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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG

IN RE SONY PS3 "OTHER OS" LITIGATION,) No. C 10-1811 RS

San Francisco, California
Thursday
November 4, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

CALVO & CLARK, LLP
One Lombard Street, Second Floor
San Francisco, California 94111
BY: JAMES A. QUADRA, ESQUIRE

HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
BY: JAMES J. PIZZIRUSSO, ESQUIRE

FINKELSTEIN THOMPSON LLP
100 Bush Street, Suite 1450
San Francisco, California 94115
BY: ROSEMARY M. RIVAS, ESQUIRE

(Appearances continued on next page)

Reported By: *Katherine Powell Sullivan, CSR #5812, RPR, CRR*
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

For Plaintiffs: PEARSON SIMON WARSHAW PENNY LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, California 91403
BY: DANIEL L. WARSHAW, ESQUIRE

For Defendant: DLA PIPER LLP
555 Mission Street, Suite 2400
San Francisco, California 94105
BY: LUANNE SACKS, ESQUIRE
CARTER W. OTT, ESQUIRE

P R O C E E D I N G S

NOVEMBER 4, 2010 **1:47 P.M.**

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

Please come forward and state your appearances.

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

THE COURT: Good afternoon.

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

THE COURT: Good afternoon.

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

THE COURT: Good afternoon.

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

THE COURT: Good afternoon.

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

THE COURT: Good afternoon.

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

This is a motion to dismiss the consolidated class

action complaint. And the claims that we have before us are a claim for breach of express warranty, breach of implied warranty and merchantability and fitness for a particular purpose, a CLRA claim, CFAA claim, Magnuson-Moss Warranty Act, 17200, 17500, conversion, and unjust enrichment.

What I propose to do is just walk through my impressions on these, and then you can address the ones you think you need to address.

The express warranty claim, as I understand that one, the plaintiffs are pointing to various statements allegedly made by Sony, but not the specific materials that were associated with the sale of the PlayStation.

So, they are not pointing to terms in the license agreement in terms of service. I have some question about whether or not that would provide a sufficient basis for an express warranty claim.

I know Judge Fogel decided the *Blennis* case. And he, I think in a similar situation, had questions about whether or not that was a basis for an express warranty claim.

I'm inclined on that claim to grant it with leave to amend, with an opportunity to address that.

The implied warranty claims, there are two counts of implied warranty. The argument there is a lack of privity argument. And in response to that, plaintiffs are directing me to the sort of notion of direct dealings, direct dealing

exception; that there was some -- even though the actual sale wasn't from the defendant, there was enough contact in the form of ongoing activity, if you will.

The long and short of it is, I don't think this is like the *U.S. Roofing* case, where there is some demonstration of money directly paid subsequent to the initial sale for updates and upgrades, and the like.

I don't see that here. So, I'm inclined to think that also is appropriately dismissed with leave to amend.

The Magnuson-Moss Warranty Act claims, that to me seems derivative of the state law warranty claims. I know there is some question the defendant suggests. In addition to the other defenses that they have presented, they have got an argument that there isn't a specified time period, and that's contrary to the regs.

But I think the more important concern to me, at this stage, is I think it does rise or fall to some extent on the state warranty claims. And as I'm inclined, at least at this juncture, to dismiss with leave to amend, I would do that with that claim, as well.

With the California Consumer Legal Remedies Act claim, the argument there is, as I understand it, plaintiffs are contending there was a misrepresentation on the functionality of the PlayStation in the sense that it's represented to have the alternate operating systems function,

and then only down the line is that effectively disabled when the upgrades come down the pike; and, therefore, there's a misrepresentation of that functionality.

And then the defense argues, well, at the time of sale there wasn't any even arguable misrepresentation; there was a reservation of rights to disable, if you will, under the license agreement and, therefore, there's no misrepresentation.

That one I'm just going to ask the parties to address for me, because I want to make sure I understand the arguments. And you can give me some further guidance.

On the Unfair Competition Claim and the false advertising claim, I don't think restitution is available under either of those theories.

To the extent it's injunctive relief that's being sought, as I understand it, the argument is to reinstate the operating system alternative functionality. And that's what's being requested.

The problem in the 17200 claim -- "problem" may be the wrong word. But, as we all know, you have to have some underlying unfair, illegal, or fraudulent practice. To the extent that I have some problems with those underlying claims, I have some question about whether or not the 17200 claim can, at this stage, be brought forward. But I would think, again, that would be with leave to amend.

