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

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13  
14 In re SONY PS3 "OTHER OS"  
LITIGATION

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

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF DEFENDANT'S MOTIONS  
TO DISMISS AND STRIKE**

15  
16  
17 Date: November 4, 2010  
18 Time: 1:30 p.m.  
19 Judge: Hon. Richard Seeborg  
Courtroom: 3

1 Defendant Sony Computer Entertainment America LLC (“SCEA”) respectfully requests  
2 that the Court take judicial notice of certain documents and information cited in its Motion to  
3 Dismiss and Motion to Strike, filed herewith.

4 **I. REQUEST FOR JUDICIAL NOTICE**

5 Pursuant to Federal Rule of Evidence 201, SCEA requests that the Court take judicial  
6 notice of the following documents, each of which is attached to the accompanying Declaration of  
7 Carter Ott (“Ott Declaration”).

8 1. Limited Hardware Warranty And Liability for the PlayStation®3. Ott Declaration,  
9 Exhibit A.

10 2. System Software License Agreement (Version 1.4) for the PlayStation®3 System.  
11 Ott Declaration, Exhibit B.

12 3. System Software License Agreement (Version 1.3) for the PlayStation®3 System.  
13 Ott Declaration, Exhibit D.

14 4. System Software License Agreement for the PlayStation®3 System, Version 1.1.  
15 Ott Declaration, Exhibit C.

16 5. System Software License Agreement for the PlayStation®3 System, Version 1.0.  
17 Ott Declaration, Exhibit S.

18 6. System Software License Agreement (Version 1.2) for the PlayStation®3 System.  
19 Ott Declaration, Exhibit T.

20 7. Terms Of Service And User Agreement for the PlayStation®Network, Version  
21 7.0. Ott Declaration, Exhibit E.

22 8. Terms Of Service And User Agreement for the PlayStation®Network, Version  
23 6.0. Ott Declaration, Exhibit X.

24 9. PlayStation®Network: Terms of Service and User Agreement, Version 5.00. Ott  
25 Declaration, Exhibit G.

26 10. PlayStation®Network: Terms Of Service And User Agreement, Version 4.0. Ott  
27 Declaration, Exhibit W.

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1           11.     PlayStation®Network: Terms Of Service And User Agreement, Version 3.0. Ott  
2 Declaration, Exhibit V.

3           12.     PlayStation®Network Terms of Service and User Agreement, Version 2.0. Ott  
4 Declaration, Exhibit F.

5           13.     PlayStation®Network Terms Of Service And User Agreement, Version 1.0. Ott  
6 Declaration, Exhibit U.

7           14.     Open Platform for PlayStation®3. Ott Declaration, Exhibit H.

8           15.     Document from the PlayStation® Knowledge Center containing “FAQs.” Ott  
9 Declaration, Exhibit R.

10          16.     Complaint in *Baker, et al. v. Sony Computer Entertainment America, LLC*, U.S.  
11 District Court, Northern District of California, Case No. CV-10-01897-RS. Ott Declaration,  
12 Exhibit I.

13          17.     Complaint filed in *Densmore, et al. v. Sony Computer Entertainment America,*  
14 *Inc.*, U.S. District Court, Northern District of California, Case No. CV-10-1945-RS. Ott  
15 Declaration, Exhibit J.

16          18.     Complaint filed in *Wright v. Sony Computer Entertainment America, Inc., et al.*,  
17 U.S. District Court, Northern District of California, Case No. CV-10-01975-RS. Ott Declaration,  
18 Exhibit K.

19          19.     Complaint filed in *Harper, et al. v. Sony Computer Entertainment America, Inc.*,  
20 U.S. District Court, Northern District of California, Case No. CV-10-02197-RS. Ott Declaration,  
21 Exhibit L.

22          20.     Complaint filed in *Huber v. Sony Computer Entertainment America, LLC*, U.S.  
23 District Court, Northern District of California, Case No. CV-10-02213-RS. Ott Declaration,  
24 Exhibit M.

25          21.     Complaint filed in *Benavides v. Sony Computer Entertainment America, Inc.*, U.S.  
26 District Court, Northern District of California, Case No. CV-10-02612-RS. Ott Declaration,  
27 Exhibit N.

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1           22.     Complaint filed in *Allee v. Sony Computer Entertainment America Inc.*, State of  
2 Wisconsin, Circuit Court, Milwaukee County, Case No. 10CV012458. Ott Declaration, Exhibit  
3 O.

4           23.     SCEA’s Notice of Removal in *Allee v. Sony Computer Entertainment America*  
5 *Inc.*, U.S. District Court, Eastern District of Wisconsin, Case No. CV-00737-WEC. Ott  
6 Declaration, Exhibit P.

7           24.     Internet postings and “public statements” from a message board Plaintiffs relied on  
8 in their Consolidated Class Action Complaint (the “Consolidated Complaint”). Ott Declaration,  
9 Exhibit Q.

10          18. PlayStation® Knowledge Center, “Can I install different Operating Systems (OS) or  
11 system Software on the PlayStation®3 computer entertainment system?” Ott Declaration,  
12 Exhibit R.

## 13     **II.     JUDICIAL NOTICE IS APPROPRIATE**

### 14           **A.     The Court May Take Judicial Notice Of Documents Incorporated By** 15           **Reference In The Consolidated Complaint**

16           Federal Rule of Evidence 201 allows a court to take judicial notice of, *inter alia*,  
17 adjudicative facts “not subject to reasonable dispute in that [they are] . . . capable of accurate and  
18 ready determination by resort to sources whose accuracy cannot reasonably be questioned.” In  
19 ruling on a pleading challenge, a court may take judicial notice of “documents whose contents are  
20 alleged in a complaint and whose authenticity no party questions, but which are not physically  
21 attached to the pleading” if (i) the complaint refers to such document; (ii) the document is central  
22 to the plaintiff’s claim; and (iii) no party questions the authenticity of the copy submitted.<sup>1</sup>

23           Here, the Consolidated Complaint alleges that SCEA sold millions of PlayStation®3  
24 (“PS3”) consoles by advertising a wide array of its features and functions, including the ability to

25 <sup>1</sup> *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds*, *Galbraith v.*  
26 *County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Knievel v. ESPN, Inc.*, 393 F.3d 1068,  
27 1076 (9th Cir. 2005) (judicial notice appropriate where the plaintiff’s claim depends on the  
28 contents of a document, stating: “We have extended the ‘incorporation by reference’ doctrine to  
situations in which the plaintiff’s claim depends on the contents of a document, the defendant  
attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of  
the document, even though the plaintiff does not explicitly allege the contents of that document in  
the complaint.”); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1281, fn. 16 (11th Cir. 1999);  
*Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, fn. 3 (2d Cir. 2002).

1 play games and movies, view photographs, access the “unified online gaming service called the  
2 PlayStation Network” (“PSN”), and utilize alternative operating systems, like Linux (“Other  
3 OS”). According to the Consolidated Complaint these features and functions were promoted,  
4 among other places, on SCEA’s website.<sup>2</sup> The Consolidated Complaint asserts eight causes of  
5 action against SCEA premised on the notion that SCEA misrepresented or failed to disclose that it  
6 “might” alter or disable features or functions in the future, including the Other OS feature. In  
7 support of these assertions, the Consolidated Complaint states explicitly that SCEA’s “right to  
8 remove the ‘Install Other OS’ feature is not specifically disclosed in [SCEA’s] Terms of Service  
9 or System Software License Agreement.”<sup>3</sup> The Consolidated Complaint also alleges that SCEA  
10 informed users that it released Firmware Update Version 3.21, which disabled the Other OS  
11 function if downloaded, to protect the “security” of users systems and later admitted that it issued  
12 the update “to protect the intellectual property of the content offered on the PS3 system.”<sup>4</sup>  
13 Finally, the Consolidated Complaint asserts that certain terms of the System Software License  
14 Agreement should be declared void because they are unconscionable.<sup>5</sup>

15 Notwithstanding their repeated references to various provisions of SCEA’s website,  
16 System Software License Agreement, the Terms of Service and User Agreement, and Firmware  
17 Update 3.21, Plaintiffs fail to attach or even quote adequately and completely any of these  
18 documents, each of which is available on the Internet.<sup>6</sup> Because the Consolidated Complaint  
19 references these documents – indeed confirms that they are patently central to Plaintiffs’ claims –  
20 and no party questions their authenticity, the Court may take judicial notice of documents  
21 attached as Exhibits A through H and R through X to the Ott Declaration.<sup>7</sup>

22 <sup>2</sup> Consolidated Complaint, ¶¶ 2, 10, 30, 45.

23 <sup>3</sup> Consolidated Complaint, ¶¶ 41.

24 <sup>4</sup> Consolidated Complaint, ¶¶ 63.

25 <sup>5</sup> Consolidated Complaint, ¶¶ 114, 117.

26 <sup>6</sup> See, e.g., Consolidated Complaint, ¶¶ 74(c), 74(d), 78-81, 107, 109, and 134-139.

27 <sup>7</sup> *Datel Holdings Ltd. v. Microsoft Corp.*, --- F. Supp. 2d ---, 2010 WL 1691790, \*\*6-7 (N.D.  
28 Cal. April 23, 2010) (taking judicial notice of “Xbox 360 ‘Limited Warranty and Return  
Information,’ which includes the Xbox 360 software license; [] the Xbox Live Terms of Use; and  
[] a portion of the Xbox 360 console packaging. The first two documents are publicly available  
online and the third is available in any Xbox 360 console packaging.”); *Berenblat v. Apple, Inc.*,  
2009 WL 2591366 at \*1, n. 3 (N.D. Cal. Aug. 21, 2009) (“[defendant’s] Request for Judicial  
Notice of the terms of the express warranty is granted, as the FAC references the warranty and at  
least two of the [] Plaintiffs exercised their rights under the express warranty.”); *In re Samsung*

1 In support of their allegations, Plaintiffs also cite to a number of comments purportedly  
2 made by PS3 owners on Internet websites containing chat rooms and message boards, regarding  
3 the PS3, the Other OS feature, and this litigation.<sup>8</sup> But they fail to provide actual screenshots of  
4 those website pages, which include other comments made by PS3 users, many of which respond  
5 directly to the postings Plaintiffs quote and thereby contradict Plaintiffs' allegations. These  
6 screenshots of the website pages, and the postings displayed on them, are appropriate for judicial  
7 notice. Courts regularly take judicial notice of Internet websites, which necessarily would  
8 include posts or comments made by visitors to chat rooms and message boards on such sites.<sup>9</sup> In  
9 addition, judicial notice is appropriate of Exhibit Q to the Ott Declaration because the  
10 Consolidated Complaint references these website chat rooms and message boards, Plaintiffs have  
11 made them central to their claims, and no party questions their authenticity.

#### 12 **B. The Court May Take Judicial Notice of Court Records**

13 Federal Rules of Evidence 201 allows a court to take judicial notice of court records,  
14 including its own records from other proceedings and records of state courts. Specifically,  
15 Federal Rules of Evidence 201 permits a court to take judicial notice of, *inter alia*, adjudicative  
16 facts "not subject to reasonable dispute in that [they are] . . . capable of accurate and ready  
17 determination by resort to sources whose accuracy cannot reasonably be questioned." It is  
18 axiomatic that courts may take judicial notice of documents filed and orders or decisions entered  
19 in any federal or state court.<sup>10</sup> On this basis, the Court may take judicial notice of the underlying

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20 *Elecs. Am., Inc. Blu-Ray Class Action Litig.*, 2008 WL 5451024, at \*4 n. 2 (D.N.J. Dec. 31, 2008)  
21 ("In the Amended Complaint, Plaintiffs specifically acknowledge the existence of warranty  
22 information in each Player's packaging. Those documents are integral to Plaintiffs' Amended  
23 Complaint, as the warranty language serves, as a matter of law, to either support or erode  
24 Plaintiffs' claims. As a result, this Court will consider the warranty information, without  
25 converting Defendant's motion to dismiss into one for summary judgment.").

23 <sup>8</sup> See Consolidated Complaint, ¶¶ 55 & 62.

24 <sup>9</sup> *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Wible v. Aetna Life Ins. Co.*, 375 F.  
25 Supp. 2d 956, 965 (C.D. Cal. 2005); *Caldwell v. Caldwell*, 2006 WL 618511 (N.D. Cal. Mar. 13,  
26 2006); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007); *Highfields  
27 Capital Mgmt., L.P. v. Doe*, 385 F. Supp. 2d 969, 971-72 (N.D. Cal. 2005) (taking judicial notice  
28 of message posted on Internet message board); *Ligotti v. Garofalo*, 562 F. Supp. 2d 204, 212  
(D.N.H. 2008) (taking judicial notice of four comments made on Internet blog). Chat rooms and  
message boards are generally considered "websites." See <http://en.wikipedia.org/wiki/Websites>.

<sup>10</sup> See *United States v. Warneke*, 199 F.3d 906, 909 fn. 1 (7th Cir. 1999); *Doran v. Eckold*, 409  
F.3d 958, 962 fn. 1 (8th Cir. 2005); *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002)  
(appellate court judicially noticed state appellate opinion and briefs); *E.I. DuPont de Nemours &*

1 seven class actions that consolidated to the above-captioned matter. For the same reasons, the  
2 Court may take notice of the case filed in Wisconsin state court, *Allee v. Sony Computer*  
3 *Entertainment America Inc.*, Case No. CV-10-12458. Accordingly, the Court may take judicial  
4 notice of Exhibits I through P to the Ott Declaration.

5  
6 Dated: September 10, 2010

7 DLA PIPER LLP (US)

8 By: /s/ Luanne Sacks

9 LUANNE SACKS

10 Attorneys for Defendant

11 SONY COMPUTER ENTERTAINMENT  
12 AMERICA LLC

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26 *Co., Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) (courts may take judicial notice of a complaint  
27 filed in a related state court action); *see also Rothman v. Gregor*, 220 F.3d 81, 92 (2nd Cir. 2000);  
28 *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1277 (5th Cir. 1978) (courts may take judicial  
notice of materials in its own files from prior proceedings); *Lynch v. Leis*, 382 F.3d 642, 648 fn. 5  
(6th Cir. 2004).