Docket No. 11-18066

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE SONY PS3 "OTHER OS" LITIGATION

ANTHONY VENTURA, JONATHAN HUBER, JASON BAKER
and ELTON STOVELL, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

v.

SONY COMPUTER ENTERTAINMENT AMERICA, INC.,
and SONY COMPUTER ENTERTAINMENT AMERICA LLC,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 10-cv-01811-RS · Honorable Richard Seeborg

BRIEF OF APPELLANTS

ROSEMARY M. RIVAS, ESQ.
FINKELSTEIN THOMPSON LLP
100 Bush Street, Suite 1450
San Francisco, California 94104
(415) 398-8700 Telephone
(415) 398-8704 Facsimile

JAMES J. PIZZIRUSSO, ESQ.
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, D.C. 20006
(202) 540-7200 Telephone
(202) 540-7201 Facsimile

WILLIAM N. HEBERT, ESQ.
CALVO FISHER & JACOB LLP
One Lombard Street, Second Floor
San Francisco, California 94111
(415) 374-8370 Telephone
(415) 374-8373 Facsimile

Attorneys for Appellants Anthony Ventura, Jonathan Huber, Jason Baker and Elton Stovell

Additional Counsel Listed Inside Cover

COUNSEL PRESS · (800) 3-APPEAL PRINTED ON RECYCLED PAPER

DANIEL L. WARSHAW, ESQ.
PEARSON, SIMON, WARSHAW & PENNY, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, California 91403
(818) 788-8300 Telephone
(818) 788-8104 Facsimile

MICHAEL P. LEHMANN, ESQ.
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, California 94104
(415) 633-1908 Telephone
(415) 358-4980 Facsimile

BRUCE L. SIMON, ESQ.
PEARSON, SIMON, WARSHAW & PENNY, LLP
44 Montgomery Street, Suite 2450
San Francisco, California 94104
(415) 433-9000 Telephone
(415) 433-9008 Facsimile

JOSEPH G. SAUDER, ESQ.
MATTHEW D. SCHELKOPF, ESQ.
BENJAMIN F. JOHNS, ESQ.
CHIMICLES & TIKELIS LLP
361 West Lancaster Avenue
Haverford, Pennsylvania 19041
(610) 642-8500 Telephone
(610) 649-3633 Facsimile

RALPH B. KALFAYAN, ESQ.
KRAUSE, KALFAYAN, BENINK
& SLAVENS, LLP
550 West C Street
San Diego, California 92101
(619) 232-0331 Telephone
(619) 232-4019 Facsimile

JEFFREY CARTON, ESQ.
D. GREG BLANKINSHIP, ESQ.
MEISELMAN, DANLEA, PACKMAN,
CARTON & EBERZ P.C.
1311 Mamaroneck Avenue
White Plains, New York 10605
(914) 517-5000 Telephone
(914) 517-5055 Facsimile

JOHN R. FABRY, ESQ.
BAILEY & GALYEN
18333 Egret Bay Boulevard, Suite 444
Houston, Texas 77058
(281) 335-7744 Telephone
(281) 335-5871 Facsimile

GURI ADEMI, ESQ.
SHPETIM ADEMI, ESQ.
DAVID J. SYRIOS, ESQ.
JOHN D. BLYTHIN, ESQ.
ADEMI & O'REILLY LLP
3620 East Layton Avenue
Cudahy, Washington 53110
(866) 264-3995 Telephone
(414) 482-8001 Facsimile

BEN BARNOW, ESQ.
BARNOW & ASSOCIATES PC
One North LaSalle Street, Suite 4600
Chicago, Illinois 60602
(312) 621-2000 Telephone
(312) 641-5504 Facsimile

LANCE A. HARKE, ESQ.
HOWARD BUSHMAN, ESQ.
D. GREG BLANKINSHIP, ESQ.
HARKE CLASBY & BUSHMAN
9699 NE Second Avenue
Miami, Florida 33138
(305) 536-8220 Telephone
(305) 536-8229 Facsimile

ROBERT C. SCHUBERT, ESQ.
WILLEM F. JONCKHEER, ESQ.
JASON A. PIKLER, ESQ.
SCHUBERT JONCKHEER & KOLBE LLP
Three Embarcadero Center, Suite 1650
San Francisco, California 94111
(415) 788-4220 Telephone
(415) 788-0161 Facsimile

Attorneys for Appellants Anthony Ventura, Jonathan Huber, Jason Baker and Elton Stovell

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I. JURISDICTIONAL STATEMENT

The District Court below had subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). This Court has jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291.

The District Court entered final judgment on December 8, 2011. ER 1.[1] Plaintiffs/Appellants ("Plaintiffs") timely filed a notice of appeal on December 22, 2011 pursuant to Rule 4 of the Federal Rules of Appellate Procedure. ER 12.

II. ISSUES PRESENTED

1. Whether the District Court erred in dismissing Plaintiffs' claims for violations of the Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750, *et seq.* ("CLRA"), the False Advertising Law, CAL. BUS. & PROF. CODE §§ 17500, *et seq.* ("FAL"), and the Unfair Competition Law, CAL. BUS. & PROF. Code §§ 17200, *et seq.* ("UCL") by failing to apply the legal standards under those statutes, and instead applying a breach of express warranty analysis?

2. Whether under the CLRA, FAL, and UCL, Defendant could—without legal repercussions—heavily market a product as having certain features and then unilaterally remove any of those features

[1] "ER __" refers to Plaintiffs' Excerpts of Record, concurrently filed herewith.

at any time after the consumer's purchase although there was no disclosure of such risk at the point of sale?

3. Whether the District Court erred in holding that Plaintiffs did not state a claim under the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030, *et seq.* ("CFAA") where Plaintiffs alleged that, without their authorization, Defendant removed advertised features from their products through an update that Plaintiffs downloaded?

4. Whether the District Court erred in dismissing Plaintiffs' claims for breach of express and implied warranties because the product at issue functioned as advertised at the point of sale even though Defendant later unilaterally removed the product's advertised features?

5. Whether privity supporting a breach of implied warranty claim may be based on a contractual relationship created by warranty and licensing agreements or post-sale interactions between a product purchaser and the product manufacturer?

6. Whether to state a claim for restitution under an unjust enrichment theory due to a company's withholding of prepaid monies, Plaintiffs must show that they requested and were denied refunds?

III. STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California entering judgment in favor of Defendant Sony Computer Entertainment America LLC, formerly known as Sony Computer Entertainment America, Inc. ("Sony"). ER 1.

Plaintiffs Anthony Ventura, Jonathan Huber, Jason Baker and Elton Stovell filed the Consolidated Class Action Complaint ("CACC") against Sony on July 30, 2010. ER 782. Plaintiffs alleged that they each bought a PlayStation®3 ("PS3"), which Sony advertised as a single, integrated system combining many important features, much like many smart phones or tablet computers (*e.g.*, Apple's iPad) sold today. Sony represented and touted to consumers that the PS3 was a stand-alone computer, a Blu-ray disc player, and a console for playing video games both offline and on Sony's PlayStation®Network ("PSN"), an online multiplayer gaming and digital media delivery service. Sony also expressly represented that the PS3 would continually be improved and enhanced through periodic firmware updates.

The PS3 was able to function as a computer because Sony developed a computer processor in the unit that allowed users to install a second operating system on the PS3 (in addition to the gaming operating system); this feature was described as the "Install Other Operating System" (or "Other OS"). Through the

Other OS feature, users could install Linux (an open source operating system that functions like Microsoft Windows on many personal computers) and then utilize word processing, graphic design, and other computer software on their PS3s.

Sony heavily advertised the PS3's computer functionality and the Other OS feature, which fundamentally set the PS3 apart from competing video game consoles— like the Nintendo Wii and Microsoft's Xbox—and allowed Sony to charge a premium. In April 2010, however, Sony issued Firmware Update Version 3.21 ("Update 3.21") for the purpose of disabling the Other OS and the PS3's computing capabilities. PS3 owners who did not download Update 3.21 lost other features such as access to the PSN and the ability to play the newest video games and movies.

Plaintiffs brought suit and alleged claims for breach of express warranty and implied warranties of merchantability and fitness for a particular purpose; violation of the CLRA; violation of the FAL; violations of the UCL; violation of the CFAA; violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq*. ("MMWA"); for conversion and unjust enrichment. ER 807-24.

Sony moved to dismiss the CCAC, arguing that consumers had no right to expect the Other OS to be available after expiration of the PS3's one-year limited warranty. ER 772. Sony also argued that under its System Software Licensing Agreement ("SSLA"), Terms of Service ("TOS"), and Limited Hardware and

Warranty Liability Agreement ("Warranty"), it had the right to remove the PS3's features. ER 760-63, 772.

In opposition, Plaintiffs argued that consumers normally and reasonably expect a product's functions to last for the life of the product, and expect that they will not be intentionally disabled by the manufacturer, absent an adequate disclosure of such a material risk at the point of sale, and that Sony's SSLA, TOS, and Warranty did not give Sony the right to take away the PS3's advertised features. ER 418-20. The District Court granted Sony's motion to dismiss with leave to amend, except as to the CFAA claim, which it upheld (hereinafter, "First Dismissal Order"). ER 324. The District Court's primary reason for granting the motion to dismiss was Plaintiffs' failure to allege that Sony represented the Other OS would be available for any specific duration of time. ER 318-19.

Plaintiffs filed their First Amended Consolidated Complaint ("FAC") on March 9, 2011. ER 215. Plaintiffs added specific allegations outlining the representations Sony made about the Other OS (as described in Part IV herein), that Sony represented that the PS3 would be continually improved and upgraded through firmware updates, and that Sony represented that the PS3 and its features had a lifespan of 10 years. ER 217-18. Plaintiffs also alleged that when Sony eliminated the Other OS, it did so to save money, contrary to its representations to customers that the reason was for security purposes. ER 219-20.