Computer Fraud and Abuse Act, the Section 1030 claim,

the argument defense makes is that the license authorizes it to disable. The question, though, that I have is, can either the authorization or lack thereof be something that can be decided on a motion to dismiss?

There is a dispute as to the meaning of the provisions, license agreement provisions, and also the conscionability of those provisions if they are interpreted in the fashion the defendant suggests. And, therefore, can this really be resolved on a motion to dismiss?

Conversion, I don't see what plaintiffs are alleging is the property that was converted. I know they make an argument that the use of the operating system feature is somehow a property right. But I have trouble seeing that. So perhaps you can address that.

Finally, unjust enrichment. As I have ruled in other similar circumstances, I don't think unjust enrichment is a standalone claim. So, I would be inclined to dismiss that as an independent claim for relief.

Finally, one more thing. As to the defendant's motion to strike -- and the motion is to strike the class claims -- while, theoretically, I recognize that a motion to strike is available in the appropriate case, to strike class allegations, where it is clear on the face of the complaint that no viable class treatment could be developed. I don't think that's this case.

If the deficiencies that I've already discussed are somehow addressed in the amendments, then perhaps there's a class case that could go forward. If they can address some of those concerns or if my ultimate conclusion is there aren't these problems, I don't see why we can't move to the class certification part of the process and make a determination then. So the bottom line is, I just think it's premature to make a motion to strike the class.

Those are my preliminary thoughts on these. There is something both sides would want to discuss. Why don't I look to the defense side first, being the moving party.

MS. SACKS: Thank you, Your Honor.

May I start with the motion to strike, first?

Your Honor, I do understand that it is a fairly aggressive position to take, that the Court should basically disavow the possibility of a class proceeding in this case at the outset based on the allegations of the complaint.

But as Judge Fogel concluded in a very, very similar case, the *Sanders* vs. *Apple* case, there are circumstances in which it is appropriate. And when you look at the analogies between that case and this one, it confirms that indeed this case is one of those.

One of the critical flaws in the entire underpinning of the complaint is the notion that everyone saw a representation that led them to conclude that the other OS

function would be supported for "the life." Whatever that might mean.

The problem is that the specific allegations of the complaint refute that notion. Nothing that is alleged anywhere in the complaint says anything about the duration, the longevity of the time in which the other OS function or, for that matter, any particular aggregate of features of the PS3 would be available.

THE COURT: Why then are we making the assumption that it must terminate at a certain point?

They're saying it's an ongoing representation; that without any termination date that you will always have the OS function. You're saying, well, they are not saying one way or the other what the time period is.

Why do we assume that it terminates?

MS. SACKS: Well, Your Honor, a manufacturer's obligation for anything having to do with a product itself is only defined by its express warranty, its express promises.

If SCEA, Sony, had said, "We guarantee that the other OS function would be supported," if they said, "We guarantee PlayStation Network access will always be available," anything about the duration, plaintiffs might have an argument.

The only thing that Sony told anyone about the duration of any feature of the PS3 is what it said in the one year express limited hardware warranty. It said "one year."

And as the *Daughtery* case, as the *Bardin* case, and as subsequent federal court authorities have noted, where something arises after the duration of that promised one year, the purchaser can have no expectation.

So, Your Honor, if the purchaser can have no expectation of the PlayStation 3 functioning at all after the expiration of that one-year warranty, how can it somehow have a greater expectation about the availability of one feature?

If SCEA cannot have liability under California law for the PS3 completely failing to perform after one year, how can it have liability for the fact that it does 99 percent of what it was advertised to do, and just not one?

That is completely irrational and cannot be reconciled with existing California law.

Now, why do I go to that issue? Because it's essential to the notion of reliance. If the class members did not seek a representation, a ubiquitous representation upon which they relied, then this cannot be treated as a class.

And that is exactly what Judge Fogel found in the *Sanders* case. In fact, in the *Sanders* case, the plaintiff there made exactly the same argument that plaintiffs are making here, that a motion to strike was premature. But what the Court found was, where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery.

And what did Judge Fogel find in *Sanders*? Exactly that. That reliance and injury would differ among the class members because there was no ubiquitous misrepresentation alleged.

Now, one of the other issues that comes up on the motion to strike, that I think is critical, is the notion that there is the absence of standing.

If these named plaintiffs did indeed see a representation about the other OS function before purchase, that they relied on, if that really was material to their decision to buy the PS3 as opposed to an Xbox or a Wii, they may have standing.

But individuals who never saw anything about the other OS, who never heard anything about the other OS, or who did and couldn't care about it, that it didn't feature in any way in their purchasing decision, cannot be injured by the fact that there -- the opportunity for use of the other OS is now constrained.

Let me just segue for --

THE COURT: There is no dispute that when it was sold it was sold with the representation that it did have this function.

MS. SACKS: Well, Your Honor, you have to identify -- that's what we keep asking the plaintiffs to do -- what specific representation they mean.

Was it on the box? No. So those purchasers who simply walked into a store and bought a PS3 did not see any representation about the other OS.

Plaintiffs say, oh, it was on SCEA's website. That is correct. But, certainly, lots of people don't look at a website before they make a purchase like this. Are you going to tell me that 10 million people each read SCEA's website before they bought a PS3, particularly people who were buying it for a gift?

So the fact is, if someone didn't see it, they can't have been injured. But, more importantly, I think we need to get to the second aspect of that. Even if people saw the fact that the other OS feature was going to be available on the PS3, that doesn't mean it mattered to their purchasing decision.

THE COURT: Isn't that a question that when we get to class certification on typicality and commonality, and all the things we look at, those are some of the questions that you'll develop in the class discovery?

MS. SACKS: They absolutely are. But as Judge Fogel found in *Sanders*, where we're going to have to ask that question over and over and over again about absent class members as well as about the named plaintiffs, the case is simply not suitable for class treatment.

THE COURT: Well, but I don't know. Perhaps you'll find a class of people who did look at the website, and they

then will say, "That's the basis on which we purchased this."

Why couldn't you -- maybe we have some issues on subclasses, and the like, but why are you assuming that there can never be a class of people who did rely upon that website?

MS. SACKS: And, in fact, Your Honor, I'm not making that assumption. I'm stuck with the class as plaintiffs have alleged it. And they have alleged that everyone is in the class. And that relates to their theory of recovery. They say it's not just the people who saw a representation and relied on it who are entitled to --

THE COURT: But your motion to strike is joining the question -- you're saying now there can never be a class with these averments; it cannot be treated as a class action.

So even if, as you say, they have defined it in a broader way than you think is viable, can you then take the step you're taking, which is to say, "And then we say as a matter of law you, Judge, shouldn't allow any inquiry into perhaps a more limited or narrow class."

I have class cases where the definition the plaintiff defines it in a very broad fashion, and when we get to certification we end up certifying a much narrower class.

MS. SACKS: That's why, Your Honor, it would be entirely appropriate for you to grant the motion to strike with leave to amend for them to assert a class definition that does not on its face include individuals who did not sustain injury.

We're not saying that the class allegations should be stricken with prejudice. We're saying that the class that's currently defined, as plaintiffs have asserted their theories, inherently is flawed because it lacks ascertainability, because it has people in it who weren't injured.

THE COURT: Was that in Judge Fogel's case? In the *Sanders* case, did he grant the motion to strike with leave to amend?

MS. SACKS: Yes.

So, Your Honor, moving on -- and, in fact, he specifically did so because he concluded that the class included individuals either who didn't purchase their iMac -- they got it from somebody else, which is an issue we've raised here -- did not see or were not deceived by the advertisements that were at issue and, thus, who suffered no damages. Those individuals lacked standing. Therefore, the class wasn't ascertainable. It really is on all fours on this issue.

Let me wind up a little bit more on this issue of the motion to strike. If we look even just at the five named plaintiffs, we see precisely the fact that this class has people in it who didn't have an injury.

Mr. Stovell, one of the five plaintiffs, owned his PS3 for almost three years before firmware update 3.21 was issued. He had never used it at any time. So, what are we going to get into here in trying to figure out whether or not

he suffered an injury? We're going to be inquiring about his subjective state of mind.

This is very different than the cases that plaintiffs cited, for instance, in the loan circumstance. *Plascencia* in particular. In *Plascencia*, the Court concluded that there was an ascertainable class for everyone who purchased based on the same loan document.

Because, as the Court expressly said, we don't have to get into people's subjective intent. Either the loan document qualifies, or it doesn't. And for that reason the Court concluded that some of the class was ascertainable. On the other hand, it found that certain parts of the class were not appropriate because those individuals had -- had had, pardon me, statute of limitations problems.

So even there, in *Plascencia*, which the plaintiffs cite, the Court was willing to in effect manipulate the class allegations to make sure that only those who were injured, who had a viable claim, were in the class.

One of the other arguments that is made, that I think is relevant to the motion to strike, has to do with typicality. So, Your Honor, let's assume for the moment what we were just talking about that these five named plaintiffs saw something about the other OS and relied on it, and that's why they bought it. They cannot be typical of all the people who didn't see anything or didn't care about it. There's going to definitely

be a disconnect.

If their lawsuit is about people who didn't see something about the other OS but, nonetheless, have supposedly been injured as the plaintiffs describe it, because their PS3 is now lesser in value -- that's the words they use -- then they are not typical of the class they're seeking to represent.

There's a complete disconnect there. Either the class has to be people who were, in fact, injured because they relied on this, or isn't. It can't be a mix of both. That's where we get into this inherent ascertainability problem.

Let me move to the motion to dismiss. Once again, the *Sanders* vs. *Apple* case is directly on point. As Your Honor mentioned, in order to plead an express warranty claim you have to plead the explicit terms of the warranty and you have to plead reliance. We cannot presume reliance.

Now, plaintiffs bring to the Court a fairly ancient case, the *Keith vs. versus Buchanan* case, which has so little to do with this that, you know, I think its only relevance is that it's interesting for those of us old enough to have watched Family Affair and seen Brian Keith in action.

The Court there concluded that reliance could be presumed because an express warranty regarding the seaworthiness of a $75,000 yacht he bought could be part of the bargain.

Judge Fogel, as has several other courts, concluded

that that does not apply in this instance; that reasonable reliance is, nonetheless, required; and, in fact, expressly rejected the same argument about *Keith* in the *Sanders* case that plaintiffs are making here.

Now, interesting, Mr. Sanders, just like the plaintiffs in this case, claimed that they've adequately pled reliance, because he said he looked at Apple's website before he made his purchase. And Judge Fogel said that's just not sufficient to show reliance in a way that would allow an express warranty claim.

If we went down and looked at each of the things that plaintiffs identify as express warranties, we see, just as the Court said, they just don't rise to the type of explicit affirmation of fact that's required.

But I think Your Honor is already leaning in that way, so unless the plaintiffs raise something about it, I'll respond in reply on that.

If we talk about the implied warranty claim -- and this is the vertical privity issue. This is the same issue Your Honor confronted in the *In Re PS3* case. And, amazingly, plaintiffs just simply ignore that. Much as they ignore the *Sanders* case. But the reality is that there was no money paid by any of these plaintiffs to Sony for anything that is part of this claim. They didn't buy it from Sony.

And this subsequent supposed direct dealings, it's

just a misstatement of the *U.S. Roofing* case. The *U.S. Roofing* case didn't create an exception to the privity requirement. It said here, because there was an oral contract between the manufacturer and the purchaser and there was money paid there was in fact privity.

Now, the plaintiffs talk about here the issuance of the user manual as somehow creating that kind of direct relationship. The problem is, they can't have it both ways on the user manual, Your Honor.

If they want to rely on the user manual, then they also have to take the limited hardware warranty that is recited right in that user manual. And it says, one, here is the terms of our express warranty; and, two, the software that you get, whether you get it at the time of purchase or whether you get it later from an update, that's controlled by the system software license agreement. Which pulls that contract into the evaluation of the implied warranty.

THE COURT: Which they suggest is unconscionable in some fashion or another.

MS. SACKS: Yes, Your Honor. And the *Leong* case, I think, took care of that. It is about as close as you could get.

The plaintiffs went out and they purchased online gaming -- so software in effect -- to play the Final Fantasy game. And in connection with that, there was a limitation. It

said that we could cut you off and you would, therefore, lose the benefits of your subscription agreement.

And just as in this case, on a pleading challenge, the Court said: Sorry. Mere restrictions like that in the license agreement aren't shocking to anybody, first of all.

And they made the same claim there that they make here. Oh, it was hidden in tiny print. The Court found that not to be convincing either.

The reality is, you know if you are buying someone's license you are buying the right to use their software. It has got to be under some limitations and terms. You don't get a whole-hearted unlimited ownership right in it, as the courts have confirmed.

So I think --

THE COURT: I'm not suggesting this goes directly to the point that you're making, but it is a somewhat different situation here where when the PlayStation is acquired it has a certain functionality. And then down the line there is not just a -- it doesn't cease to have that functionality. You -- I think there is no dispute about this -- disable the functionality.

You make an intentional decision to -- which you say you've reserved the right to do. I recognize that. But the undisputed fact is, you do then say or decide, "If you download the upgrade, we're disabling this functionality." There is no

dispute about that.

MS. SACKS: No, there is not, Your Honor. But, I think there is an important distinction there, particularly with the *Apple* case which the plaintiffs cite to, that also involved a firmware update.

This is not an instance in which Sony went in and forced the download onto the purchasers.

THE COURT: Except if you take the plaintiffs' averments, effectively, you wouldn't deprive yourself of the downloads. Essentially, it's not sort of an election in the sense that the consumer who would acquire it would want the updates.

MS. SACKS: For those people who the other OS function and running Linux was important to them, they do have the option to continue to run it.

THE COURT: By not downloading.

MS. SACKS: By not downloading. And, in fact, two of the named plaintiffs are in exactly that position. They admit they did not download it.

Then, again, if you look at several of the other plaintiffs and you look at what they say this effect of downloading has been on them, the only real effect is that they can't access the PlayStation Network.

They can still browse the Internet. That's a function that's provided by the native operating system. They

can still play all the games and all the movies and all the music that they had purchased before update 3.21 came out.

They claim there may be games in the future that they can't play. We'll take that as a given. But the reality is, everything that they were doing the day before update 3.21 came out, even if they downloaded, they can still do it now, except access Sony's PlayStation Network, which Sony certainly has a right to place a limit on.

If you compare this case to the *Apple* case, I think this contrast really helps understand this idea of unconscionability, whether you think of it as conversion, Computer Fraud Abuse Act. The *Apple* update not only affected a feature, it bricked the entire phone. You couldn't use it at all. You couldn't even get it repaired afterwards.

The plaintiffs admit that they are doing everything, with the exception of accessing the PlayStation Network, that they were doing before. The core features of the PS3 are still available to them.

So the idea that we imposed this update on people and that somehow is shocking or unconscionable, just doesn't play out when you look at the reality of the facts.

The other issue, Your Honor, with regard to the motion to dispute is the -- I'm sorry, the motion to dismiss, is the simple lack of specificity about the supposed misrepresentations.

Plaintiffs have just sort of thrown everything up on the wall and hoped that something stuck. At the very least, the plaintiffs should have to amend their complaint to say for each of the five of them what specifically they saw that led them to believe that the other OS function would be available, along with all other features, at all times.

That's critical. Because right now, at this point, we have a total hodgepodge. We have a hodgepodge of representations, some of which were in Japanese website articles, some of which were made after the purchase of the PS3 by the named plaintiffs. It's all over the place.

All we know from the plaintiffs is they say they looked at the website. But they don't say what they saw on the website. They don't give us any other details.

And if they only did look at the website, then what is all of the rest of this nonsense about what Ken Kutaragi said a year before the PlayStation 3 was released?

I think to the extent that all of plaintiffs' claims, even really what they are trying to put together as an express warranty claim, since all of those are really based on this mixed action of misrepresentation and omission, they do have to specify consistent with Rule 9(b).

And that's not something that's unique. That's also something that Judge Fogel, Judge Patel, Judge Ware, and Judge White have all found in cases within the last two years,

that Rule 9(b) applies to California state law claims that sound in fraud, not just those that are in title fraud.

THE COURT: Well, that proposition is not particularly novel. But which California -- which of the claims sound in fraud? Which California claims? Does the CLRA sound in fraud?

MS. SACKS: Absolutely, Your Honor.

THE COURT: Did those cases or the particular judges you mentioned all have CLRA claims? Or what kind of claims were they?

MS. SACKS: Your Honor, I believe, if you'll give me one minute to get to it --

THE COURT: Certainly, if it's a UCL claim and it's based on fraudulent conduct, I agree with you that 9(b) does, and I ruled as well on that, saying it does apply. But I'm not sure I remember seeing a CLRA claim where that was characterized as a fraud claim for 9(b) purposes.

MS. SACKS: Your Honor, in *Berenblat*, for instance, Judge Fogel looked at the question under a CLRA claim. There the issue was whether by promising that a PowerBook would have two gigs of memory at the time of sale, that the subsequent failure of one of the two memory slots and, thereby, the lack of availability of one gig of memory constituted the same kind of failure to adequately disclose at the time of sale under the CLRA.

Also, in the *Leong* case, there was the question about when somebody sold a product as a notebook, whether that stated a viable claim under the CLRA where at some point in time it no longer functioned as a notebook.

I believe the *Oestreicher* case also has a CLRA claim, Your Honor. I can check and confirm that.

THE COURT: You are citing these cases because these are all cases in which the presiding judge said that 9(b) is the standard for bringing the claim?

MS. SACKS: 9(b) would not be the standard for all subsections of the CLRA, but those like 5, 7, and 9, which are the three that the plaintiffs have asserted here, are all involving representations about the quality, character, functionality of a good at the time of sale.

Yes, Your Honor. In *Oestreicher* there was indeed a CLRA claim which the Court found that the Rule 9(b) standard applied to.

THE COURT: Okay.

MS. SACKS: In fact, Judge Patel went on to say, "This heightened pleading standard applies to allegations of fraud and allegations that sound in fraud, including false misrepresentation," and then proceeded to apply that on the CLRA.

So I would not -- 9(b) would not apply to Section 19 of the CLRA.

THE COURT: I understand.

MS. SACKS: Finally, Your Honor, you talked about the CFAA issue and whether or not the idea of the disablement is an unauthorized intrusion onto someone's computer.

Again, though, there's no CFAA case that the plaintiffs have come forward with that comes anywhere close to the facts here.

The reality is that notwithstanding just the license authorization that we assert Sony had, the fact is the plaintiffs had a voluntary choice there. Sony did not automatically put that update -- we'd have, possibly, a different argument if in fact this was non-voluntary. And I know you'll recall that in the PlayStation 3 case, there is an assertion there that it was effectively a forced update.

That's not what we have here. So that's why they may have a claim for a breach of license agreement, whatever, but it's not a claim for the CFAA.

THE COURT: I agree with you that Section 1030 is routinely not used in this particular -- I've not seen it used in this context. But if you read the language of Section 1030, I'm not sure I see why it couldn't be.

I agree with you that there isn't a body of law out there where this type of claim has then been distilled into a CFAA claim. I don't disagree with you.

But I don't think simply reading Section 1030, you

come away with the notion that there is no way in which this could conceivably fit under those provisions.

MS. SACKS: Your Honor, I think the problem is that in order to accept the notion that Sony made an unauthorized intrusion onto the plaintiffs' PS3s, you have to start with the assumption that what was, quote/unquote, disabled was something that the plaintiffs had an ownership interest in.

I've got an ownership interest in my computer and my hardware and what I have sitting on my hardware drive. So if somebody hacks into my computer, they have literally made an unauthorized intrusion.

But that's not what we're talking about here. We're talking about if you are so interested in keeping this one feature, then you're not going to be able to access the PSN anymore. You may not be able to play some games. But that is not hacking into somebody's computer, which is the essence of the CFAA.

One last point on the Magnuson-Moss Warranty Act. The *Kelly vs. Microsoft* case is very much on point. Their computers were sold with a sticker on them that said, "Windows Vista capable." And, in fact, they weren't at the time, the immediate time, the units were sold.

This goes to your question about if you don't tell somebody that it's only going to be there for a particular period of time, you can't then just say, well, I didn't have

any obligation to keep it in effect.

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

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

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

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

THE COURT: Thank you.

MS. SACKS: Thank you.

THE COURT: Who on plaintiffs' side?

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

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

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

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

THE COURT: Okay.

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

THE COURT: Right away.

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

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

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

So Sony says:

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

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

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

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

THE COURT: Where else is it?

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

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

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

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

THE COURT: How so?

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

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

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

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

THE COURT: Because you can play DVDs.

MR. PIZZIRUSSO: Well, no.

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

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

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

(Simultaneous colloquy between the Court and Counsel.)

THE COURT: -- the DVD.

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

THE COURT: No, no.

(Simultaneous colloquy between the Court and Counsel.)

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

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

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

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

THE COURT: Right.

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

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

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

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

Judge Fogel's opinion in *Blennis*. Footnote 1, "This disposition is not designated for publication and may not be cited."So they are basing just about their entire argument on this issue on an un-citable opinion.

We cited the *Keith* case, California Court of Appeals 1985, and a 2010 case. So it's not some ancient case about Family Matters. There are two cases that specifically go into detail on this issue.

And *Keith* says, advertisements, brochures, those can create an express warranty. And you do not have to plead and prove reliance because -- and this requires some history. And, again, I apologize because we have to go back a little bit here.

Prior to 1963, there was a California Civil Code provision that said for express warranty you do have to prove reliance. It was changed in 1963. And the case -- the cases that have said you have to prove reliance are citing cases that cite the pre-1963 standard.

So, Your Honor, we don't believe that is the law of California. We think the Keith and Weinstat cases clearly lay that out.

So I would urge the Court to read those, because what they say is, the 1735 California Civil Code said "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of

such affirmation or promise is to induce the buyer to purchase the goods --

THE COURT: Okay.

MR. PIZZIRUSSO: -- and if the buyer purchases the goods relying on them.

THE COURT: Let's move to the implied warranty issues.

MR. PIZZIRUSSO: Okay.

The implied warranty issue here is really all about privity. And there are a couple of issues here.

First of all -- and this goes to a lot of the argument. We're here on a motion to dismiss. We are not here on summary judgment. And defendants have raised a lot of issues outside of the complaint, where they say inferences should be drawn to them. That's just not the standard. Plaintiffs get the inference on a motion to dismiss.

THE COURT: I'm familiar with that.

MR. PIZZIRUSSO: Okay. I'm sure you are.

THE COURT: Focus on the implied warranty.

MR. PIZZIRUSSO: Implied warranty privity, Your Honor, there are a couple of issues here. Number one, in the other PlayStation case, there was not an express warranty claim.

In the express warranty claim that we have pled --

THE COURT: In the case that I had.

MR. PIZZIRUSSO: In the other PlayStation case you have.

In the express warranty claim that we have pled, that also requires privity.

THE COURT: I think there wasn't an express warranty claim. I'll go back and look.

MR. PIZZIRUSSO: You gave them leave to re-plead and argue it the next time around, but not in the decision.

THE COURT: Well, okay. Go ahead.

MR. PIZZIRUSSO: So here we have pled an express warranty claim. Express warranty requires privity. Sony has not attacked privity --

THE COURT: Implied warranty.

MR. PIZZIRUSSO: Right. I'm starting with express warranty because it gets to implied warranty.

We have pled an express warranty claim. We have pled privity relationship there. Sony has not denied that we are in privity on the express warranty claim. They have raised other issues about express warranty.

If we are in privity with Sony --

THE COURT: I don't think Sony -- Sony at no point is acknowledging, as I understand it, that they are in privity with the plaintiffs here.

MR. PIZZIRUSSO: On the implied warranty claim. They have not made that argument in any of their papers on the

express warranty claim. And that is important because we cite the *Atkinson* case.

THE COURT: Privity is not required in express warranty. They wouldn't have to bring it up.

MR. PIZZIRUSSO: It is required in express warranty, Your Honor.

THE COURT: Well, focus for me on implied warranty. I want you to move along.

MR. PIZZIRUSSO: I'm trying to, Your Honor.

The point being here is that if we are in privity in express warranty, we're in privity in implied warranty. They have not cited or articulated --

THE COURT: To help you, I don't buy your analysis of the position they have taken. So just go to implied warranty and tell me -- I'm focusing on privity.

Let's assume for purposes of argument that I don't find compelling the argument that they have not argued a lack of privity with respect to express warranty. So, now, let's go to implied warranty and focus on that.

MR. PIZZIRUSSO: Okay. The reason why we allege we are in privity is because of the fact that there is an express warranty. And implied warranties flow from express warranties, Your Honor. This is all part of the same kind of relationship here.

THE COURT: Okay. Let's do it this way. I

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

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

THE COURT: Okay.

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

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

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

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

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

THE COURT: There is no further transfer of funds.

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

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

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

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

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

How can you have a class?

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

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

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

THE COURT: Okay.

MR. PIZZIRUSSO: So that's privity.

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

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

THE COURT: If the CFR provision provides for a

temporal element, the absence of case authority doesn't mean you don't read the CFR section and determine whether or not it applies.

MR. PIZZIRUSSO: Well, you would think, in all of the cases that have alleged Magnuson-Moss violations in California -- and there are many -- some court would have found that a compelling argument.

THE COURT: Well, have any weighed in on and analyzed the question and said you're right?

MR. PIZZIRUSSO: No, but it's not our burden either.

THE COURT: Okay.

MR. PIZZIRUSSO: But, one more point, Your Honor. We think that there is at least one cite that we have that does kind of go to this temporal element that it was really for the life of the product. And that's paragraph 44.

Because what happened here is, Sony first decided that the newer PlayStation models wouldn't have the other OS feature at all. So people got all up in arms. They said, "Wait a minute. What about those of us who have the old unit?" The slim model is what they called it. And Sony said don't worry -- here is their exact quote.

Jeffrey Lavond (phonetic), who was the Linux maintainer for Sony, said, SCE -- that's Sony Computer Entertainment -- 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.

So this is one example of a statement that they had made that indicates that this was going to be around for the life of the product. So there is an element there that we think we've alleged. And when you weigh the facts in our favor, as you must, we think we win on that issue as well.

And to clarify, Your Honor, the Magnuson-Moss, I think you made the point, rises and falls on the state warranty law claims. They have only argued as to the implied warranty claim under Magnuson-Moss. So if the express warranty claim here survives, the express warranty claim under Magnuson-Moss also survives.

THE COURT: Okay.

MR. PIZZIRUSSO: On the Consumer Fraud Act, Your Honor, again, we have -- we allege that we did not authorize Sony to come in and disable this feature; that there was no real choice here. And just looking at basic contract law, if I'm dangling somebody over a hotel balcony and saying, "Sign this agreement," and then say, "Okay," well, I have their authorization. That's clearly not authorization under basic contract.

THE COURT: You are equating the decision on whether or not to do the upgrade as being dangled over a cliff?

No, I am not being facetious.

MR. PIZZIRUSSO: I am, Your Honor. It was a Hobson's choice. Either way, you lose functionality. You are going to lose features either way. And we said that's not a real choice. And we allege that. And our complaint has taken us through at this stage. They can argue that on the motion for summary judgment.

In fact, the *Apple* case that we cite, the judge denied the motion to dismiss on this point, and ruled in favor of the plaintiff on the Computer Fraud and Abuse Act. And then at summary judgment the defendants raised it again, and they won.

But on the motion to dismiss, where the facts are taken in our favor, and we allege there was no real choice and no authorization, I think we survive on that claim as well.

I'm going to allow my colleague to address the other points.

THE COURT: Okay. And I'll give you about five minutes to do so.

MR. WARSHAW: Daniel Warshaw for the plaintiffs. Thank you for the time, Your Honor.

A lot of my arguments dovetail to Mr. Pizzirusso's arguments, as the 17200 claim obviously takes a predicate from the other cause of actions. I'll skip those and go right to the heart of what you had questions about, Your Honor.

Let's start with the Consumer Legal Remedies Act.

The first issue, Your Honor, is that the defendants have completely missed the mark on fraudulent concealment. And there's a case I would like to draw the Court's attention to. That is the *Gerber Products* case, *William vs. Gerber Products*.

In this case, Gerber came out with a fruit chew for toddlers. They had pictures of fruit. It said it was all natural. Turns out it had high fructose corn syrup and some grape juice in it. And the Court held that under the CLRA, there was a cause of action for fraudulent concealment.

So analogize it to this case, Your Honor. Because at the point of purchase of the PS3 in its original condition with the other OS feature, Sony failed to disclose in a proper manner that they would at some point reserve their rights to remove it.

Yes, they allege it's in their detailed contracts you get after purchase, et cetera. But if we look at the law of the State of California regarding Consumer Legal Remedies Act, there is a cause of action for concealment. And this case is directly on point.

THE COURT: You would agree that would be a 9(b) pleading standard for that fraudulent concealment type of claim. Right?

MR. WARSHAW: Correct. I agree that 9(b) covers anything that has grounded in fraud. I wouldn't necessarily agree, as Sony's counsel say, that all CLRA claims have the

9(b) standard.

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

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

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

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

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

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

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

to do with respect to the predicate unlawful violations.

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

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

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

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

And we've already discussed fraud.

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

THE COURT: Uh-huh.

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

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

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

THE COURT: How about the motion to strike?

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

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

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

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

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

(Laughter)

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MS. SACKS: May I have --

THE COURT: Actually, I do have to move on. I have gotten the gist of it. I will go back and do my homework and give you an order.

MS. SACKS: May I just say, Your Honor, we didn't cite *Berenblat* to begin with. The plaintiffs did.

THE COURT: Cite what?

MS. SACKS: The *Berenblat* case.

THE COURT: Okay. Whoever cited what, I'll read them all. So thank you.

(Counsel thank the Court.)

(At 2:48 p.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, November 15, 2010

s/b Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter