiffs avers that he was unaware the Other OS feature would be disabled if he downloaded Update 3.21 – to the contrary, the Consolidated Complaint admits that each of the named plaintiffs independently decided whether or not to do the download depending on the associated known consequences, which were fully disclosed by SCEA at the time of issuing the Update.[93] Thus, no injury has been alleged from

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[86] Civil Code § 1780 (emphasis added).
[87] Complaint (Docket #76), ¶¶ 10-18.
[88] This issue aside, Plaintiffs have admitted that their PS3s are "personal computers," as they purport the relevant representations state. *See* Section IV(A), *supra*.
[89] *See Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1361 fn. 3 (2003).
[90] *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994); *see also Consumer Advocates*, 113 Cal. App. 4th at 1361 (representation that satellite television system provided "crystal clear" digital video or "CD quality" audio were "not factual representations that a given [industry] standard was met," but merely "boasts, all-but-meaningless superlatives," akin to "mere puffing," and "which no reasonable consumer would take as anything more weighty than an advertising slogan.").
[91] Consolidated Complaint, ¶ 106.
[92] Consolidated Complaint, ¶¶ 107.
[93] Consolidated Complaint, ¶¶ 10-19; Ott Decl., ¶ 19, Ex. R.

this supposed non-disclosure.[94]

B. Plaintiffs' Unconscionability Claim Also Fails

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

> Some services may change your current settings, cause a loss of data or content, or cause some loss of functionality.
>
> SCE, at its sole discretion, may modify the terms of this Agreement at any time, including any terms in the PS3TM systems 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 Agreement. Your continued access to or use of the System Software will signify your acceptance of any changes to this Agreement.[95]

The Consolidated Complaint alleges that this term is unconscionable because it was imposed by SCEA after purchase of the PS3, presenting buyers with no choice but to accept it, and because it unreasonably reallocated risk between SCEA and PS3 buyers. However, these allegations are truly inadequate, and indeed are thinly veiled conclusory recitations of the legal elements of an unconscionability theory, and thus inadequate under *Iqbal.* Indeed, California courts reviewing similar "clickwrap" licenses have approved of them, finding they are neither procedurally or substantively unconscionable.[96] Thus, an end user license agreement is not rendered invalid simply because a consumer receives it after purchase of the software.[97] Nor is it unconscionable merely because it affords the licensor the right to limit or revoke the license, and unconscionability claims based on facts Plaintiffs allege here have been dismissed at the pleading

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[94] 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 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. 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."); *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).

[95] Consolidated Complaint, ¶¶ 114-122.

[96] *See e.g., Meridian Project Systems, Inc. v. Hardin Const. Co. LLC.*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (shrinkwrap license not unconscionable); *Leong v. Square Enix of Am. Holdings, Inc.*, 2010 WL 1641364 at *10 (C.D. Cal. Apr. 20, 2010) (clickwrap license not unconscionable).

[97] 426 F. Supp. 2d at 1107.

stage.[98] Clauses allowing a software licensor to terminate or alter the scope of its services are not "sufficiently shocking;"[99] indeed, as the Central District Court of California concluded when reviewing terms of a video game software license and subscription agreement, "[i]f such a clause were unconscionable, [defendant] and all of its competitors would be forced to make their games available in perpetuity or face class actions suits for loss of data."[100]

The Consolidated Complaint also avers that the allegedly unconscionable terms were written in "small-type, prolix form; disguised…under nebulous heading; and buried…among sundry other unrelated contractual terms."[101] These conclusory allegations are contradicted by the actual terms of the SSLA: the challenged verbiage is in the same font size as the rest of the Agreement and appears under the headings "Services and Updates" and "General Legal." The SSLA is less than two and half pages (when printed) and, as such, it is hard to image any terms being "buried" or in "prolix form" in such a short document.[102]

Finally, the three year statute of limitations would also bar the unconscionability claim with regard to PS3 purchases prior to April 27, 2007.[103]

VIII. PLAINTIFFS CANNOT SUCCEED ON THEIR UCL CLAIM

The Consolidated Complaint attempts to assert claims under the UCL for "unlawful," "unfair", and "fraudulent" business practices.[104] Substantively, the Consolidated Complaint does not state a cause of action under any of these prongs of the statute, but equally important, Plaintiffs lack standing to assert these claims.

A. The Allegations In The Consolidated Complaint Do Not Support A Restitutionary Remedy

"Because remedies for individuals under the [unfair competition law] are restricted to injunctive relief and restitution, the import of the [loss of money or property] requirement is to

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[98] *Id.* at *1.
[99] *Id.* *10.
[100] *Id.*
[101] Consolidated Complaint, ¶ 117.
[102] Ott Decl., ¶ 3, Ex. B.
[103] *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.").
[104] Consolidated Complaint, ¶¶ 140-155.

limit standing to individuals who suffer losses of money or property that are eligible for restitution."[105] Stated differently, damages like Plaintiffs seek here are not afforded.

In *Korea Supply v. Lockheed Martin Corp.*, the California Supreme Court described the bounds of the restitutionary remedy available under the UCL, upholding a demurrer to a UCL claim[106] because "[a]ny award that plaintiff would recover from defendants . . . would not replace any money or property that defendants took directly from plaintiff.[107] Applying *Korea Supply* here, Plaintiffs do not have a claim because they do not allege that they gave any money to SCEA, let alone as a result of wrongful conduct. The gravamen of the Consolidated Complaint is that Plaintiffs were harmed by Update 3.21 a year or more after they purchased their PS3s from third party retailers.[108] Plaintiffs therefore cannot seek restitution of their purchase price – it is temporally impossible for any causal connection to exist between Update 3.21 and Plaintiffs' purchase.[109]

As this Court stated with regard to claims alleged against SCEA related to the PS3 regarding other firmware updates: "plaintiffs have failed to allege sufficient facts showing how [SCEA] has been wrongfully 'enriched,' or what they have paid to [SCEA] that it should be required to restore them. Accordingly, this claim for relief is also dismissed…."[110] Plaintiffs' claim is a claim for damages – not restitution – and so they lack standing to bring a UCL claim.[111]

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[105] *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22, (2009) (quoting *Buckland*, 155 Cal. App. 4th 798, 817 (2007); *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 facts supporting restitution); *Walker v. USAA Casualty Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007)).

[106] *Korea Supply*, 29 Cal. 4th 1134, 1149 (2003).

[107] *Id.*

[108] Consolidated Complaint, ¶¶ 10-19, 52-61.

[109] *See Korea Supply*, 29 Cal. 4th at 1146 ("Any award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff."); *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 837 fn. 6 (2006).

[110] *See In re Sony PS3 Litig.*, No. C 09-4701 RS, 2010 WL 3324941, *4 (N.D. Cal. Aug. 23, 2010).

[111] Plaintiffs' request for "disgorgement" of profits received by SCEA (Consolidated Complaint, ¶ 146) is similarly inappropriate. *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 127-28 (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).

B. Plaintiffs' "Unlawful" Claim Should Be Dismissed

A claim of "unlawful" business practices effectively "borrows" violations of other laws and makes them independently actionable under the UCL.[112] The Consolidated Complaint alleges that SCEA's "conduct is unlawful because it constitutes a breach of express warranty, breach of implied warranties, conversion, and unjust enrichment….[;] violates the [CLRA], the Magnuson-Moss Warranty Act [], the Computer Fraud and Abuse Act [], and the False Advertising Law []."[113] A defense to an underlying violation is also a defense to a UCL claim of "unlawful" business practices.[114] Here, SCEA moves to dismiss each of the claims offered in support of the UCL "unlawful" claim. Moreover, an "unlawful" claim premised on an alleged violation of the False Advertising Law must be based on an affirmative "statement…which is untrue or misleading" when made[115] – which the Consolidated Complaint indisputably fails to aver.

C. An "Unfair" Claim May Not Be Premised On A Practice Recognized By California Courts As Appropriate And Lawful

SCEA supposedly violated the "unfair" prong of the UCL through deceptive sales practices and advertising, but again the Consolidated Complaint fails to provide the specificity required by Rule 9(b).[116] Additionally, courts have already concluded that "clickwrap" provisions that grant only a license for software are lawful when issued under circumstances comparable to those alleged in the Consolidated Complaint, and accordingly, the mere use of such a license is not inherently "unfair."[117] On this additional basis, Plaintiffs' UCL claim fails.

D. Plaintiffs' Claim Of "Fraudulent" Practices Does Not Satisfy Rule 9(b)

The asserted claim for "fraudulent" business practices is similarly insufficient under Rule 9(b) because it lacks the requisite specific allegations of "the time, place and content of [any]

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[112] *Cel-Tech Comm., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999); *Farmer's Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1992).
[113] Consolidated Complaint, ¶ 153.
[114] *Hobby Indus. Assn. of America, Inc. v. Younger*, 101 Cal. App. 3d 358, 371 (1980) (holding "any defense" available on the underlying claim also applicable to derivative UCL action).
[115] Cal. Bus. & Prof. Code § 17500; *Kasky v. Nike*, 27 Cal. 4th 939, 959 (2002).
[116] *Genna*, 25 F. Supp. 2d at 1039; *see* Section VIII(D), *infra*.
[117] *See* Section VIII(B), *infra*.

alleged [misrepresentation]," the identity of the speaker, or "the manner in which [the] representations were false and misleading."[118] To the contrary, in lieu of the requisite specificity, Plaintiffs offer mostly nonactionable puffery.

IX. THE COMPUTER FRAUD AND ABUSE ACT CLAIM FAILS

The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. section 1030 *et seq.*[119] was intended to address hacking, i.e., trespass into computers in the course of computer fraud.[120] The Consolidated Complaint asserts SCEA violated Section 1030(a)(5) of CFAA, which requires that a defendant

> (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
> (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
> (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.[121]

However, Plaintiffs cannot establish there was any "damage" "without authorization." The SSLA and Terms of Service explicitly set forth that SCEA may disable or alter any software feature, particularly to prevent unauthorized use or access to its intellectual property, which Plaintiffs concede was SCEA's reason for issuing Update 3.21.[122] It was therefore always within purchasers' expectations that SCEA may take away or limit the Other OS function as well as access to the PSN. Furthermore, SCEA notified the public in advance that it intended to release a software update that, if downloaded by a user, would disengage the Other OS option, and confirmed that it was doing so due to security concerns related to its intellectual property.[123] Accordingly, it cannot be said that SCEA disabled the Other OS feature "without authorization."[124]

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[118] *Genna*, 25 F. Supp. 2d at 1038.
[119] Consolidated Complaint, ¶¶ 126-133.
[120] *US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1193 (D. Kan. 2009); *Egilman v. Keller & 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 deal with a hack of the PS3. Consolidated Complaint, ¶ 63.
[121] 18 U.S.C. § 1030(a)(5).
[122] *See* Section II(B), *supra*.
[123] Section II(B), *supra*.
[124] *See, e.g., SecureInfo Corp. v. Telos Corp.*, 387 F. Supp. 2d 593, 608-09 (E.D. Va. 2005); *compare with Int'l Airport Centers, LLC v. Citrin*, 440 F. 3d 418, 419-21 (7th Cir. 2006) (holding

Notably, Ventura and Baker admit that they did not download Update 3.21[125] and therefore cannot even attempt to assert a claim under CFAA.[126]

X. THE CONVERSION CLAIM FAILS BECAUSE PS3 USERS HAVE NO OWNERSHIP INTEREST IN THE ALLEGEDLY CONVERTED PROPERTY

To prevail on a conversion claim, Plaintiffs must show: (1) their ownership or right to possession of the property at the time of the alleged conversion; (2) SCEA's conversion by a wrongful act or disposition of property rights; and (3) resultant damages.[127]

In support of this claim, Plaintiffs baldly assert that "[b]y purchasing a PS3, [they] and each member of the Class became owners of their PS3 and all of their PS3's features" and that "the PS3's features, including the 'Other OS' feature…were Plaintiffs' and the Class's property."[128] But the Warranty, SSLA, and Terms of Use clearly disavow any such ownership right.[129] Because Plaintiffs have no ownership interest, their conversion claim must fail as a matter of law.[130]

XI. PLAINTIFFS LACK STANDING TO PROSECUTE AN UNJUST ENRICHMENT CLAIM

Plaintiffs assert a claim for "Unjust Enrichment"[131] based on the same general factual allegations as the others.[132] The Consolidated Complaint alleges that SCEA was "unjustly enriched" due to its collection of "monetary benefits…. from the sales of PS3s with the 'Other OS' function."[133] To state a claim for relief and have Article III standing, Plaintiffs must allege

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that terminated employee's unauthorized erasing of files from an employer's computer constitutes "damage without authorization").

[125] Consolidated Complaint, ¶¶ 11 & 17.

[126] Consolidated Complaint, ¶¶ 11 & 17; Docket #1 (*Ventura* Complaint), ¶¶ 26-29.

[127] *Oakdale Village Group v. Fong*, 43 Cal. App. 4th 539, 543-44 (1996).

[128] Consolidated Complaint, ¶¶ 164-65.

[129] Section II(B), *supra*.

[130] *See CG Roxanne LLC v. Fiji Water Co. LLC*, 569 F. Supp 2d 1019, 1035 (N.D. Cal. 2008) ("Plaintiff's conversion claim [] fails since the plaintiff must own the property to assert a conversion claim...."); *Cardonet, Inc. v. IBM Corp.*, No. C-06-06637 RMW, 2008 WL 941707, *1 (N.D. Cal. April 7, 2008) ("a claim for conversion does not lie here. Fundamentally, conversion requires the 'wrongful exercise of dominion' over another's property. [citation omitted]. This requires some deprivation of ownership.").

[131] Consolidated Complaint, ¶¶ 169-174.

[132] Consolidated Complaint, ¶ 170.

[133] Consolidated Complaint (Docket #76), ¶ 171.

facts to show that they suffered the harm of which they complain.[134] But, as this Court concluded in another action regarding firmware updates to the PS3, "plaintiffs have not adequately explained how [SCEA] has been wrongfully 'enriched' or what they have paid to [SCEA] that it should now be required to restore to them."[135]

XII. CONCLUSION

On the grounds set forth more fully above, defendant Sony Computer Entertainment America LLC respectfully requests that the Court enter an order dismissing Plaintiffs' claims for relief.

Dated: September 10, 2010

DLA PIPER LLP (US)

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[134] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Warth v. Seldon*, 422 U.S. 490, 502 (1975).

[135] *See In re Sony PS3 Litigation*, No. C 09-4701 RS, 2010 WL 3324941, *3 (N.D. Cal. Aug. 23, 2010). This claim also fails because California law does not recognize an independent claim for "unjust enrichment." *Oestreicher*, 544 F. Supp. 2d at 975; *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) (quoting *Lauriedale Assocs., Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992)).