Sony filed a motion to dismiss the FAC, again arguing that Plaintiffs failed to identify an explicit promise that the Other OS feature would be available in perpetuity or unconditionally. ER 196-98. Plaintiffs argued, among other things, that the FAC properly alleged express affirmation of facts regarding the Other OS and the PS3's lifespan, and that Sony was obligated to disclose material facts, including its purported right to remove any of the PS3's advertised features at anytime. ER 156, 158, 162-163.

The District Court granted Sony's second motion to dismiss, without leave to amend (hereinafter, "Second Dismissal Order"). ER 11. As to the breach of the express warranty claim, the District Court held that Plaintiffs failed to allege "any clear representation, rising to a warranty, that any user could expect a particular PS3 he or she purchased would be able to utilize the Other OS feature for ten years, or, more to the point, that the PSN Network would continue to be available and accessible by the machine without any condition that the user elect to disable the Other OS feature." ER 8.

With regard to the breach of implied warranty claims for merchantability and fitness for a particular purpose, the District Court held that Plaintiffs failed to establish privity or a "basis on which even an implied promise that has been breached could be found." *Id.* As to Plaintiffs' MMWA claims, the District Court held that "disposition of the state law warranty claims determines the disposition

of the Magnusson-Moss Act claims." ER 9–10.

The District Court conducted little legal analysis in dismissing Plaintiffs' claims for violations of the CLRA, FAL, and UCL. In dismissing the CLRA claims, the District Court said, "Plaintiffs' claims under the CLRA fail for the same basic reasons as do their warranty claims." ER 9. According to the District Court, "[n]othing in the circumstances of the sale of the PS3 or any representations Sony made regarding its capabilities or expected product lifespan, gave rise to an obligation to refrain from subsequently restricting access to the PSN or other services to those users willing to install Firmware Update 3.21. Nor does characterizing the conduct as a failure to disclose the possibility of such future actions transform it into a cognizable claim." *Id*.

With regard to the CLRA unconscionability claim, the District Court merely stated, "[Plaintiffs] have failed to allege facts showing that they suffered any cognizable harm there from, given that Sony's conduct was not wrongful even without reliance on any specific provisions in those agreements." *Id*.

In dismissing Plaintiffs' FAL and UCL claims, the District Court applied similar conclusory reasoning: "Plaintiffs' statutory claims for unfair business practices and false or misleading advertising rely on the same underlying factual basis found wanting in the other claims addressed above. Accordingly, those counts are also dismissed." ER 10.

The District Court then reversed itself from its prior order upholding Plaintiffs' CFAA claim, stating "the facts do not support liability under the CFAA because the Other OS feature was only removed in instances where users affirmatively elected to download and install Firmware Update 3.21." *Id*.

Finally, the District Court dismissed the unjust enrichment claim, stating that Plaintiff Baker failed to allege facts as to the terms and conditions on which he prepaid money into his PSN account which he could no longer access because he did not download Update 3.21, or that he requested and was denied a refund. *Id*. Plaintiffs were not granted leave to re-plead any of these claims. ER 11.

IV. STATEMENT OF FACTS

In 2006, after an extensive marketing campaign, Sony introduced the PS3. ER 216. Sony touted the PS3 as "the most advanced computer system that serves as a platform to enjoy next generation computer entertainment." ER 237. The PS3 had four core attributes, in addition to stand alone game play, that Sony widely advertised: (1) the Other OS feature which allowed the PS3 to function as a computer; (2) access to online gaming through the PSN; (3) a built in Blu-ray disc player; and (4) the capability to receive updates to maintain and enhance system functionality. ER 237.

Sony spent several years developing the PS3, setting out to create an advanced new processor to power a "computer" that could also play games and

Blu-ray movies. ER 228–29. Sony and its partners joined efforts with Toshiba and IBM and invested hundreds of millions dollars to develop a new and unique computer chip enabling the PS3 to act as a computer. *Id.*

Sony succeeded in developing its new "Cell" processor that allowed both a Game Operating System ("Game OS") and the Other OS to operate simultaneously on the PS3 through the use of a "hypervisor," which managed the interface between the two operating systems. ER 229-31. The Game OS allowed the PS3 to operate as a gaming console while the Other OS allowed users to install Linux and perform computing functions. ER 216-17. The Cell processor was so powerful, Sony actively promoted and funded the use of the PS3s in computer "clusters" to allow users to do sophisticated research and complex computing tasks. ER 229, 244-48. The United States Air Force and other government agencies bought hundreds of PS3s for this precise purpose. ER 244-47.

For years before the PS3's release in 2006 and afterwards, Sony heavily promoted the PS3's computer and Linux capabilities. ER 233-49. Sony's efforts included: advertising the Other OS and Linux capabilities on the PS3 box, in PS3 manuals, and on the PS3 screen (ER 239-41); a media blitz through press releases and interviews advertising the PS3's computer capabilities (ER 233-49); advertising the PS3's computer capabilities on Sony's websites (ER 237, 239, 241-43); sponsoring events promoting the PS3's computer functionality (ER 242-43);

entering into agreements with third parties to cross-promote Linux and the PS3's computing capabilities (ER 241-43); working closely with Linux developers to ensure consumer installation of Linux on the PS3, which increased visibility of the Other OS (ER 236, 241-42); creating a PS3 Linux Distributor's Starter Kit (ER 239); and funding PS3 super-computer "clusters." ER 244-49.

Sony also actively promoted the PS3 as having a 10-year lifespan and that its features (including the Other OS) would be maintained and improved through periodic "updates" throughout this period (thus ensuring that the PS3's features would be available for 10-years or more, as well). ER 217-18. To guarantee the PS3's10-year lifespan, Sony entered into direct contracts with consumers to provide periodic updates. ER 217. Sony never informed consumers that it retained the purported right (or that it even had the ability) to remove the PS3's advertised features, such as the Other OS. ER 219.

When Sony released a new "slim" PS3 at a lower price without the Other OS feature available, customers contacted Sony with fears that the Other OS feature might be removed from the older, "fat" models as well. ER 255. Sony assured customers that it would not remove the Other OS feature from older models. ER 255-57. Despite Sony's assurances and its express promises that the PS3 would act as a computer, had a 10-year lifespan, and that its features would be continually updated, on April 1, 2010, Sony intentionally disabled the Other OS feature

through Update 3.21. ER 218-19. Users who did not download Update 3.21 found their PS3 inoperable for its other intended purposes as an online gaming and Blu-ray disc player. ER 258.

Sony falsely told the public that Update 3.21 was for "security" reasons. ER 258-59. Plaintiffs alleged in detail, however, that the true reason Sony removed the Other OS was because it no longer wanted to pay to support that feature especially since many owners were using the PS3 primarily as a computer and not buying as many games or accessories, through which Sony hoped to recoup profits lost on selling the PS3 below cost. ER 263-64. Indeed, when Sony released the less expensive "slim" models without the Other OS, Sony admitted it did so because maintaining the hypervisor for multiple operating systems was very expensive. ER 262-63.

Plaintiffs alleged that it is virtually impossible to use the Other OS for piracy and that there were other, less onerous alternatives available to Sony (aside from removing the Other OS) to address any security concerns to the extent such existed. ER 260-61. Sony offered no compensation to the purchasers who were shortchanged as a direct result of Sony's actions, despite selling the PS3 at a premium because of the Other OS. ER 216, 263-64. The underlying lawsuit followed.

V. SUMMARY OF ARGUMENT

Plaintiffs' FAC sufficiently pled claims against Sony for violations of the CLRA, FAL, UCL, CFAA, and MMWA, and common law claims for breach of express and implied warranties and unjust enrichment based on Sony's removal of the PS3's advertised features for which Plaintiffs had bargained and paid a premium.

Plaintiffs alleged that Sony violated the CLRA, FAL, and UCL by making affirmative misrepresentations and failing to disclose material facts capable of deceiving reasonable consumers as to whether the PS3's advertised functions would be subject to the material risk of intentional and permanent destruction at the unfettered discretion of Sony after purchase. The District Court failed to analyze the CLRA, FAL and UCL claims under the applicable legal standards of misrepresentation and deception, and instead dismissed those claims with scant analysis, stating essentially that those claims "failed for the same basic reasons as their warranty claims." ER 9-10.

The District Court erroneously viewed the CLRA, FAL and UCL claims as equivalent to common law contract-based, warranty claims. *Id*. They are not. These consumer protection statute claims, which are based on concepts of misrepresentation and deception, are fundamentally different from warranty claims which are focused on what a seller has contractually promised.

To sufficiently plead CLRA, FAL, and UCL claims, Plaintiffs need not prove, much less allege, that Sony made an express promise not to disable, post-sale, the Other OS, PSN, or any other essential advertised PS3 feature for some set duration. Rather, Plaintiffs need only show that, having represented and promoted the PS3 as possessing unique and compelling multiple features that set it apart from the competition—including the capabilities to act as both a computer and as a gaming system tied into a powerful online gaming network—Sony had a duty to disclose, clearly and unambiguously, that it expressly disavowed the existence of any future obligations and reserved the unilateral right to disable any of the PS3's features at any time, or to condition the continued enjoyment of one or more of them upon the abandonment of another, as happened here. Absent such a disclosure, a reasonable consumer would believe that so long as the PS3 hardware remained capable of functioning as a computer, and so long as Sony continued to operate the PSN and to promote the PSN as an integral feature to induce new PS3 purchases, Sony would not deliberately and retroactively deny PS3 owners the continued benefit of all features and give consumers the Hobson's choice of picking one over the other.

Nothing in Sony's representations at the point of sale fairly disclosed this draconian possibility. This case is not about a decision by Sony, for example, to discontinue supporting the PSN altogether, and Sony clearly has found it to be in

its commercial interest not to do so. It is about a decision to deny continued usage of an essential advertised feature to consumers who wish to maintain the functionality of another essential advertised feature—the ability to operate as a computer. Neither Sony nor the District Court point to any language in Sony's representations and disclosures that comes close to warning consumers of this risk, nor would such a weighing of such language have been appropriate on a motion to dismiss.

Nor is this case about a product failing or wearing out due to a latent defect or natural aging. This case is about consumers, who own PS3s still fully capable of running the Other OS and using the PS3 as a computer, who paid a premium for that capability, and whose computer function has suddenly been "turned off" remotely by Sony, because Sony did not find it to be in its continued profit interest to allow users to continue to employ that feature. Plaintiffs are unaware of any other manufacturer having done what Sony did here: marketing and selling a product with a certain set of features, and then unilaterally turning off one or more of those features to make even more money, and failing to compensate consumers as a result.

The District Court failed to recognize and analyze the essential question under the CLRA, FAL, and UCL: whether Sony's misrepresentations and omissions about the PS3's system's multi-functionality had the capacity to deceive

reasonable consumers—instead, relying solely on an incomplete and inadequate discussion of unrelated warranty claims. Moreover, what a reasonable consumer would have understood from Sony's disclosures is a question of fact that cannot be resolved on a motion to dismiss. At the very least, this question of fact cannot be converted to a question law by a finding on a motion to dismiss that Sony made no promise not to disable any given essential feature.

Additionally, the District Court erred in failing to apply the correct legal standards under the UCL's unlawful and unfair prongs by again, erroneously applying a breach of express warranty standard. Plaintiffs clearly stated a claim for unlawful business practices by virtue of stating claims for violations of the CLRA, FAL, CFAA and MMWA as explained herein. Moreover, the UCL's unfair prong involves a balancing test that, when correctly applied against the FAC, shows the District Court erred in dismissing the unfair business practices claim.

With regard to the breach of express warranty claim, Plaintiffs identified numerous Sony representations about the PS3's features, including the Other OS, that created express warranties. Plaintiffs were not required to allege that Sony promised the PS3's features would be available for any specific duration to state an express warranty claim (although Plaintiffs did adequately make these allegations, as well). The District Court's holding on this issue creates a new requirement

never before imposed in any California decision.

As to the breach of implied warranty claims, the District Court erred in the same regard as with the express warranty claims. Moreover, the warranty and licensing agreements between Sony and PS3 users are a sufficient basis to support privity. And since Plaintiffs state claims for breach of express and implied warranties, they also state MMWA claims.

The District Court also erred in holding that Plaintiffs' act of downloading Update 3.21 which caused the removal of the Other OS absolved Sony of liability under the CFAA, which makes it illegal to cause damage to a person's computer without authorization.

Finally, Plaintiff Baker stated a claim for restitution under an unjust enrichment theory. By failing to affirmatively refund money to consumers such as Plaintiff Baker who were denied access to prepaid money in PSN accounts because of the failure to download Update 3.21, Sony unjustly enriched himself.

VI. STANDARD OF REVIEW

The standard of review for dismissal of a complaint under Rule 12(b)(6) is *de novo*. *Ass'c for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). This means that the Court gives no deference to the lower court's ruling. On review of a 12(b)(6) motion, this Court accepts "all factual allegations in the complaint as true" and draws "all reasonable inferences in

favor of the plaintiff." *Id.* (citing *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043, n.2 (9th Cir. 2008)). The plaintiff must aver in his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As discussed herein, the District Court failed to apply the correct legal standards, improperly failed to credit the FAC's allegations, and failed to draw reasonable inferences in Plaintiffs' favor. As such, the District Court's Second Dismissal Order should be reversed.

VII. ARGUMENT

A. THE DISTRICT COURT INCORRECTLY ANALYZED PLAINTIFFS' CLRA CLAIMS AS IF THEY WERE BREACH OF EXPRESS WARRANTY CLAIMS

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices undertaken by any persons in a transaction intended to result in the sale or lease of goods or services to any consumer[.]" CAL. CIV. CODE § 1770(a)(4). Plaintiffs alleged violations of CAL. CIV. CODE §§ 1770(a)(5), 1770(a)(7), 1770(a)(9) and 1770(a)(19).[2]

[2]Section 1770(a)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have[.]" Section 1770(a)(7) prohibits "[r]epresenting that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." Section 1770(a)(9) prohibits "[a]dvertising goods or services with intent not to sell them as advertised." Section 1770(a)(19) prohibits "[i]nserting an unconscionable provision in a contract."

The District Court incorrectly analyzed Plaintiffs' CLRA claims as if they were express warranty claims.[3] Under the CLRA, affirmative misrepresentations and the concealment or suppression of material facts are actionable if they are likely to deceive reasonable consumers. *Williams v. Gerber Products Co.,* 552 F.3d 934, 938 (9th Cir. 2008); *Cairns v. Franklin Mint Co.,* 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998); *McKell v. Washington Mut., Inc.,* 142 Cal. App. 4th 1457, 1471 (2006). Whether reasonable consumers are likely to be deceived is generally a question of fact inappropriate for resolution on a motion to dismiss. *Williams,* 552 F.3d at 938; *McKell,* 142 Cal. App. 4th at 1472; *Committee on Children's Television*, 35 Cal. 3d 197, 197 (1983). Analyzing Plaintiffs' CLRA claims under the correct standards, it is clear that the District Court erred in dismissing these claims.

1. Sony's Affirmative Misrepresentations

Plaintiffs alleged a slew of affirmative misrepresentations by Sony that could mislead reasonable consumers to believe that: (1) the PS3's advertised

[3] *Paduano v. Am. Honda Motor Co., Inc.,* 169 Cal. App. 4th 1453, 1466-69 (2009) (despite failure of warranty claims there remained trial issues of fact regarding CLRA claims); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litig.,* 754 F. Supp. 2d 1145, 1201 (C.D. Cal. 2010) (dismissing breach of warranty claims but not CLRA claims); *Cirulli v. Hyundai Motor Co.,* No. SACV 09-0854 AG (MLGx), 2009 WL 5788762, at *4-5 (C.D. Cal. June 12, 2009) (same); *Mlejnecky v. Olympus Imaging Am., Inc.,* No. 2:10-cv-02630, 2011 WL 1497096, at *3 (E.D. Cal. April 19, 2011) (CLRA claims not the same as warranty claims).

features would be available for the life of the product; (2) Sony would not intentionally disable the PS3's features, including the Other OS and PSN, for the PS3's useful life of 10-years; and (3) Sony's updates would improve and enhance the PS3 by adding features and upgrades, not remove them. ER 217-18. Contrary to its representations, however, Sony used its firmware update process to *remove* the PS3's advertised features, forcing consumers to choose between continued use of the PSN and the ability to play new games and movies or computer functionality, whereas consumers bought the PS3 based upon the heavily promoted ability to do all these things. The District Court did not consider whether Sony's misrepresentations as a whole were likely to deceive reasonable consumers, and therefore erred in dismissing them.

2. Sony's Material Omissions

Even if Sony's statements were literally true when made and Sony did not directly promise not to subsequently disable essential features (a point Plaintiffs disputed), Sony is not absolved from CLRA liability. Rather, Sony's omissions could be found to have been misleading and deceiving to reasonable consumers because there was no clear and understandable disclosure that Sony had retained the purported unilateral right to remove an essential advertised feature at any time after purchase and well before the end of the PS3's useful life through an "update." *See, e.g., McAdams v. Monier,* 182 Cal. App. 4th 174, 179 (2010). This is

particularly deceptive given Sony's affirmative representations to the contrary that its updates would enhance functionality rather than take it away. ER 217.

Under the CLRA, an omission is actionable if it is contrary to a representation actually made by the defendant or was a fact the defendant had a duty to disclose. *Collins v. eMachines, Inc.,* 202 Cal. App. 4th 249, 255 (2011); *Daugherty v. Am. Honda Motor Co., Inc.,* 144 Cal. App. 4th 824, 835 (2006); *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 37 (1975). A duty to disclose material facts exists in one of following circumstances applicable here: (1) the defendant had exclusive knowledge of material facts not know to the plaintiff; (2) the defendant actively conceals a material fact from the plaintiff; or (3) the defendant makes partial representations but also suppresses some material fact. *LiMandri v. Judkins,* 52 Cal. App. 4th 326, 337 (1997); *see also Collins,* 202 Cal. App. 4th at 256 (CLRA claim stated where defendant failed to disclose problem with microchip controlling functionality of floppy disk, although one-year warranty had expired.)

Sony's purported right to remove the PS3's advertised features was clearly contrary to its representations about the PS3's update process, as well as its features and lifespan. Additionally, Sony had a duty to disclose the material risk that, at any time after the PS3 purchase, Sony could unilaterally diminish the catalogue of essential features and functionality that had been prominently

advertised to distinguish the product from competing products and to induce consumers to buy the product in the first place. The FAC alleges that Sony had exclusive knowledge of material facts, namely, its retention of the right and the ability to remove any of the PS3's advertised features during the PS3's useful life through updates. ER 282. *See, e.g., In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1289-90 (N.D. Cal. 2008) (plaintiff adequately pled that Apple had exclusive knowledge of legal and technical limitations associated with the iPhone). Sony actively concealed these material facts by using vague and ambiguous language and by burying its purported right to remove the PS3's advertised features in the SSLA, the Warranty, and the TOS, which were not presented to Plaintiffs until after they already bought and set up the PS3.[4] ER 286. Finally, Sony made partial representations (*i.e.*, promoting the PS3's Other OS, promoting the PSN, the Blu-ray capability, the PS3's lifespan, and the availability of updates to improve functionality), all of which would lead reasonable consumers to reasonably expect that the PS3 was a multi-function device whose slate of distinctive features would not be gutted by later "updates." ER 281-84. These partial representations omitted a clear disclosure of material facts that would have dispelled that expectation, namely, that Sony believed it retained the right to

[4] Notably, Plaintiffs vigorously disputed that the language in those agreements gave Sony the right to remove the PS3's essential features (ER 284) and the District Court initially agreed in the First Dismissal Order. ER 316, 319, 321.

remove the PS3's advertised features at any time during the useful life of the product through "updates." ER 255, 282-83.

In essence consumers paid a premium for a product whose future range of premium utility was entirely dependent on the good graces of Sony, in its sole control and discretion. Nothing in the ordinary experience of purchasing a consumer product, and nothing in Sony's disclosures, fairly warned a reasonable consumer of the eventuality that Sony would withdraw its "permission" for the consumer to use one or another of the products features, even though the product was still fully capable of performing those functions. Under the District Court's erroneous reasoning, because Sony did not promise continued consumer access to any of the PS3's list of major advertised features and functions, the claim must fail. ER 6. Thus, Sony presumably could have issued updates disabling the PS3's ability to play Blu-ray movies, play games, or perform any other function, just as easily as it disabled the ability to function as a computer without defeating reasonable consumers expectations or violating the CLRA's disclosure obligations. It cannot be the law, however, that a manufacturer can promote and sell a multi-function gaming console and then immediately take away every feature and turn it into a $600 paper weight, without recourse.

The District Court also made the unsupported assumption that two entirely separate products are involved –a physical PS3 hardware "*product*," with internal

functions, and a separate and distinct external PSN network "*service.*" ER 5. From this, the District Court reasoned that Sony did no wrong in eliminating access to the PSN for those users who wished to keep the Other OS. The District Court stated that consumers would still have "fully functioning devices" capable of being used either to play games or as computers. *Id.* But the District Court fundamentally misconstrued the FAC's allegations and failed to view them in the light most favorable to Plaintiffs. The FAC alleges that the original functionality of the PS3, as it was promoted and sold, included far more than the ability to either play games or act as a computer. And what Sony took away was not merely access to an external Internet service, but connectivity to a network specifically designed and promoted to fully and seamlessly integrate with the PS3 and to expand the performance capabilities of the console far beyond its internal hardware and software so as to enable the download of new games, the streaming of video and audio content such as movies and music, and an interactive connection with other online gamers in a multiplayer community environment. ER 216, 218, 228, 233-238, 257. In addition to all of the expanded capabilities offered by the PSN, a consumer electing to decline Update 3.21 lost the continued ability of the PS3 console to play new games and new Blu-ray movies that required the update to function. ER 219-20.

The District Court analogized the case to the sale of a car combined with a free pass to a car amusement park that is physically external to the car, with no promise that the amusement park would always be accessible. ER 5. But the Court's internal/external distinction is of little analytic utility in the digital information age. The fact is that scores of consumer products are now promoted and sold as hybrid, integrated systems that provide not only functions internal to the devices, but also communication and interactive connectivity to the external world of information, media and social networking. These products include dozens of varieties of smart phones, tablet computers, laptops, desktops and Internet capable digital televisions. Sony promoted and sold the PS3 not as an internal, entirely separate gaming console with limited access to a separate, external Internet service as a bonus, but as a single, integrated "system" with more functionality than its competitors.

The District Court acknowledged that the consumer's decision whether to download Update 3.21 "may have been a difficult one for those who valued both the other OS feature and access to the PSN, but it was still a choice." ER 6. But it is here that the District Court went astray in analyzing the CLRA claims. Under the CLRA the question is not whether Sony had undertaken a promissory or contractual obligation prohibiting it from ever presenting such a draconian "choice" to PS3 owners. The relevant question is whether PS3 purchasers, at the

time of purchase, were given adequate notice of the very real risk that, after purchase, they would be put to just that drastic a Hobson's choice, particularly in light of the FAC's allegations as to the way in which Sony promoted the PS3 and PSN as an integrated, multi-feature "system" in order to induce those purchases. What a reasonable consumer would have understood, and whether he or she would likely have been deceived, are questions of fact that the District Court failed to address at all in deciding the motion to dismiss.

In its motion to dismiss, Sony relied on *Daugherty*, 144 Cal. App. 4th 824, to argue that the only expectation buyers could have is that the PS3 would function for the length of the one-year express warranty. ER 394. *Daugherty* involved the potential for a generally insignificant oil leak manifesting, if at all, years after the warranty had expired. *Id.*, 144 Cal. App. 4th at 828-29. The vehicle performed fully as advertised and the single latent problem could be "easily repaired by installing a retainer bracket designed to maintain the oil seal in its proper position." *Id.* at 827. This case is a far cry from *Daugherty*, and is closer to a case in which the oil leak was caused by a signal sent to the car by the manufacture for which there was no available fix. Here, the PS3s did not malfunction from a latent defect causing them to lose the Other OS, nor can Plaintiffs somehow obtain an easy repair to restore the Other OS. Rather, Sony unilaterally and intentionally removed the Other OS through an "update" despite the fact that Plaintiffs paid a premium

for the PS3 and the Other OS feature. Plaintiffs' reliance on Sony's representations about the PS3's features, lifespan, and continuous improvement through updates were reasonable. These facts readily distinguish this case from the cases that Sony cited before the District Court.[5] Nevertheless, the District Court was persuaded by Sony's argument, stating "it is not enough for plaintiffs to show that they have a right to expect continued availability of the Other OS feature beyond the warranty period, but also a right to continued access to the PSN." ER 6. Whatever the possible relevance of this statement to the warranty claims, it has no bearing on the CLRA claims, where the reasonable expectations of the consumer based on the misrepresentations and omissions alleged in the FAC are for the trier of fact to decide. The District Court's fundamental error in dismissing the CLRA claims was the improper confusion of the concept of rights of consumers in the contractual sense with the separate and distinct analytical framework of misrepresentation, omission and deception. The Second Dismissal Order is devoid of any reasoned analysis under CLRA standards and contains only

[5] Contrary to Sony's arguments, courts do not discount the consumer's reasonable expectations. *See Baggett v. Hewlett-Packard Co.,* 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007) (finding alleged expectations that all ink in cartridge could be used was reasonable based on manual's representations about cartridge's average life; also the manual did not represent upper limit of printed pages after which printing would shut off). A consumer's expectations are considered depending on if there are untrue or misleading representations, or if a duty to disclose material facts exists. *See, e.g., Daugherty,* 144 Cal. App. 4th at 834 ("The complaint fails to identify any representation by Honda that its automobiles had any characteristic they do not have, or are of a standard or quality they are not.").

a single, entirely conclusory sentence on the subject: "Nor does characterizing the conduct as a failure to disclose the possibility of such future actions transform it into a cognizable claim." ER 9. The District Court erred in dismissing Plaintiffs' CLRA claims.[6]

B. THE DISTRICT COURT ALSO ERRONEOUSLY ANALYZED PLAINTIFFS' FAL AND UCL CLAIMS AS IF THEY WERE BREACH OF EXPRESS WARRANTY CLAIMS

The FAL prohibits the dissemination, by any means whatsoever, of any statement known to be untrue or misleading. CAL. BUS. & PROF. CODE § 17500. The UCL, on the other hand, is broader and prohibits any "unlawful, unfair or fraudulent business act or practice." CAL. BUS. & PROF. CODE § 17200.

The District Court dismissed Plaintiffs' FAL and UCL claims without analyzing any of the legal standards applicable to the FAL or the UCL's three

[6] The District Court's analysis was also wrong regarding the CLRA unconscionability claim, which has both procedural and substantive elements referring to "an absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1170 (9th Cir. 2003). Plaintiffs detailed sufficient facts showing that Sony's SSLQ, TOS and Warranty were both substantively and procedurally unconscionable. ER 283-86. When applying the correct unconscionability standards against the FAC, Plaintiffs state a claim. Except for calling Plaintiffs' allegations conclusory, which they are not, the District Court provided no justification for reversing its statements in the First Dismissal Order: "Sony also argues that the CLRA claim is defective insofar as it alleges that Sony included unconscionable provisions in its software licensing agreement for the PS3. While a conclusive determination must await any amended complaint, it presently appears that the issue may not be subject to resolution in Sony's favor at the pleading stage." ER 322 at n. 5.

prongs. The District Court's *entire* discussion of Plaintiffs' claims under both Sections 17200 and 17500 is as follows:

> Plaintiffs' statutory claims for unfair business practices and false or misleading advertising rely on the same underlying factual basis found wanting in the other claims addressed above. Accordingly, those counts are also [sic] must be dismissed.

ER 10.[7]

The District Court instead constructed its own test of wrongfulness: "[f]or Sony's conduct to have been in any manner wrongful, it is not enough for plaintiffs to show that they have a right to expect continued availability of the Other OS feature beyond the warranty period, but also a right to continued access to the PSN." ER 6.

The District Court's "wrongfulness" test was improper. First, wrongfulness under the FAL and each prong of the UCL has a different, specific legal meaning, and none of them has anything to do with the District Court's entirely novel and unfounded "wrongfulness" test. Second, the District Court mistakenly focused exclusively on Plaintiffs' "continued access to the PSN" in its analysis, whereas

[7] Additionally, by dismissing Plaintiffs' claims without leave to amend, the District Court erred by failing to provide any meaningful discussion of the analysis of Section 17200 or demonstrating why Plaintiffs would be unable to amend their complaint to state a claim under Section 17200. *Mayes v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984). This is particularly problematic since the pleading requirements for Section 17200 claims are very different from Plaintiffs' other claims. Dismissing these claims without leave to amend was therefore reversible error.

Plaintiffs actually pled several injuries apart from being denied access to the PSN – and the District Court addressed none of these injuries in its opinion. Therefore, no matter what basis might be imputed to the District Court's decision, dismissing Plaintiffs' FAL and UCL claims was clearly erroneous.

1. Plaintiffs Stated a Claim under the "Fraudulent" Prong

To state a claim under the FAL and UCL based on false advertising or promotional practices, the plaintiffs must only show that "members of the public are likely to be deceived." *Stearns v. Ticketmaster,* 655 F.3d 1013, 1020 (9th Cir. 2011) *cert. denied* (April 23, 2012) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("*Tobacco II*")).[8] As with Plaintiffs' CLRA claims, whether members of the public are likely to be deceived is generally one of fact inappropriate on a motion to dismiss. *Williams*, 552 F.3d at 938-39; *McKell*, 142 Cal. App. 4th at 1472.

Importantly, there is no requirement under the UCL's fraud prong that Sony breach an agreement with Plaintiffs – contrary to the District Court's requirement that there cannot be wrongfulness unless Sony violated Plaintiffs' "right to continued access to the PSN."

[8] A violation of the UCL's fraud prong is also a violation of the false advertising law (§§ 17500, *et seq.*). *See Tobacco II*, 46 Cal. 4th at 338 (citing *Comm. on Children's Television*, 35 Cal. 3d at 210).

Here, Sony marketed the PS3 as including the Other OS and as having the functionality of a computer. ER 293. Consumers bought the PS3 believing Sony's representations that they were getting a single, fully-integrated, multi-functional system. However, Sony purported—by virtue of terms not disclosed to purchasers (fairly or at all)—to reserve the right to eliminate functions at its discretion. ER 293-94. And after Sony released Update 3.21, PS3 owners were forced to lose the computer functionality or lose access to the PSN, thereby losing the ability to play games or watch movies online. ER 294-95. As with Plaintiffs' CLRA claims, Sony had a duty to disclose material facts. Its misrepresentations and omissions were likely to deceive reasonable consumers in violation of the FAL and the UCL's fraud prong.

2. Plaintiffs Stated a Claim Under the "Unfair" Prong

"Unfairness" under Section 17200 involves a balancing test. For example: if a person buys a vacuum cleaner with an upholstery attachment, can the manufacturer demand the attachment back if the fine print in the warranty agreement stated that the manufacturer has a right to recall components when it is "necessary"? If the "motive" of the manufacturer is to protect against a dangerous upholstery attachment, the manufacturer's conduct is probably fair. But if the manufacturer's "motive" is to take the attachment to increase profits, the manufacturer's conduct is probably unfair under California law.

"[This] 'unfair' standard . . . is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." *Ticconi v. Blue Shield of Cal.*, 160 Cal. App. 4th 528, 539 (2008); *see also Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 596-97 (2009), *reh'g denied* (Dec. 8, 2009), *review denied* (Mar. 10, 2010) ("As our Supreme Court has put it, the courts need to deal with innumerable new schemes that the fertility of man's invention can contrive"; thus courts apply a flexible and "suitably broad" standard to claims of "unfair" practices.) "The test of whether a business practice is unfair involves an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Ticconi*, 160 Cal. App. 4th at 539. An "unfair" business practice occurs "when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.*

As illustrated in the above example, it is critical to note that an unfair business practice need not violate a legal right of consumers or violate the law, notwithstanding the District Court's analysis. Moreover, a business practice may be unfair even if there is no law prohibiting it. *Cel-Tech Commc'n v. Los Angeles Cellular Tel. Co.,* 20 Cal. 4th 163, 181 (1999). The standard under California law says *nothing* about violations of legal rights or legal protections. In fact, a plaintiff states an "unfair" practice simply by alleging (1) a substantial injury to consumers;

(2) that "countervailing benefits to consumers or competition" do not outweigh the injury; and (3) that the injury was one that "consumers themselves could not reasonably have avoided." *Davis*, 179 Cal. App. 4th at 597-98 (emphasis added).

Under this standard – which covers a broader range of conduct than the novel "wrongfulness" standard invented by the District Court – Plaintiffs clearly stated a claim for unfair business practices.

(a) Plaintiffs Alleged a Substantial Injury

Plaintiffs alleged that Sony caused them substantial injury by:

- advertising and marketing the PS3 as including the Other OS and as having the functionality of a computer, while purporting to reserve the right—by virtue of terms that were not fairly disclosed to purchasers and were without legal effect—to eliminate those features at its discretion;
- after the sale, issuing an update that was promised, as a part of the "bargain" that Plaintiffs struck when they purchased their PS3s, to preserve and enhance the PS3, but that in fact significantly degraded its features and functionality; and
- damaging Plaintiffs' property, which Plaintiffs owned and which Sony had no right to alter, without Plaintiffs' permission, by requiring Plaintiffs to eliminate features of that property in order to be able to continue using the PS3 to play online games and to perform other functions, including playing new games released by Sony and newer Blu-ray discs.

ER 257-58, 293.

(b) Plaintiffs Alleged That Any Benefits Do Not Outweigh the Injury

Plaintiffs also alleged that Sony's purported "security" justification was fabricated. ER 254, 258-61. Plaintiffs alleged that Sony wanted to remove the Other OS for financial reasons—supporting the feature was costing too much money. ER 254-55, 261-64. In any event, Sony's "security" justification did not justify the invasion of Plaintiffs' property interests in their PS3s because it could have taken much less intrusive steps to address its security concerns – which related to *Sony's* security, not consumers. ER 258-61. In other words, Sony's purported benefits do not outweigh the injury.

(c) Plaintiffs Alleged That Consumers Could Not Reasonably Avoid the Injury

Finally, Plaintiffs alleged that PS3 buyers could not have reasonably foreseen that Sony would falsely advertise that "updates" would enhance and preserve the PS3's functionality, or that Sony reserved the right to eliminate any feature. ER 293. The only legal basis Sony offered for disabling the PS3's core features were buried in the SSLA, TOS and Warranty. ER 264. For example, the Warranty stated: "Some [warranty] services may … cause some loss of functionality." ER 264. Similarly, the SSLA stated: "[Sony] may provide updates, upgrades, or services to your PS3TM to ensure it is functioning properly in accordance with [Sony] guidelines or provide you with new offerings. . . .

Some services may . . . cause a loss of functionality." *Id*. However, no reasonable consumer—if such consumer was even made aware of these terms in a meaningful way—would ever interpret fine print disclaimers such as these to be a license for Sony to eliminate core features for *the primary purpose of saving Sony money*. Therefore, Plaintiffs could not have reasonably avoided their injury; they were ultimately and without a legitimate basis forced to "pick their poison" by either accepting Update 3.21 and losing the Other OS, or declining Update 3.21 and losing other core features, such as accessing the PSN and playing new video games and Blu-ray movies that require the most recent updage. ER 264. Either way, Plaintiffs were injured.

The above balancing test has to be applied to the alleged facts to determine whether Plaintiffs stated a claim for unfair business practices. The District Court simply ignored the balancing test prescribed under California law and instead applied its own "wrongfulness" and one-size-fits-all test. Most fatal to the District Court's approach is that it involved no balancing of harms at all; instead the District Court's test focused solely on *rights*, rather than *harms*, even though the balancing test for the "unfair" prong has nothing to do with rights. *See Davis*, 179 Cal. App. 4th at 597-98. Here, Plaintiffs made allegations of the impacts on consumers, and they alleged that Sony's motives were nefarious and focused solely on turning a profit. While the District Court may not have believed the allegations,

it was required to accept them as true. Since the District Court was deciding a motion to dismiss, disregarding Plaintiffs' allegations was improper; Plaintiffs are entitled to prove their allegations.

3. Plaintiffs Stated a Claim under the "Unlawful" Prong

The UCL's "unlawful" prong borrows from virtually any law or regulation to serve as the predicate wrong for a UCL claim. *Cel-Tech,* 20 Cal. 4th at 180. Thus, a violation of the borrowed law results in a *per se* violation of the UCL. As discussed herein, Plaintiffs alleged facts sufficient to establish violations of the CLRA, FAL, MMWA, and the CFAA. *See infra* Parts IV. A-E. Thus, Plaintiffs stated an unlawful business practices claim, as well.

C. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' EXPRESS WARRANTY CLAIMS BECAUSE PLAINTIFFS PLED THE REQUIRED ELEMENTS

The District Court held that Sony's numerous representations about the PS3's features failed to create an express warranty. ER 318. Further, the District Court found that Plaintiffs needed to address the "temporal aspect" of Sony's representations:

> More fundamentally, even assuming that plaintiffs have already pleaded, or subsequently plead, that Sony made an express affirmation of fact, or description of the PS3, that the system included the Other OS feature at the time they made their purchases, they must still somehow address the temporal aspect of the express warranty claim they are attempting to make.

Id. Plaintiffs amended their complaint to include more specific and detailed statements about the continued availability of the PS3's features and more clearly demonstrated Sony's "promises" and "affirmations of fact." ER 218, 221-23. Nevertheless, in its Second Dismissal Order, the District Court held that Sony's statements in its manual, on the PS3 box, and in various advertisements touting the PS3's features and its lifecycle "fall far short of any clear representation, rising to a warranty, that any user could expect a particular PS3 he or she purchased would be able to utilize the Other OS feature for ten years." ER 8.

The court erred in two respects. Plaintiffs' FAC sufficiently pled affirmations and promises to support their express warranty claim under California law. Moreover, the District Court improperly imposed a novel "temporal" pleading requirement on the express warranty claim that no other court has adopted and that is not required under California warranty law. But even if such a requirement does exist, Plaintiffs pled detailed allegations showing that Sony represented that the PS3's core features would be updated and available for the lifespan of the product, touted as 10 years or more.

1. Plaintiffs Pled Affirmations of Fact by Sony Constituting Express Warranties

"Under California law, any affirmation of fact or promise relating to the subject matter of a contract for the sale of goods, which is made part of the basis of the parties' bargain, creates an express warranty." *McDonnell Douglas Corp. v.*

Thiokol Corp., 124 F. 3d 1173, 1176 (9th Cir. 1997); *Weinstat v. Dentsply Int'l. Inc*., 180 Cal. App. 4th 1213, 1227 (2010); CAL. COM. CODE § 2313. Express warranties may be found in advertisements, brochures, written sales contracts, and owner manuals. *Keith v. Buchanan*, 173 Cal. App. 3d 13, 20 (1985) (finding that a representation that a boat was "seaworthy" in manufacturer's sales brochure was an express warranty).[9] Affirmations of fact are presumed to be part of the basis of the bargain unless good cause exists to presume otherwise. *Id.* at 21. This Court has recognized that "while product superiority claims that are vague or highly subjective often amount to nonactionable puffery, misdescriptions of *specific or absolute characteristics* of a product are actionable." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (citation omitted) (emphasis added).

Whether advertisements and representations amount to a warranty is generally not amenable to resolution on a motion to dismiss where all reasonable

[9] *See also Brothers v. Hewlett Packard-Co.*, No. C-06-02254, 2007 WL 485979, at *7 (N.D. Cal. Feb. 12, 2007) (denying motion to dismiss express warranty claim and finding that statements that a notebook computer could provide a certain level of graphics functionality because of its compatibility with a particular graphics card that were made in HP's technical specification documents and brochures could form the basis of an express warranty claim); *Morey v. NextFoods, Inc*., No. 10-cv-761, 2010 WL 2473314, *2 (S.D. Cal. June 7, 2010) ("The complaint contains pictures of GoodBelly products that clearly state that GoodBelly 'Support Healthy Digestion [and] Natural Immunity' and that GoodBelly has 'Clinically Tested Live Cultures.' These assertions suffice to state a claim for breach of [express] warranty.") (internal citation omitted).

inferences are weighed in Plaintiffs' favor. In *Pau v. Yosemite Park and Curry Co.*, a panel of this Court reversed dismissal of plaintiffs' express warranty claim, holding that a rental company's brochure offering rental bikes and representing that the Mirror Lake area trail was "safe for cycling" could reasonably be interpreted by a jury as an express warranty that the bikes "were safe for the Mirror Lake trail and that this statement became part of the basis of the bargain." 928 F.2d 880, 886-87 (9th Cir. 1991). Similarly, in *Anthony v. General Motors Corp.*, the California Court of Appeal held it was a jury issue whether General Motors' nationwide advertising about the "the excellence and reliability of [GM's] products" was a warranty. 33 Cal. App. 3d 699, 706-07 (1973) ("Neither the trial court nor this court can say, at this stage of the proceedings, that plaintiffs would not be able to produce evidence of advertisements containing broad claims amounting to a warranty that General Motors products, including the trucks equipped with the wheels herein involved, were free from inherent risk of failure.").

Plaintiffs pled numerous allegations demonstrating how Sony's promises created express warranties and how they were breached. Plaintiffs pled that Sony expressly warranted that the PS3 would function as a personal computer (through the Other OS), a Blu-ray player, and a gaming console. ER 233-54. With particular regard to the PS3's computer capabilities, Plaintiffs alleged that Sony

made several representations about a user's ability to install another operating system, such as Linux, and use the PS3 as a computer on the PS3 box (ER 238-49), in the PS3 manual and directions (ER 238), on the PS3 screen (ER 239-41), on several PS3-related websites (ER 237, 239), in numerous public interviews (*e.g.,* ER 234-35), and through many other sources (*e.g.*, ER 234-35). Plaintiffs alleged that Sony widely promoted the PS3's unique Linux feature and even set up research "clusters" and sold PS3s to various government agencies who specifically wanted to use the PS3's Linux computing features for significant and expensive projects. ER 244-49.

The FAC also details how Update 3.21 presented Plaintiffs with the following choice: install Update 3.21 and lose the Other OS and the ability to use the PS3 as a computer, or do not install the update and lose other core features of the PS3. ER 257-58. Plaintiffs adequately alleged that by forcing Plaintiffs to give up promised features of the PS3, Sony breached these promises when it issued Update 3.21. Therefore, the District Court erred in concluding that Plaintiffs failed to adequately plead their claims under California express warranty law.

2. An Express Warranty Claim Does Not Have a Temporal Element, But Even if it Does, Plaintiffs Met This Requirement

The District Court imposed a novel, affirmative obligation on Plaintiffs to not only show an "affirmation" or "promise" that formed the basis of the bargain,

however, but also that Sony had represented that consumers "would be able to utilize the Other OS feature for 10 years, or, more to the point, that the PSN would continue to be available and accessible by the machine without any condition that the user elect to disable the Other OS feature." ER 8. Plaintiffs are unaware of any court having added a fourth, "temporal" element to the claim such as that added by the District Court below.[10] Nor does such an element make sense. In *Pau*, for example, the "safe for cycling" representation was actionable even thought it did not state, "safe for cycling for five years."

Further, the *Weinstat* court reaffirmed the notion of "good faith," which "infuses the [California] Uniform Commercial Code," and reasoned that "[e]ven before purchasing a product, a buyer would reasonably expect any statement or description of the product appearing in a user manual or similar publication to be true, regardless of when the manual was received or read. A seller's defense based solely on the post-sale awareness of the manual arguably would fall short of good faith." *Weinstat*, 180 Cal. App. 4th at 1231. In a similar fashion, the elimination of the PS3's features post-sale also violates the notions of "good faith" that permeate the UCC. Any reasonable consumer would expect that affirmations of fact a manufacturer makes about product features are going to relate to the general

[10] *See also Pau*, 928 F.2d 880, 886-87 (9th Cir. 1991); *Consol. Data Term. v. Applied Digital Data Sys.*, 708 F. 2d 385, 391 (9th Cir. 1983); *Vicuna v. Alexia Foods, Inc.*, No. C 11–6119 PJH, 2012 WL 1497507,*2 (slip op.) (N.D. Cal. April 27, 2012); *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1182 (CD Cal. 2010).

life of the product. Moreover, no reasonable consumer would expect that a manufacturer who touted the "updating" of features through software downloads from the manufacturer would instead use that ability to eliminate a product's features post-sale. As such, the District Court erred in imposing this temporal pleading condition on Plaintiffs.

Assuming *arguendo*, however, that Plaintiffs were required to plead a temporal element to their express warranty claims, Plaintiffs met that burden. Plaintiffs alleged a temporal aspect to their claims by showing that Sony represented that the PS3's features (including computer functionality and the other core features of the PS3) were designed to and would be *continually upgraded and available for the life of the product* (10-years or more). ER 235, 250–52. Plaintiffs also adequately alleged that Sony represented that firmware updates would make the constantly evolving PS3 "future proof" and that this would ensure the continued viability of the PS3's features for at least 10-years. ER 252-53. Sony's website and manual stated that its updates would "add new features and updates," "update … features," and "add features." ER 252-53. Further, Sony issued a press release where its vice president of product marketing, Scott Steinberg, is quoted as stating that Sony's updates are what make the 10-year life cycle viable: "***With these regular firmware updates and futureproofed technology***, SCEA is making the 10-year lifecycle of PS3 possible." ER 252.

(emphasis added). And when Sony removed the Other OS from the newer PS3 models, it even reaffirmed its past representations that it would not remove the Other OS feature from older models but that it would continue to provide support for it. ER 255. These allegations show that Sony's representations created an express warranty that the PS3's features would be continually available and upgraded for 10-years or more, which Sony breached through Update 3.21. Plaintiffs also alleged (and Sony did not dispute) that no statements, warranties, or anything else indicated that Sony retained a purported right to remove these key, promoted features of the product at any time. ER 218-19, 249-50.

In light of the above, the District Court erred in dismissing Plaintiffs' breach of express warranty claims.

D. THE DISTRICT COURT ERRED IN DISMISSING THE IMPLIED WARRANTY CLAIMS BECAUSE PLAINTIFFS PLED THE REQUIRED ELEMENTS

The primary basis for the lower court's dismissal of Plaintiffs' implied warranty claims without leave to amend was its erroneous belief that "[t]here is no dispute that the PS3s performed in all respects as represented at the time of sale." ER 8. Sony never moved to dismiss on the ground that Plaintiffs failed to adequately plead the elements of their implied warranty claim, instead focusing solely on an alleged lack of privity between the parties. ER 198-200. It was thus inappropriate for the Court to dismiss on this issue without allowing Plaintiffs an

opportunity to address this claim. Moreover, Plaintiffs *did* dispute that "the time of sale" was the only meaningful period at which to evaluate the implied warranty claim given the advertised "evolving" nature of the product (through Sony-supplied updates) and the District Court wrongly decided this contested issue at the pleadings stage.

Although the District Court did not explicitly decide the issue, it addressed the "lack of privity" between Plaintiffs and Sony, but also acknowledged that Plaintiffs' novel privity argument might be able to proceed. ER 8 (citing *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004)). Plaintiffs offered detailed allegations, which the District Court failed to discuss, establishing privity between Plaintiffs and Sony through numerous direct dealings including as a result of the SSLA and other agreements Sony forced upon Plaintiffs. Thus, dismissal was also improper based on any alleged lack of privity.[11] As such, the District Court's dismissal of Plaintiffs' implied warranty and MMWA[12] claims should be reversed.

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[11]Even if Plaintiffs inadequately pled privity, however, they should have been granted leave to amend to allege the third party beneficiary exception to the privity requirement. Where "a plaintiff pleads that he or she is a third-party beneficiary to a contract that gives rise to the implied warranty of merchantability, he or she may assert a claim for the implied warranty's breach." *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1185 (C.D. Cal. 2010); *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008).

[12]Plaintiffs acknowledge that their implied warranty claims under MMWA rise or fall on the viability of their state law claims.

1. Plaintiffs Sufficiently Pled Their Breach of Implied Warranty Claims.

In California, the implied warranty of merchantability requires a product "to conform to the promises or affirmations of fact made on the container or label and be fit for the ordinary purposes for which such goods are used." *Hauter v. Zogarts*, 534 P. 2d 377, 385 (1975) (quotations and citations omitted); *In Re Ferrero Litigation*, 794 F. Supp. 2d 1107, 1118 (S.D. Cal. 2011). Plaintiffs met their burden to plead that Sony breached the implied warranties of merchantability and fitness for a particular purpose.

In the First Dismissal Order, the District Court accepted Plaintiffs' implied warranty theory and agreed "that their purchase of the systems included the right to future updates that would *maintain and enhance the functionality of the machines*." ER 320–21 (emphasis added). The District Court further found that "if their claim is otherwise viable, the fact that the problem did not arise until delivery of Update 3.21 *will not be dispositive*." ER 321. (emphasis added). Similarly, the District Court held that at the pleading stage, "it is not feasible to determine whether providing a PS3 that lacks only the Other OS feature would satisfy the warranty implied under all the circumstances of the original sales." *Id.* Nevertheless, despite finding that Plaintiffs' implied warranty theory was sound at the pleading stage, the District Court initially dismissed the claims solely for a lack of privity and granted Plaintiffs leave to amend their privity allegations. *Id*.

Because the District Court found that Plaintiffs' implied warranty claims were otherwise sound, Plaintiffs focused their amendment on addressing the District Court's privity concerns. Thus, Plaintiffs were blindsided when the District Court reversed its earlier decision and rejected their underlying implied warranty theory—an issue that had not even been raised in Sony's second Motion to Dismiss. This was improper because the District Court never gave Plaintiffs the opportunity to address the Court's erroneous assumption that they conceded the PS3s performed as represented at the time of sale. *See e.g.*, *Wong v. Bell*, 642 F. 2d 359, 361-62 (9th Cir. 1981) (while a trial court may act on its own initiative in dismissing a claim, plaintiffs must be given an opportunity to submit a memorandum in opposition).

Even if it was appropriate for the District Court to reconsider its earlier ruling despite no briefing or argument on the issue, the District Court erred in dismissing Plaintiffs' claims on the merits. The District Court held:

> There is no dispute that the PS3s performed in all respects as represented at the time of sale. The Other OS system continues to function as represented unless users elect to disable it by installing Firmware Update 3.21. Plaintiffs have not shown how conditioning continued access to the PSN service on users' willingness to disable the Other OS feature breached any warranty implied in the sale of the product.

ER 8. The District Court erred because Plaintiffs *did* dispute that the PS3 performed as represented, as well as showed that the "time of sale" was not an

appropriate criteria by which to judge their implied warranty claims. Plaintiffs also pled they had no meaningful "choice" in disabling the Other OS and that Sony's elimination of other advertised features for those who did not download Update 3.21 was also inappropriate.

Plaintiffs pled that Sony impliedly warranted that the PS3 would function as a personal computer (ER 216-17), *as well as* a gaming console (ER 216), capable of connecting to the PSN (ER 218), and that the console would be updated, upgraded, and evolve through Sony's firmware updates. ER 252-53. These promises were made on the PS3 box, in the PS3 manuals, and on the PS3 screen among other places at the time of sale. ER 238-41. Sony's breach consisted of it utilizing the firmware update process (an integral part of the sale that, while not occurring at the time of sale occurred shortly thereafter) *not* to enhance and upgrade the PS3 (as initially promised), but instead to take away core and advertised functionality without any compensation to the end user. Sony should not be able to escape responsibility for destroying a product's key features simply because it did so after the initial sale took place but as part of the expected overall transaction.

Neither party disputed the fact that Sony eliminated the PS3's ability to be used for at least some of the ordinary purposes for which it was to be intended in forcing users to install Update 3.21 (and lose access to the "Other OS" feature) or

not install Update 3.21 and lose other core features (such as the ability to play games on the PSN). ER 257-58. While the District Court placed blame on Plaintiffs because they downloaded Update 3.21, Plaintiffs pled that Sony was responsible for that result and a jury should decide whether Sony's actions constituted a breach of implied warranty. Viewing Plaintiffs' allegations in the light most favorable to them, the District Court erred in dismissing Plaintiffs' claim for breach of the implied warranty of merchantability.

Additionally, Plaintiffs' FAC met the standard for breach of the implied warranty of fitness for a particular purpose. In California, the implied warranty of fitness for a particular purpose "arises when a seller . . . has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, which are fit for such purpose." *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (1985) (internal quotations omitted). The District Court failed to address Plaintiffs' implied warranty of fitness for a particular purpose claim in its Second Dismissal Order. Nonetheless, Plaintiffs adequately pled that Sony breached its implied warranties for the particular purposes of "utilizing other operating systems (such as Linux) and [use] as personal computer," as well as use to "access the PSN and play games online." ER 278. Therefore, taking Plaintiffs' allegations as true, the District

Court erred in dismissing Plaintiffs' claims for breach of the implied warranty of fitness for a particular purpose, as well.

2. Plaintiffs Adequately Pled Privity

Absent an exception, vertical privity is generally required for an implied warranty of merchantability claim, which the District Court acknowledged. *See, e.g., Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 695-96 (1954). Nevertheless, the District Court failed to recognize that Plaintiffs and Sony engaged in numerous direct dealings that either placed the parties in privity or alleviated the need for direct privity.

In California, privity exists where two parties are sufficiently comingled in their dealings, even if the buyer did not purchase directly from the manufacturer. *See U.S. Roofing v. Credit Alliance Corp*., 228 Cal. App. 3d 1431, 1442 (1991). In *U.S. Roofing*, the purchaser (U.S. Roofing) consulted with a manufacturer (LAS) when it sought to purchase a crane, but ultimately purchased the crane from a leasing company rather than directly from the manufacturer. *Id.* at 1438. When the crane malfunctioned, U.S. Roofing engaged in further dealings with the manufacturer and eventually brought suit against both the leasing company and the manufacturer for breach of the implied warranty of merchantability. *Id.* at 1439. On appeal, the court reasoned that the direct dealings between U.S. Roofing and the manufacturer supplied sufficient evidence from which a jury could find that

privity existed. *Id.* at 1442. The court relied on the ongoing nature of the relationship between the manufacturer and U.S. Roofing (both pre and *post*-sale), as well as the existence of an express warranty provided by the manufacturer, in finding sufficient evidence of privity between the parties. *Id*.

Similarly, the California Court of Appeals once again found privity to exist between an ultimate purchaser and a manufacturer despite the absence of a direct contractual relationship in *Cardinal Health 301, Inc. v. Tyco Elec. Corp.*, 169 Cal. App. 4th 116, 141 (2008). In *Cardinal Health*, a component manufacturer (T&C) contracted with a product manufacturer (Remec) to supply components for an end product that Cardinal Health 301 Inc. (Cardinal) purchased. *Id.* at 123-24. When the component malfunctioned, Cardinal brought suit for breach of implied and express warranties against T&C's successor company. *Id.* at 126. Applying the rule from *U.S. Roofing*, the court held that sufficient *post-sale* direct dealings had taken place to establish privity between Cardinal and the component manufacturer, T&C. *Id.* at 142. The court phrased the post-sale direct dealings privity rule as "where . . . the manufacturer essentially adopts and benefits from the initial sales negotiations and there are numerous direct dealings between the parties[.]" *Id.* at 143-44.

The post-sale "direct dealings" here are even more extensive than those in *U.S. Roofing* and *Cardinal Health* and, at the very least, Plaintiffs should be

afforded an opportunity to develop the claims through discovery. *E.g., U.S. Roofing, Inc.*, 228 Cal. App. 3d at 1442, n.3 (holding that whether there is vertical privity is a factual question that is inappropriately resolved at the pleading stage). Here, one of the key features that Sony promoted on the next generation PS3 was its ability to constantly "evolve" through Sony-provided firmware updates. ER 235. Thus, as a continuum of their PS3 purchase and the features with which it was marketed, consumers were obliged to enter into a post-sale, contractual relationship with Sony to access the PSN and receive these bargained for updates. ER 226. To download firmware updates, consumers also had to explicitly accept Sony's "clickwrap" SSLA terms. ER 253. These terms even explicitly stated that they form a "contract" between the consumer and Sony, thus placing the parties into direct privity. ER 253-54. *Cf. Arizona Cartridge Remanufacturers Ass'n Inc. v. Lexmark Int'l, Inc.*, 421 F. 3d 981, 988 (9th Cir. 2005) (holding that "the privity requirement is met here, because the consumer is a party to the contract with Lexmark . . . the contract is formed when the final purchaser opens the cartridge box with notice of the restriction on reuse.").[13] And, as discussed *infra*, Sony claims that the SSLA's terms apply and provide a defense in this case.

[13]Additionally, the California Court of Appeal has also held that a "purchase order and . . . shrink-wrap Licensing Agreement that accompanied the software . . . [are] two parts of the same contract." *Epicor Software Corp. v. The Imagery Group, Inc.*, No. G039104, 2008 WL 2133194, at *4 (Cal. Ct. App. May 22, 2008) (unpublished).

Aside from the direct contractual relationship created between Sony and consumers through Sony's SSLA, as in *U.S. Roofing*, when consumers experienced problems with their PS3s, they went to Sony (and not the retailer) for support. Any repairs on the PS3s would have been arranged and paid for by Sony under its express written warranty, which independently also create a privity relationship with the end-user. *See, e.g., Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 229 (2006) (manufacturer brought itself into privity with the plaintiff, who had not purchased directly from manufacturer, by extending express warranty to the consumer); *see also Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, No. C 06-3359, 2009 U.S. Dist. LEXIS 30610, at *26-27 (N.D. Cal. April 10, 2009) (same). The Court should recognize the privity relationship that developed, as in *U.S. Roofing* and *Cardinal Health*, when Sony manufactured and promoted a product that consumers would use—by purposeful design—in an ongoing relationship with Sony, and from which Sony would continue to derive revenue (ER 275-76), long after the consumer purchased the console from a retailer.

It was through consumers' direct "contract" with Sony (when Sony put itself in the shoes of the retailer) that the firmware updates, about which Plaintiffs complain, breached the implied warranty. Sony's intentional post-sale interactions with consumers were an integral part of the original sale and form the basis for Plaintiffs' claims; it was not any retailers' actions that caused the loss of the PS3s'

features, but Sony's deliberate disabling of features through an "update." ER 257. As such, Plaintiffs and Sony were in privity and Plaintiffs' implied warranty claims should proceed.

E. Plaintiffs Stated a Claim for Violation of the CFAA Because Sony Intentionally Caused *Damage* Without Authorization to Their PS3s

The CFAA prohibits a number of different computer crimes, including accessing a computer without authorization, accessing a computer in excess of authorization, and causing unauthorized damage to a computer. *See* 18 U.S.C. § 1030(a)(1)-(7). Plaintiffs alleged three distinct violations of the CFAA: first, that Sony "knowingly caused the transmission of software and intentionally caused damage without authorization to Plaintiffs' and Class members' PS3 consoles," [18 U.S.C. § 1030(a)(5)(A)]; second, that Sony "intentionally accessed Plaintiffs' and Class members' PS3 consoles without authorization and recklessly caused damage," [18 U.S.C. § 1030(a)(5)(B)]; and third, that Sony "intentionally accessed Plaintiffs' and Class members' PS3 consoles without authorization and caused damage and loss," [18 U.S.C. § 1030(a)(5)(C)]. ER 287-88. Section 1030(a)(5)(A) is patently distinguishable from sections 1030(a)(5)(B) and (a)(5)(C) in that the latter two prohibit "intentionally *access[ing]* a protected computer without authorization," while the former prohibits "intentionally

caus[ing] damage without authorization, to a protected computer" (emphasis added).

Both Sony in its motion to dismiss and the District Court erred by conflating these three statutory sections. Sony maintained that Plaintiffs' claims failed because Update 3.21 was not forced upon them, but could only be transmitted with their "authorization." ER 206-08. The District Court was apparently persuaded by this argument, finding that the Other OS feature was only removed in instances where users affirmatively elected to download and install Firmware Update 3.21. ER 6. But under the plain language of section 1030(a)(5)(A), it is the *damage* that must be unauthorized, not the *access* to the computer. This is the only reasonable conclusion in light of the identical and disparate language in the first clauses of Sections 1030(a)(5)(B) and (a)(5)(C), which would be superfluous and illogical under any other conclusion.

Plaintiffs alleged that Sony "knowingly caused the transmission of software code and intentionally caused damage" by "knowingly and admittedly releas[ing] Update 3.21 for the specific purpose of removing the 'Install Other OS' feature." ER 288; *see* 18 U.S.C. § 1030(a)(5)(A). This damage was without authorization "because a failure to download Update 3.21 resulted in the loss of other features" of the PS3. ER 288. Thus, even if Plaintiffs authorized Sony's *access* to their PS3s, they did not authorize the *damage* to their PS3s, either in the form of a loss

of the Other OS feature (for those who downloaded Update 3.21), or the loss of access to the PSN (for those who did not).[14]

F. Plaintiffs Are Entitled to Restitution Based on a Theory of Unjust Enrichment

Courts in California are divided over whether "unjust enrichment" can be pled as an independent cause of action. *Compare McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) ("Unjust enrichment is not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies"); *Enreach Tech., Inc. v. Embedded Internet Solutions, Inc.*, 403 F. Supp. 2d 968, 976 (N.D. Cal. 2005) ("unjust enrichment is not a valid cause of action in California"); *with Hirsch v. Bank of America*, 107 Cal. App. 4th 708, 722 (2003) ("Appellants have stated a valid cause of action for unjust enrichment"); *see also Ghirardo v. Antonioli*, 14 Cal. 4th 39, 50-51 (1996); *Gerlinger v. Amazon.Com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004) ("Under California law, unjust enrichment is an action in quasi-contract."). For its part, the Ninth Circuit has previously recognized an "unjust enrichment" cause of action under California law.

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[14]The Ninth Circuit's recent decision in *U.S. v. Nosal,* --- F.3d ----, 2012 WL 1176119 (9th Cir. Apr. 10, 2012) does not disturb Plaintiffs' interpretation of the CFAA. In *Nosal,* the Ninth Circuit held that the phrase "exceeds authorized access" in the CFAA does not extend to violations of use restrictions. *Id.* at 7. In interpreting this clause, the Court referred to the CFAA several times as an "anti-hacking" statute. However, the CFAA is not *limited* to hacking violations, and Plaintiffs' claim rests on a different clause of the CFAA—the "intentionally caus[ing] damage without authorization" clause.

See, e.g., Carter v. Honeywell, 247 Fed. Appx. 872, 873 (9th Cir. 2007); *Zanze v. Snelling Servs., LLC*, 413 Fed. Appx. 994, 997 (9th Cir. 2011).

Even where courts find that unjust enrichment is not an independent cause of action, they still consider the substance of the facts alleged in the complaint and often interpret the cause of action as a claim for restitution. *See, e.g., McBride*, 123 Cal. App. 4th at 387-88; *Lauriedale Assocs., Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992); *see also Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1100-01 (N.D. Cal. 2006). Regardless of the label Plaintiffs place on their claim for relief, Plaintiffs adequately alleged a right to restitution based on a theory of unjust enrichment.

An "unjust enrichment claim is grounded in equitable principles of restitution." *Hirsch*, 107 Cal. App. 4th at 721. "An individual is required to make restitution if he or she is unjustly enriched at the expense of another." *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657, 1662 (1992) (citing Restatement (First) of Restitution § 1). "A person is enriched if the person receives a benefit at another's expense." *Id.* "While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the

claimant has suffered a loss." Restatement (Third) of Restitution and Unjust Enrichment § 1.

The District Court incorrectly concluded that Plaintiffs failed to state a claim for restitution because "they have not alleged sufficient facts as to the terms and conditions on which they paid moneys to Sony, or that they have requested and been denied refunds." ER 10. Plaintiffs alleged on behalf of Plaintiff Baker and Class 3 that they paid money to Sony "for PSN-related services, such as the PlayStation Store, PlayStation Plus, pre-paid money into the PSN Wallet, and Qore subscriptions." ER 296. Some of this money was paid "as part of [Plaintiffs'] purchase of the product," (*e.g.*, paying a premium for the PSN as an advertised feature of the PS3), (ER 218, 220), and some of it was separately pre-paid into Plaintiffs' PSN accounts. ER 296. These facts were more than sufficient to establish the "terms and conditions" on which Plaintiffs paid money to Sony.

As to refunds, the District Court cited *no* authority for the proposition that Plaintiffs must request and be denied refunds before they can make a claim for restitution. ER 10. Indeed, no such action is a prerequisite to any claim for restitution.[15] Plaintiff Baker and Class 3 alleged that they paid money to Sony for PSN-related services. ER 296. They further alleged that "[a]fter failing to download Update 3.21, these individuals were no longer able to access these

[15] The District Court appeared to simply adopt this argument, unsupported by any authority, from Sony's motion to dismiss. ER 209.

features and items for which they had directly paid sums to SCEA as SCEA prohibited them from accessing the PSN." ER 296. Thus, Sony was enriched because it "benefited from these PSN sales," and this enrichment was unjust because it came "at the expense of Plaintiff Baker and . . . Class 3." ER 296-97. Moreover, under the Restatement's formulation of "at the expense of another," it is not necessary that Sony's benefit directly correspond to an observable loss to Plaintiffs; if Plaintiffs can demonstrate that Sony violated their legally protected rights—which they alleged Sony did under the UCL, FAL, CLRA, MMWA, and CFAA—Plaintiffs will be able to show that Sony benefited at their expense.

VIII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court reverse the District Court's order dismissing Plaintiffs' claims with prejudice.

Dated: June 4, 2012

Respectfully submitted,

s/ Rosemary M. Rivas
Rosemary M. Rivas
FINKELSTEIN THOMPSON LLP

s/ James J. Pizzirusso
James J. Pizzirusso
HAUSFELD LLP

s/ William N. Hebert
William N. Hebert
CALVO FISHER & JACOB LLP

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,824 words.

Dated: June 4, 2012

Respectfully submitted,

s/ Rosemary M. Rivas
Rosemary M. Rivas
FINKELSTEIN THOMPSON LLP

s/ James J. Pizzirusso
James J. Pizzirusso
HAUSFELD LLP

s/ William N. Hebert
William N. Hebert
CALVO FISHER & JACOB LLP

Attorneys for Appellants

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore