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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re SONY PS3 "OTHER OS" LITIGATION

CASE NO. 3:10-CV-01811

DEFENDANT'S NOTICE OF MOTION AND MOTION TO STRIKE CLASS ALLEGATIONS; MEMORANDUM OF POINTS AND AUTHORITIES

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

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NOTICE OF MOTION AND MOTION TO STRIKE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 4, 2010, at 1:00 p.m. or as soon thereafter as counsel may be heard in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, defendant Sony Computer Entertainment America LLC ("SCEA") will, and hereby does, move to strike paragraphs 9 and 70-77, and Prayer for Relief, Section A (the class action allegations) of Plaintiffs' Consolidated Class Action Complaint (the "Consolidated Complaint").

This motion is brought pursuant to Fed. R. Civ. P. 23(c) and 12(f) and is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities, *infra*; the Declaration of Carter Ott and Request for Judicial Notice, submitted herewith; the Consolidated Class Action Complaint; the complete file and record in this action; the argument of counsel; and such other and further evidence and argument as the Court may choose to entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At its core, this putative class action proceeding is not a class action at all, but rather a loose collection of individual grievances which factually range all over the map. The Consolidated Complaint alleges that, since late 2006, SCEA has misrepresented one of the many features of PlayStation®3 ("PS3") consoles, namely the ability to install and use a Linux or other operating system (referred to as the "Other OS") in lieu of the PS3 native operating system. The Consolidated Complaint goes so far as to allege that SCEA promised to support the Other OS feature in perpetuity, *i.e.*, that SCEA failed to disclose to PS3 purchasers that it "might" disable the Other OS function.

The claims asserted in the Consolidated Complaint are defective on their face as demonstrated in SCEA's contemporaneous Motion To Dismiss. But pertinent to this motion, the class allegations in the Consolidated Complaint are also fatally flawed and should be stricken. More specifically, as set forth below, courts in this and other Circuits agree that fraud-based claims are rarely susceptible to class treatment because of the inescapable abundance of

individualized factual inquiries necessary to establish the requisite elements of materiality, reliance and damage. And this case epitomizes the concerns that have prompted courts to summarily reject fraud-based class claims.

First and foremost, there is no ubiquitous false statement of fact that all PS3 owners allegedly saw and relied upon. Indeed, the Consolidated Complaint does not point to some allegedly false statement that appeared on the PS3 packaging, or which appeared in some massive media advertising campaign. Instead, the Consolidated Complaint refers to a hodgepodge of quotes from obscure interviews of SCEA executives, statements made by unrelated third parties, and a portion of a few pages from SCEA's website. Not only does the Consolidated Complaint fail to allege that all PS3 purchasers saw and relied upon these statements, but it could not do so given the public pronouncements by many PS3 purchasers to the contrary.

Second, the Consolidated Complaint paints dramatically different portraits of the five individuals named as plaintiffs. It does not contend that all five saw or heard the same representations. It concedes that they did not use the Other OS feature in the same manner (if at all): one plaintiff never installed Linux during the more than two years he owned his PS3; two plaintiffs used the Other OS feature only to do things equally available through the PS3 native operating system; one plaintiff supposedly also played Linux-specific games; and the last plaintiff used Linux extensively, including for electronic mail, word processing, spreadsheet software, and other "productivity applications." Finally, the Consolidated Complaint does not assert that all five have been injured in the same way – some continue to use Linux and thus cannot use the PlayStation®Network, which provides access to various online activities, including chat and game play, while others downloaded Update 3.21, but can still do exactly the same thing they always did with their PS3 through the native operating system. And of course, Mr. Stovell, the plaintiff who never installed Linux, has experienced no change whatsoever in the day-to-day functioning of his PS3.

Third, the Consolidated Complaint paints an even different picture of other PS3 users – it alleges injuries supposedly sustained by some users that none of the five plaintiffs avers having suffered, like consequential damages due to the purchase of peripherals rendered superfluous by

Update 3.21, loss of money spent on new games that require Update 3.21 by those who declined the download, loss of hard drive space by those who had partitioned the drives when installing Linux, and loss of data by those who downloaded Update 3.21 without prior backup.

But beyond these issues, which prevent any assertion that common issues will predominate and that the five named plaintiffs are typical of the putative class members, even more pervasive problems persist. The class defined in the Consolidated Complaint is not ascertainable – it is comprised not of all PS3 owners, but only those who purchased their consoles for personal use and not for resale and still owned it on March 27, 2010. Thus, class membership is not readily discernible based on objective criteria. The class would not include anyone who bought a PS3 for business use, or to give as a gift – which of course involves questions of the purchasers' subjective intent. It would also not include anyone who received a PS3 as a gift, or anyone who sold it or otherwise disposed of it prior to March 27, 2010.

Finally, the class would include many PS3 owners who lack standing because they lack injury in fact – if someone bought a PS3 not knowing that it had the "Other OS" function, or not caring if it did, surely the fact that Update 3.21 disabled such a function would not result in a compensable harm.

For the reasons established below, this Court should strike the class allegations from the Consolidated Complaint.

II. APPLICABLE LEGAL STANDARD

Rule 12(f) authorizes courts to strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter."[1] It functions to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial."[2]

On this basis, federal courts recognize that, 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.[3] Leave to amend need not be granted if it is clear that the complaint's

[1] Fed. R. Civ. P. 12(f).
[2] *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)).
[3] *See Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. Jan. 21, 2009) ("Federal courts have used motions to strike to test the viability of a class at the earliest pleading stage of the

deficiencies cannot be cured by amendment.[4] The Supreme Court has also noted that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of absent parties are fairly encompassed within the named plaintiff's claim."[5] In such instances, "[t]he court need not wait for a motion for class certification …."[6] The Ninth Circuit Court of Appeals recently clarified that

> [n]othing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question. The only requirement is that the certification question be resolved (at an early practicable time.) The plain language of Rule 23(c)(1)(A) alone defeats Plaintiffs' argument that there is some sort of 'per se rule' that precludes defense motions to deny certification….[7]

To maintain a class action, Rule 23(a) requires that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, Rule 23(b) requires the satisfaction of one of three elements set forth in Rule 23(b). Rule 23(b)(2) allows class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

By contrast, Rule 23(b)(3) allows class actions where "the court finds that the questions of

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litigation."); *Dodd-Owens v. Kyphon, Inc.*, No. C 06-3988 JF (HRL), 2007 WL 3010560, **3-4 (N.D. Cal. Oct. 12, 2007) ("Plaintiff's general and conclusory response does not squarely address Defendant's concerns and the requirements of Rule 23. To proceed with their class action Plaintiffs at the very least must allege some specific commonality and typicality among class members. Accordingly, the Court will grant the motion to strike, but also will grant Plaintiffs a final opportunity to amend the class allegations of their complaint."); *Thompson v. Merck & Co.*, No. C.A. 01-1004, 2004 U.S. Dist. LEXIS 540, *17 (E.D. Pa. Jan. 6, 2004) ("we conclude that the classes presented here cannot meet the requirements of Rule 23(b) and therefore the class allegations must be stricken from the complaints"); *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D. Kan. 2004).

[4] *Lucas v. Dep't of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995); *see also Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996) (dismissal with prejudice may be ordered if amendment would be futile).

[5] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

[6] *Stubbs*, 224 F.R.D. at 674.

[7] *See also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-40 (9th Cir. 2009). Plaintiffs' counsel's argument, during the most recent case management conference, regarding the appropriateness of such a motion is directly contradicted by this ruling as well as the rulings of numerous other courts. *See* footnote 3, *infra*.

law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[8] To satisfy the predominance requirement, "a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole,… predominate over those issues that are subject only to individualized proof."[9] Courts therefore deny certification where individualized issues of fact abound.[10] Where, after adjudication of the classwide issues, the plaintiff would be required to introduce individualized proof or argue individualized legal points to establish elements of his individual claims, and such discrete inquiries would also be required of each absent class member, such claims are not suitable for class certification under Rule 23(b)(3).[11] The "predominance criterion [of Rule 23(b)(3)] is far more demanding than the commonality requirement of Rule 23(a)."[12]

III. RELEVANT FACTUAL BACKGROUND

A. The Commencement Of These Consolidated Class Actions

A number of class actions were initiated in this District based on purported representations SCEA made regarding the Other OS feature and the release of Update 3.21. The above-captioned matter is the result of the consolidation of seven class actions, prosecuted by five individuals named in the Consolidated Complaint – Anthony Ventura, Jonathan Huber, Antal Herz, Jason Baker, and Elton Stovell (collectively, the "Consolidated Complaint Plaintiffs") – and nine individuals named in the predecessors of the Consolidated Complaint – Sean Bosquett, Frank Backman, Paul Graham, Paul Vannatta, Todd Densmore, Keith Wright, Jeffrey Harper, Zachary Kummer, and Rick Benavides (collectively, the "Underlying Complaint Plaintiffs").[13]

The Consolidated Complaint states claims for (1) Breach of Express Warranty; (2) Breach

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[8] Fed. R. Civ. P. 23(b)(3).
[9] *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001), *superseded by statute on other grounds.*
[10] *See Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255-56 (2d Cir. 2002).
[11] *Schuentz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1014 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003); *Gonzalez v. Proctor and Gamble Co.*, 2007 WL 2700954, **5-6 (S.D. Cal. Sept. 12, 2007).
[12] *Garcia v. Veneman*, 211 F.R.D. 15, 23 (D.D.C. 2002).
[13] Consolidated Complaint, ¶¶ 10-19; Docket #1; Ott Decl., ¶¶ 10-15, Exs. I-N.

of Implied Warranty of Merchantability; (3) Breach of Implied Warranty of Fitness for a Particular Purpose; (4) Violation of the California Consumer Legal Remedies Act; (5) Violation of the Computer Fraud and Abuse Act; (6) Violation of the Magnuson-Moss Warranty Act; (7) Violation of California's False Advertising Law; (8) Violation of California's Unfair Competition Law; (9) Conversion; and (10) Unjust Enrichment for themselves and a class defined as "[a]ll persons who purchased, in the United States and its territories, a new PS3 with the Open Platform feature for personal use and not for resale and continued to own the PS3 on March 27, 2010."[14] Based on these claims, Plaintiffs seek injunctive relief; compensatory, consequential, punitive, and statutory damages; restitution and restitutionary disgorgement; interest; and attorney's fees and costs.[15]

B. The PS3 And Other OS Feature

The PS3 is an advanced video gaming and computing system.[16] At the time of its launch on November 17, 2006, it was sold with a number of advertised features, including the ability to play video games, movies, and music on various media including CDs, DVDs, and Blu-ray discs; view photographs; and use SCEA's online gaming service, the PlayStation®Network ("PSN").[17] In addition, unlike many other video game consoles, the PS3 could be updated via periodic "firmware" updates.[18]

The PS3's features also included an "Other OS" feature which enabled users to install and run a Linux operating system in addition to the PS3's native operating system.[19] According to the Consolidated Complaint, the Other OS feature "provide[d] users with an excellent platform to

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[14] Consolidated Complaint, ¶ 70.

[15] Consolidated Complaint, Prayer for Relief. On or about July 28, 2010, an action based on similar allegations was commenced against SCEA in a Wisconsin state court by an individual named James Allee. Ott Decl., ¶ 16, Ex. O (*Allee* Complaint). Mr. Allee asserts claims based on Wisconsin law on behalf of himself and a proposed class defined as "[a]ll Wisconsin residents who purchased a PS3 during the period November 17, 2006 to March 27, 2010, and who did not resell their PS3 before March 27, 2010." *Id.*, ¶ 16, Ex. O (*Allee* Complaint), ¶¶ 41, 43-77. On August 27, 2010, SCEA removed the *Allee* action to the United States District Court for the Eastern District of Wisconsin pursuant to the Class Action Fairness of 2005. Ott Decl., ¶ 17, Ex. P.

[16] Consolidated Complaint, ¶ 30.

[17] Consolidated Complaint, ¶ 36.

[18] Consolidated Complaint, ¶ 33.

[19] Consolidated Complaint, ¶ 36.

develop applications for the PS3 or as a jumping off point for deployments to other products, including those from IBM, Sony, or Mercury"[20]; "allowed Cell programming[21] and the operation of supercomputer clusters"[22]; and allowed the PS3 to run like a "fully functional home computer, loaded with more than 1,000 applications."[23]

C. Firmware Update 3.21

"On or about March 28, 2010," SCEA announced the release of firmware "Update 3.21" on April 1 which, if installed, "would disable the [Other OS] feature."[24] Thereafter, "[o]n or about April 1, 2010, [SCEA] released Update 3.21" for "security reasons."[25]

PS3 owners were not required to download Update 3.21.[26] But "if a user failed to download Update 3.21, he or she would lose the following features: (1) the ability to sign in to the PSN; (2) the ability to use online features that require a user to sign in to the PSN, such as chat; (3) the ability to use the online features of PS3 format software; (4) playback of new PS3 software or Blu-ray discs that require Update 3.21 or later; (5) playback of copyright-protected videos that are stored on a media server; and (6) use of new features and improvements that are available on PS3 Update 3.21 or later."[27] However, Plaintiffs do not complain they personally experienced the latter three consequences; instead, those that did not download Update 3.21 only complain that they cannot access the PSN.[28]

D. PS3 Owners Experienced Different Representations

The asserted claims are premised on purported representations that were made about the PS3 and the Other OS function.[29] But as the Consolidated Complaint concedes, PS3 owners

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[20] Consolidated Complaint, ¶ 49.
[21] Plaintiffs explain that "Cell is a microprocessor which facilitates software development." Consolidated Complaint, fn. 5.
[22] Consolidated Complaint, ¶ 37.
[23] Consolidated Complaint, ¶¶ 3 & 47.
[24] Consolidated Complaint, ¶ 52.
[25] Consolidated Complaint, ¶¶ 4 & 53. Plaintiffs specifically allege that SCEA stated that "the update was released in order to 'protect the intellectual property of the content offered on the PS3 system'" from a hack of the PS3. Consolidated Complaint, ¶ 63; Ott Decl., ¶ 10, Ex. I (*Baker* Complaint), ¶ 41. SCEA was entitled to terminate the functionality of the Other OS feature pursuant to its software license. *See* Motion to Dismiss, Section II(B).
[26] Consolidated Complaint, ¶ 53.
[27] Consolidated Complaint, ¶ 53.
[28] Consolidated Complaint, ¶¶ 10-19.
[29] Consolidated Complaint, ¶ 45.

received varied representations (if any) during the class period.

The Consolidated Complaint fails to provide any specifics about the representations that the Consolidated Complaint Plaintiffs purportedly relied upon, and four out of five of them contend only generally that they relied on statements made on SCEA's website. They therefore implicitly concede that they did not rely on the very representations referenced in the Consolidated Complaint.[30] They also reference postings allegedly made by other PS3s owners that they contend demonstrate putative class members reviewed relevant representations about the Other OS function prior to purchase.[31] But many other PS3 owners admit in other postings on the same websites that they did not review any such representations and had no idea that the PS3 ever had an Other OS function or Linux functionality:

> wow. i didn't even know this type of things existed on my ps3 (60gb). lol. hey, as long as it doesn't affect me playing games and getting online, then I really don't care….[32]
>
> * * * * *
>
> Help! can someone tell me whats (sic) going on, i never really knew what the "install other os" function was for….[33]
>
> * * * * *
>
> whats (sic) the OS feature [34]
>
> * * * * *
>
> I had no idea this feature existed until this update was announced. [35]

And this is not surprising as there was no reference to the Other OS feature on the PS3's packaging.[36] The Consolidated Complaint relies on a number of statements about the PS3 and the Other OS feature allegedly made at various times, including two statements in May 2006[37], one in June 2006[38], one in February 2007[39], and one in August 2009.[40] But because class members, including Plaintiffs, purchased at different times, they could not have heard or seen all of these

[30] Consolidated Complaint, ¶¶ 10, 12, 14, 16, & 18.
[31] Consolidated Complaint, ¶ 62, first and second paragraphs.
[32] Ott Decl., ¶ 18, Ex. Q, p. 9.
[33] Ott Decl., ¶ 18, Ex. Q, p. 11.
[34] Ott Decl., ¶ 18, Ex. Q, p. 12.
[35] Ott Decl., ¶ 18, Ex. Q, p. 13.
[36] *See* Consolidated Complaint, ¶¶ 45, fourth bullet point.
[37] Consolidated Complaint, 15:11-16, 15:24-16:2.
[38] Consolidated Complaint, ¶ 38.
[39] Consolidated Complaint, ¶ 39 & 15:17-20.
[40] Consolidated Complaint, 16:3-7.

statements prior to purchase. Instead, the statements quoted in the Consolidated Complaint come from little-known articles, many pulled in from other countries or from statements by third parties, and many post-dating the dates on which Plaintiffs allegedly purchased their PS3s.

For example, not one of the Plaintiffs alleges purchasing his PS3 after January 1, 2009.[41] Accordingly, not one of them could have relied on the statements allegedly made in August 2009, even though the Consolidated Complaint references it. Similarly, because Mr. Harper purchased "[i]n or around January 2007," he could not have relied on the statements referenced in the Consolidated Complaint purportedly in February 2007.[42]

E. PS3 Owners Had Different Reasons For Purchasing Their PS3s, And Used Their PS3s In Different Ways

Plaintiffs nearly unanimously state that they "chose to purchase a PS3, as opposed to an Xbox or a Wii, because it offered the Other OS feature as well as the other unique PS3 features (such as the ability to play Blu-ray discs and access the PlayStation Network), despite the fact that the PS3 was substantially more expensive than other gaming consoles."[43] According to the Consolidated Complaint, this extra expense was compensated for: "the ability to use Linux on a PS3 saves consumers money" as "[c]onsumers who load a Linux operating system do not need to buy many additional electronic devices or applications" that they "would otherwise need to buy if

[41] Consolidated Complaint, ¶¶ 10, 12, 14, 16, and 18. (Ventura purchase "in or around July 2007"; Baker purchase "on or about March 15 or 16, 2007"; Stovell purchase "on November 24, 2007"; Herz purchase "on October 11, 2008"; Wright purchase "on or about December 20, 2008"); Ott Decl., ¶ 10, Ex. I (*Baker* Complaint), ¶¶ 5, 6, and 8 (Vannatta purchase "on or about July 13, 2008"; Bosquett purchase "on or about September 6, 2008"; Backman purchase "on or about January 1, 2009."); Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 9-10, 15-16 (Harper purchase "[i]n our around January 2007."; Kummer purchase "[i]n or about May 2008"); Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 5 (Huber purchase "on or about December 2007"); Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 5. ((Benavides purchase "on or about February 2008"); Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶¶ 6 & 31 (Densmore purchase "in 2007."). Evidentially, Mr. Graham has no way to recall or determine when he purchased his PS3, as he simply contends he purchased his PS3 "during the class period." Ott Decl., ¶ 10, Ex. I (*Baker* Complaint), ¶ 7.

[42] *See* Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 9-10; Docket #1 (*Ventura* Complaint), ¶ 7; Consolidated Complaint, ¶¶ 10 and 16; Ott Decl., ¶ 10, Ex. I (*Baker* Complaint), ¶ 4.

[43] Docket #1 (*Ventura* Complaint), ¶ 17; Consolidated Complaint, ¶¶ 10, 12, 14, 16, 18; Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶¶ 31 & 32; Ott Decl., ¶ 12, Ex. K (*Wright* Complaint), ¶ 12; Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 5; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 15; *see also* Ott Decl., ¶ 16, Ex. O (*Allee* Complaint), ¶ 25.

[SCEA] did not offer the Other OS Function."[44] The Consolidated Complaint also relies on a number of postings made on the Internet that purportedly show that the Other OS function was important to class members:

> [I] bought a ps3, waited a week in freezing rain and paid 600 dollars for it under the impression I would have a system that could use linux, i've spent YEARS learning and playing with linux on my ps3….[45]
>
> * * * * *
>
> ….It absolutely entered my cost benefit analysis when choosing between PS3 and Xbox360….PS3 could run Linux, Xbox had no answer….[46]

But they fail to quote or even cite numerous other postings by PS3 owners on the same websites who have stated that they did not purchase the PS3 because of the Other OS feature and did not use it:

> oh well, I don't use it anyway so I don't care.[47]
>
> * * * * *
>
> Im (sic) shocked at the amount of lies people are typing now as well. You would think EVERYONE here uses the OS feature when in reality ill (sic) be most of them didnt (sic) even know it existed til (sic) the 'hack' gained some momentum which is thankfully ended now.[48]
>
> * * * * *
>
> …Sure I supposed there is a small group of people that use it for both for (sic) some bizarre reason. My mind is plenty open to this fact, the fact of the matter is that this feature is used by a super small minority of people, and we are talking really small….[49]
>
> * * * * *
>
> Who cares? Its (sic) a feature that only 10 people use.[50]
>
> * * * * *
>
> I don't see this affecting too many people, i mean who really uses their ps3 as a computer? The only people that might legitimately be affected by this are the hackers and maybe the universities and companies that use it for research purposes.[51]
>
> * * * * *

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[44] Docket #1 (*Ventura* Complaint), ¶ 21; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 17; *see also* Ott Decl., ¶ 16, Ex. O (*Allee* Complaint), ¶ 30.
[45] Consolidated Complaint, ¶ 62, second paragraph.
[46] Consolidated Complaint, ¶ 62, third paragraph.
[47] Ott Decl., ¶ 15, Ex. Q, p. 2; *see also* Request for Judicial Notice, Section II; *Caldwell v. Caldwell***,** 2006 WL 618511 (N.D. Cal. Mar. 13, 2006).
[48] Ott Decl., ¶ 15, Ex. Q, p. 4.
[49] Ott Decl., ¶ 15, Ex. Q, p. 5.
[50] Ott Decl., ¶ 15, Ex. Q, p. 7.
[51] Ott Decl., ¶ 15, Ex. Q, p. 8.

I didn't use it so i don't care.[52]

The Consolidated Complaint also makes clear that, even those who contend to have purchased the PS3 because of the Other OS function, used it in different ways. Plaintiffs claim that, "[p]rior to the release of Update 3.21," they used the PS3 to play games, watch Blu-ray discs, and access the PSN.[53] But they admit that they used the Other OS function in different ways, if at all. For example, Stovell admits that for the over two-year period that he owned his PS3 before the release of Update 3.21, he never used the Other OS feature.[54] By contrast, Ventura claims he used the Other OS function to "browse the Internet" and "play Linux-specific games"[55]; whereas, along with "brows[ing] the Internet," Herz used the Other OS function on his PS3 to "run word processor software, spreadsheet software, email software, other productivity applications, and make his own programs"[56]; and Densmore claims he used the Other OS function to "utilize Cell programming."[57]

F. Update 3.21 Affected PS3 Owners In Different Ways

1. Many PS3 Owners Downloaded Update 3.21, But For Different Reasons

Many, but not all, of the Plaintiffs downloaded Update 3.21.[58] Of those Plaintiffs that downloaded, many state that they did so to continue to use the PS3's other features.[59] These Plaintiffs complain that they have been "damaged" by their inability to "access the 'Other OS' feature and the Linux operating system."[60] The Consolidated Complaint also cites several Internet postings regarding a similar complaint.[61] But other Internet posts indicate PS3 owners

[52] Ott Decl., ¶ 15, Ex. Q, p. 10.
[53] Consolidated Complaint, ¶¶ 10, 12, 14, 16, & 18.
[54] Consolidated Complaint, ¶ 18.
[55] Consolidated Complaint, ¶ 10.
[56] Consolidated Complaint, ¶ 12.
[57] Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶ 31.
[58] Consolidated Complaint, ¶¶ 13, 15, & 19; Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶ 6, 7, 31, and 32; Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 6; Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 12 & 18; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 24.
[59] Consolidated Complaint, ¶¶ 13, 15, & 19; Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶¶ 6, 7, 31, & 32; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 24.
[60] Consolidated Complaint, ¶¶ 13 & 15; Ott Decl., ¶ 11, Ex. J (*Densmore* Complaint), ¶¶ 6, 7, 31 and 32; Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 12 & 18; Ott Decl., ¶ 15, Ex. N (*Benavides* Complaint), ¶ 24.
[61] *See, e.g.*, Consolidated Complaint, ¶ 62, first paragraph.

downloaded Update 3.21 because they did not care about the Other OS feature:

> I don't use Linux(like 99% of the userbase) so it's easy for me to support this move.[62]
>
> * * * * *
>
> Take it away sony I dont (sic) care at all personally. i only hope there is more into this update, that is all. Keep up the good work guys.[63]

2. PS3 Owners Who Did Not Download Update 3.21 Have Different Complaints

Messrs. Ventura, Wright, and Baker made the decision not to download Update 3.21 because they wished to "continue to use the Other OS function."[64] But they complain about different effects. Specifically, they complain that, as a result, they are not able to "play online games," "access the PSN," and "play new games or Blu-ray discs that require Update 3.21."[65] But Ventura also complains about additional issues that affected him alone: he complains that "new Blu-ray discs could disable the Blu-ray entirely if they contain an AACS Host Revocation List that affects the old software version" and that he "will no longer be able to take advantage of future benefits, including the ability to update any of the images that [he] owns online, to benefit from future updates to the Play[S]tation, and to install or play games that Sony will sell in the future."[66]

3. "Additional Injuries" Allegedly Resulting From Update 3.21

The Consolidated Complaint also list numerous miscellaneous "additional injuries," purportedly "caused by the release of Update 3.21," which the Consolidated Complaint Plaintiffs implicitly concede they did not suffer but allege were sustained by certain other members of the proposed class[67]:

PS3 owners who downloaded Update 3.21 but did not know what it would do. The Consolidated Complaint alleges that others downloaded Update 3.21 not knowing what it would

[62] Ott Decl., ¶ 15, Ex. Q, p. 3.
[63] Ott Decl., ¶ 15, Ex. Q, p. 6.
[64] Consolidated Complaint, ¶¶ 11 & 17; Docket #1 (*Ventura* Complaint), ¶ 28; Ott Decl., ¶ 12, Ex. K (*Wright* Complaint), ¶ 15.
[65] Consolidated Complaint, ¶¶ 11 & 17; Ott Decl., ¶ 12, Ex. K (*Wright* Complaint), ¶ 15.
[66] Docket #1 (*Ventura* Complaint), ¶¶ 26-29
[67] Consolidated Complaint, ¶¶ 56-61.

do.[68] But the Consolidated Complaint Plaintiffs implicitly concede that they were aware of the effect of Update 3.21. Of course, many PS3 owners did not purchase the PS3 to use the Other OS function, or never used it, and therefore were not affected.

PS3 owners who did not download Update 3.21 and send their PS3s to SCEA for repair. The Consolidated Complaint states that, without authorization, SCEA downloads Update 3.21 on PS3s owned by individuals who have not downloaded Update 3.21 when these individuals send their PS3s to SCEA for repair.[69] The Consolidated Complaint Plaintiffs implicitly admit that they have not been affected in this way.

PS3 owners who purchased peripherals for use with the Other OS. "Many users purchased peripheral devices specifically for use with the 'Other OS' function, such as wireless keyboards and mice and external hard drives."[70] As a result of downloading Update 3.21, these "devices are rendered superfluous."[71] The Consolidated Complaint Plaintiffs do not state they have been injured due to the purchase of any peripherals.

PS3 owners who partitioned their hard drive and later download Update 3.21. PS3 owners who chose to use the Other OS feature had to partition the PS3's hard drive to make space available for the feature.[72] Those that did so allegedly "lost access to that portion of the hard drive."[73] Thus, Update 3.21 "reduce[d] the hard drive space available on the PS3 for which users had originally paid."[74] Of course, none of the Consolidated Complaint Plaintiffs allege this experience, and certainly not plaintiff Stovell, who never installed Linux.

PS3 owners who downloaded Update 3.21, had data stored in the Other OS section of their PS3s, but failed to backup that data. PS3 owners who downloaded Update 3.21 without first "back[ing] up [stored] data on another medium" "lost" that data.[75] None of the Consolidated Complaint Plaintiffs allege they experienced this.

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[68] Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 29.
[69] Consolidated Complaint, ¶ 55; Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 30.
[70] Consolidated Complaint, ¶ 58.
[71] Consolidated Complaint, ¶ 58.
[72] *See, e.g.*, Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶ 5.
[73] Consolidated Complaint, ¶ 57.
[74] Consolidated Complaint, ¶ 57.
[75] Consolidated Complaint, ¶ 56.

PS3 owners who purchase new games that require Update 3.21 and who do not know that Update 3.21 is required to play those games. "Many users who do not install Update 3.21 purchase new games for their PS3, unaware that new games cannot be played without the update. Users only become aware of that fact when they open the package and try to play the game. Retailers do not accept returns on games that are not in their original packaging, and thus users are damaged in the amount they paid for such games."[76] None of the Consolidated Complaint Plaintiffs allege they experienced this.

PS3 owners who did not download Update 3.21 and who paid for services that require PS3 features they are foreclosed from using because they did not download Update 3.21. PS3 owners who did not download Update 3.21 are allegedly foreclosed from using "attributes" of the PS3 that are necessary to access other services they have paid (or are paying) for, such as Qore (an "online service" offered by SCEA) and Netflix.[77] None of the Consolidated Complaint Plaintiffs allege they experienced this.

IV. THE PROPOSED CLASS IS NOT ASCERTAINABLE

Although not expressly listed in Rule 23 as a certification requirement, courts recognize that a proposed class must be "ascertainable," *i.e.*, it must be possible for members to readily identify themselves, so that the parties and the court in the future can evaluate those bound by any judgment under *res judicata* principles.[78] Thus, a proposed class definition must be precise, objective, and identifiable based on readily available criteria.[79] Membership may not turn on extensive fact-finding, a resolution of the merits of the claims, or the subjective belief of class members.[80] Plaintiffs' proposed class fails on several ascertainability grounds:

The proposed class explicitly does not include all PS3 purchasers. Instead, it is limited

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[76] Consolidated Complaint, ¶ 61.
[77] Consolidated Complaint, ¶¶. 59-60. Notably, SCEA advises PS3 owners to back up their data. Ott Decl., ¶ 9, Ex. H.
[78] *See DeBremaechker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); *Deitz v. Comcast Corp.*, 2007 WL 2015440, *8 (N.D. Cal. July 11, 2007).
[79] *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009); *Aiken v. Obledo*, 442 F. Supp. 628, 658 (E.D. Cal. 1977) (class definition must be "sufficiently definite so that it is administratively feasible for the court to determine whether an individual is a member.").
[80] *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980) (class certification denied because of extensive fact finding necessary to identify members of class).

only to those PS3 owners who purchased the PS3 "for personal use and not for resale."[81] As the Plaintiffs concede, individuals purchased PS3s for various reasons, including personal and/or business reasons.[82] But neither the parties nor the Court have any way of readily identifying those purchasers who purchased for "personal use" as opposed to for business use. In addition, because the definition is premised on a purchase for "personal use and not for resale," it explicitly excludes those who purchased the PS3 to provide it as a gift and those who received it as a gift. The Court and the parties therefore have no means of determining which PS3 owners may be entitled to notice regarding class treatment of this action, any proposed settlement, or of the effect of any judgment. In fact, because the proposed class is premised on the reason for the purchase, the only way to establish who is a member of the proposed class is by assessing the state of mind of each and every person who purchased a PS3 until March 27, 2010. On this additional basis, certification of this class is improper.[83]

In addition, the proposed class is also flawed because it only includes those who "continued to own the PS3 on March 27, 2010."[84] The parties and the Court also have no means of determining who sold, gave away, or simply disposed of their PS3s before, on, or after that date.

Finally, the phrase "for personal use" has no objective meaning. Neither the Court, SCEA, nor (more importantly) PS3 owners have any way to establish whether it means only for personal use, primarily for personal use, or some third possible meaning. As a result, PS3 owners have no objective means of discerning if they are members of this class who will be bound by the resolution of this action. For this additional reason, class treatment is not appropriate.

V. THE PROPOSED CLASS IS FATALLY OVERBROAD

"[N]o class may be certified that contains members lacking Article III standing…. The

[81] Consolidated Complaint, ¶ 70.
[82] Consolidated Complaint, ¶¶ 10, 12, 14, 16, 18, 70, & 84; *see also* Ott Decl., ¶ 13, Ex. L (*Harper* Complaint), ¶¶ 13 and 19; Ott Decl., ¶ 14, Ex. M (*Huber* Complaint), ¶¶ 4, 5, 30 & 46.
[83] *See Simer v. Rios*, 661 F.2d 655, 668-69 (7th Cir. 1981) (certification not appropriate where class membership depends on state of mind of class members); *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987) ("A class definition that requires the Court to assess subjective criteria, like the class members' state of mind, will not be certified.").
[84] Consolidated Complaint, ¶ 70.

class must therefore be defined in such a way that anyone within it would have standing."[85] Plaintiffs' class definition is inherently flawed in that it contains numerous, and possibly almost entirely, individuals who do not possess standing.

The asserted claims are premised on representations SCEA purportedly made regarding the PS3's Other OS function. But many PS3 owners concede that they never saw any representations or that they even knew, up until after this action was filed, that the PS3 had an Other OS function.[86] These individuals, therefore, lack standing to prosecute the very claims that Plaintiffs purport to state on their behalf.

These claims are also based, in part, on some kind of injury or damage sustained as a result of Update 3.21.[87] But many, if not most, class members (including plaintiff Stovell) who downloaded Update 3.21 did so with no injury because they did not purchase the PS3 for the Other OS function, did not use the Other OS function, and never planned to use it.[88]

Certification of this class is therefore improper because the definition includes "individuals who either did not see or were not deceived by advertisements, and individuals who suffered no damage. Such individuals would lack standing to bring these claims."[89]

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[85] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Harris v. Purdue Pharma., L.P.*, 218 F.R.D. 590, 595 (S.D. Ohio Sept. 30, 2003) (denying certification, in part, because members of class lack standing); *Bishop v. Saab Auto. A.B.*, 1996 WL 33150020, **4-5 (C.D. Cal. Feb. 16, 1996) (ascertainability requirement cannot be established where class members lack standing); *Duffin v. Exelon Corp.*, 2007 WL 1385369, **1 & 4 (N.D. Ill. May 4, 2007) (proposed class including individuals lacking standing are overbroad and not appropriate for class treatment); *Coleman v. McLaren*, 98 F.R.D. 638, 643-44 (N.D. Ill. 1983) (denying certification because proposed class included individuals lacking standing); *Bostick v. St. Jude Medical, Inc.*, 2004 WL 3313614, *14 (W.D. Tenn. Aug. 17, 2004) (recommending class not be certified because it includes individuals who lack standing); *Pfizer v. Superior Court*, 182 Cal. App. 4th 622, 631-32 (2010) ("the class certified by the trial court…is grossly overbroad because many class members, if not most, clearly are not entitled to restitutionary disgorgement…. In sum, the certified class…is overbroad because it presumes there was a class-wide injury.").

[86] Section III(A) & (D), *supra*.

[87] Section III(D), *supra*.

[88] Section III(E) & (F), *supra*.

[89] *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, (N.D. Cal. 2009) (granting motion to strike class allegations).

VI. THE CONSOLIDATED COMPLAINT SHOWS THAT INDIVIDUAL ISSUES PRECLUDE SATISFACTION OF RULE 23(b)(3)

A. The Claims Are Based On An Omission Theory, Which Raises Countless Individual Issues For Each Class Member

1. Individual Issues Predominate Because Reliance and Materiality Will Require an Individualized Determination For Each Class Member

The claims based on violation of the CLRA, UCL, and False Advertising Law and for Conversion and Unjust Enrichment are based on allegations of fraud. Such claims are rarely certified, as individual issues would overwhelmingly predominate the action.[90] In fact "[t]he Advisory Committee, in commenting on Rule 23(b)(3), has noted that 'although having some common core, a fraud case may be unsuited for treatment as a class action if there were material variations in the representations made or in the kinds or degree of reliance by persons to whom they were addressed.'"[91]

As noted in SCEA's Motion to Dismiss, these claims require reliance/materiality or at least a showing that SCEA caused an "injury in fact." This District refused to certify a class in *Martin v. Dahlberg, Inc.* when confronted with similar issues of reliance and materiality:

> The present record suggests that a myriad of factors may have influenced the decisions of putative class members to purchase Miracle-Ear hearing aids. Even among the named plaintiffs, there is a need for fact-specific and individualized examination of the reliance issue. Some putative class members like Mr. Springer, may have been influenced by advertisements totally unrelated to the Clarifier and claims of reduced background noise. Others, like Mr. Martin, may have seen the Clarifier ads, but are uncertain as to what effect those commercials had on their purchasing decision. … Others may have come to purchase Miracle-Ear hearing aids as a result of word of mouth and other factors unrelated to Dahlberg's fraudulent course of conduct. ***In all likelihood, many individuals who purchased Miracle-Ear hearing aids did so for a variety of factors, any one of which, or combination thereof, actually may have caused the customer to***

[90] *See Gonzalez v. Proctor and Gamble Co.*, 247 F.R.D. 616, 624 (S.D. Cal. 2007) ("a fraud class action cannot be certified when individual reliance will be an issue," quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996)); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 656 (C.D. Cal. 1996) ("it seems particularly unwise for the Court to certify a class action where fraud is one of the principal claims set forth by plaintiffs"); *In re ZZZZ Best Sec. Litig.*, 1994 WL 675160, *8 (C.D. Cal. May 25, 1994) ("the courts of this circuit that required a showing of individual reliance in *state fraud claims* … have generally refused to initially certify common law fraud claims because individual issues predominate over common issues"); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 217 (N.D. Cal. 1994) ("individualized questions of reliance…preclude certification of plaintiffs' class for purposes of resolving these claims").

[91] *Horowitz v. Pownall*, 105 F.R.D. 615, 619 (D. Md. 1985) (quoting Fed. R. Civ. P. 23(b)(3), Adv. Comm. note; 39 F.R.D. at 103 (1966)).

make the purchase.[92]

As in the cases above, establishing reliance and materiality here, even for the class representatives, will be a difficult task and is certainly inappropriate for collective resolution on a class basis. Each class member will have to individually establish that he or she "would not have acted as he did if he had known of the concealed or suppressed fact."[93] The allegations and statements made by other PS3 owners confirm that issues regarding reliance and materiality abound.[94] For example, Stovell's claim that he purchased his PS3 because of the Other OS feature is contradicted by the fact that he did not use it for the over two year period before he downloaded Update 3.21.

In addition, numerous putative class members indicated that they never saw any representations regarding the Other OS function, did not use the Other OS function, and have no interest in this action because they have not been injured.[95] Furthermore, because PS3 owners who did not utilize the PSN did not accept the Terms of Use,[96] they will be subject to entirely different defenses than others, like the Consolidated Complaint Plaintiffs, who did use the PSN and thus did accept the Terms of Use.[97] Given these varying experiences, establishing reliance and materiality as to each of the purported class members could require thousands, if not millions, of individualized mini-trials.

2. Individual Issues Predominate Because SCEA's Duty to Disclose Will Require an Individualized Determination For Each Class Member

As noted, Plaintiffs' claims are based on an omission theory, which requires a duty to disclose with respect to each class member.[98] Because that showing is required for each class

[92] *Martin*, 156 F.R.D. at 215 (emphasis added); *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 437 (C.D. Cal. 2007) ("different class members may have relied on different representations. Moreover, some class members may not have relied on – or even been exposed to – any representation."); *see also Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668-669 (1993) (denying class certification on materiality grounds when plaintiffs' claims were based on varying misrepresentations regarding quality of orange juice).

[93] *See id.*

[94] *See* Section III(E) & (F), *supra*.

[95] *See* Section III(E), *supra*.

[96] *See* Motion to Dismiss, Section III(B).

[97] *Id.*

[98] *See Lovejoy v. AT&T Corp.*, 119 Cal. App. 4th 151, 157 (2004) (a claim for fraudulent concealment requires that "the defendant must have been under a duty to disclose the fact to the

member, individual issues predominate. In *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996), the court denied class certification in large part because, like here, existence of a duty to disclose would turn on which representations were made to *each* class member:

> Before the court can determine even the threshold liability of GMAC to a class member, the court will have to examine all of the facts and circumstances of the transaction between the class member and the automobile dealer *to determine whether a duty to disclose arose under the applicable state law*. Such a determination will involve literally hundreds of thousands if not millions of individual factually complex hearings.[99]

SCEA's alleged duty to disclose arises from a jumble of supposed statements regarding the PS3 and Update 3.21 allegedly made through various forms of publication, to the media at a press event, in "promotional materials," through press releases, on the Internet, and in technical specifications.[100] Thus, the duty to disclose as to each class member will depend on which various statements he or she saw or heard.[101] Again, the allegations in the Consolidated Complaint demonstrate the difficulty of this showing. Plaintiffs generally state that they have relied on statements regarding the PS3 and the Other OS function, but fail to specifically state that they saw or heard any of the quotes referenced in the Consolidated Complaint. In addition, many PS3 owners have indicated that they have not seen any of these. Clearly, establishing a duty to disclose as to each class member will overwhelm any alleged common issues of law or fact.[102]

B. The Express Warranty Claim Cannot Be Maintained As a Class Action

Plaintiffs' express warranty claim fairs no better. As set forth in SCEA's Motion to Dismiss, these claims depend on an affirmation of fact and reliance.[103] As courts routinely

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plaintiff").

[99] *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 677 (M.D. Ala. 1996) (emphasis added); *see also Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 453-454 (E.D. Pa. 2000) ("Showings of duty, failure to disclose, and reliance obviously would have to be made for each class member … The benefits of class action are essentially offset by the sheer number of individual issues that would arise in this litigation"); *Brown v. Regents of Univ. of Cal.*, 151 Cal. App. 3d 982, 990-91 (1984) ("The extent of a physician's duty to disclose is directly controlled by the unique situation of each patient. … Since this duty will necessarily vary from case to case, we determine that individual issues will predominate over common questions").

[100] *See* Section III(D), *supra*.

[101] *Mack*, 169 F.R.D. at 677.

[102] In addition, the question whether the statute of limitation precludes the CLRA claim, for each class member, also presents further individual issues that preclude satisfaction of the Rule 23(b)(3) and Rule 23(a)'s typicality requirement. *See* Motion to Dismiss, Section VII(B).

[103] *See* Motion to Dismiss, Sections IV; *see also Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682,

acknowledge, warranty claims present individual issues precluding certification.[104]

Plaintiffs base their warranty claim on statements allegedly made regarding the Other OS feature, without specifically referencing any statement in particular.[105] However, as made clear by the class members' unique experiences with regard to what they heard or saw regarding the Other OS feature, individual factual inquiries will be required to show the facts surrounding each class member's transaction.[106] When numerous class members saw or heard various different representations, and the named Plaintiffs cannot even identify which statements they purport to have seen or heard, establishing which statements were made prior to the time of sale will undoubtedly implicate countless individualized issues. For this additional reason, Plaintiffs' warranty claim further precludes class treatment.

C. Further Individual Questions Will Predominate The Damages Inquiry

Aside from the individual inquiries necessary to resolve standing and class membership[107] and liability[108], further individual mini-trials will be necessary to resolve each class member's right to damages, the type of damages, and the amounts. The Consolidated Complaint demands compensatory, consequential, punitive, and statutory damages as well as restitution and restitutionary disgorgement.[109] As Plaintiffs' and putative class members' experiences make clear, resolving these questions will require further individual inquiries.

The Consolidated Complaint seeks varying amounts of restitution[110]; admits that members

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696 (1954).

[104] *See Smith v. Brown and Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo. 1997) ("claims that Defendant breached expressed warranties are permeated with individual issues because these claims require proof that purchasers were induced to make purchases based on affirmative representations"); *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 660-61 (1988); *Rose v. Medtronics, Inc*., 107 Cal. App. 3d 150, 157 (1980).

[105] Consolidated Complaint, ¶¶ 78-99, 134-139.

[106] *See* Cal. Comm. Code § 2313, com. 1 ("'Express' warranties rest on 'dickered' aspects of the individual bargain…"); *A.A. Baxter Corp. v. Colt Indus., Inc.*, 10 Cal. App. 3d 144, 154 (1970) ("to constitute an express warranty, the statement must be a part of the contract"); *see also* Motion to Dismiss, Sections IV-VI. Individual issues also preclude certification of the Computer Fraud And Abuse Act claim because, whether a class member downloaded Update 3.21 or not raises different defenses. *See* Motion to Dismiss, Section IX.

[107] Section IV & V, *supra*

[108] Section VI(A), *supra*

[109] Consolidated Complaint, Prayer for Relief.

[110] Consolidated Complaint, ¶¶ 10, 12, 14, 16, & 18.

of the class may be entitled to damages on different bases[111]; and many members of their proposed class admit that they have suffered no damage at all.[112] For many other class members that have not made this admission, the parties must resolve whether they suffered any damage. For example, those class members that never used the PSN or the Other OS feature could not have suffered the damages Plaintiffs assert. Plaintiffs also admit that they paid different amounts for their PS3s, but seek anything from the entire purchase price to some part of it.[113] In addition, the Consolidated Complaint alleges that some class members (not including any of the Consolidated Complaint Plaintiffs) saved money by not having to purchase electronics they otherwise would have because of the Other OS feature, while others (not including any of the Consolidated Complaint Plaintiffs) allegedly spent money on electronics they needed for the Other OS feature.[114] Clearly, individual inquiries for each class member will be necessary just to resolve this puzzle.

The mini-trials for each class member necessary to resolve these questions regarding damages also preclude satisfaction of Rule 23(b)(3).[115] Furthermore, the individual inquiries and mini-trials necessary to resolve standing, class membership, liability and relief necessarily make class treatment unmanageable, precluding satisfaction of Rule 23(b)(3)'s requirement that class treatment be "superior" to individual lawsuits for resolving the dispute.[116]

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[111] Section III(F), *supra*
[112] Section III(E) & (F), *supra*.
[113] Consolidated Complaint, ¶¶ 10, 12, 14, 16, & 18.
[114] Consolidated Complaint, ¶¶ 50 & 58.
[115] *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 & 71-72 (4th Cir. 1977) (class certification not appropriate, in part, because of the "overwhelming burden of damage mini-trials that class certification would impose"; where the issue of damages "does not lend itself to…mechanical calculation, but requires 'separate "mini-trial[s]"' of an overwhelmingly large number of individual claims," the need to calculate individual damages will defeat predominance); *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 791 (6th Cir. 2005) ("A plaintiff seeking class certification must present a damages model that functions on a class-wide basis."); *Reed v. Advocate Health Care*, 2009 WL 3146999, *22 (N.D. Ill. Sept. 28, 2009); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 531 (E.D. Tex. 2003); *Banda v. Corzine*, 2007 WL 3243917, *19 (D.N.J. Nov. 1, 2007).
[116] *Bradford v. UnionPacific R.R. Co.*, 2007 WL 2893650, **9 & 11-12 (W.D. Ark. Sept. 28, 2007); *Mattoon v. City of Pittsfield*, 128 F.R.D. 17, 21 (D. Mass. 1989) (class certification is not appropriate "if it seems likely that the class action 'would degenerate into a series of mini-trials before liability could be established.' (citation omitted) …cases likely to 'splinter into individual trials' are not appropriate as class actions.") (quoting *Nichols v. Mobile Bd. Of Realtors, Inc.*, 675 F.2d 671, 679 (5th Cir. 1982) and 3B *Moore's Federal Practice*, ¶ 23.45[2])).

VII. PLAINTIFFS CANNOT SATISFY THE TYPICALITY REQUIREMENT

For certification to be appropriate, the class representative's claims and the defenses to such claims must typify the claims and defenses applicable to the class.[117] Typicality focuses on the similarity between the named plaintiffs' and the absent class members' respective legal and remedial theories.[118] Although the class representative need not be the mirror image of absent class members, he or she must be "part of the class and possess the same interest and suffer the same injury as the class members" and must not be subject to unique defenses not shared by putative class members.[119]

The same individual issues that preclude satisfaction of the predominance requirement make it infeasible for Plaintiffs to be typical of the class they propose.[120] Although the Consolidated Complaint references a number of allegedly false representations, Plaintiffs fail to state that they relied on any of them, implicitly admitting that they did not. On this basis alone, they cannot satisfy the typicality requirement.

In addition, by virtue of when they purchased their PS3s, they could not have been subject to the same statements.[121] In fact, one of the statements alleged in the Consolidated Complaint could not form the basis of Plaintiffs' individual claims because it was made years after they purchased their PS3s.[122] The bases for their claims therefore differ from the absent class members' and even among the Underlying Actions Plaintiffs.[123] As a further example, although

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[117] Fed. R. Civ. P. 23(a)(3); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001).
[118] *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1998).
[119] *General Tel. Co.*, 457 U.S. at 156; *CRLA v. Legal Services Co.*, 917 F.2d 1171, 1175 (9th Cir. 1990); *Newman v. RCN Telecom Serv., Inc.*, 238 F.R.D. 57, 76 (S.D.N.Y. 2006); *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321 (9th Cir. 1997) ("Thus, when named plaintiffs are subject to unique defenses which could skew the focus of the litigation, district courts properly exercise their discretion in denying class certification.").
[120] The predominance and typicality requirements often overlap. *In re Neurontin Marketing, Sales Prac. and Prods Liability Litig.*, 257 F.R.D. 315, 321 (D. Mass. 2009); *Ritti v. U-Haul Intern., Inc.*, No. 05-4182, 2006 WL 1117878, *8 (E.D. Pa. April 26, 2006).
[121] *See* Section III(D), *supra*.
[122] *Id.*
[123] *Deitz v. Comcast Corp.*, 2007 U.S. Dist. LEXIS 53188 at **12-17 ("[P]laintiff admitted … that he had not read Comcast's policies and practices notice, the welcome kit, or even many of his bills. These are the very documents that plaintiff claims were misleading to Comcast subscribers. Here, plaintiff will have to prove reliance. Because Plaintiff did not read any of Comcast's communications, he will be subject to a unique defense that he did not read, and thus could not have relied on, any of the misstatements. It is predictable here that because of plaintiff's unique circumstances, 'a major focus of the litigation will be on defenses unique to him.' …

the Consolidated Complaint alleges that SCEA failed to adequately disclose that it had the right to disable the Other OS function, the Consolidated Complaint Plaintiffs fail to allege this claim on behalf of themselves.[124]

It is also clear that Plaintiffs purchased their PS3s for different reasons and used their PS3s in different ways than putative members of their proposed class, precluding resolution of the question of materiality through common proof.[125] Many class members admit that they did not purchase the PS3 because of the Other OS function, never used it, and did not care that Update 3.21, if downloaded, disabled its functionality. Clearly, Plaintiffs' concerns are not shared by these individuals. The Consolidated Complaint also makes clear that issues regarding materiality abound even among the five Consolidated Complaint Plaintiffs. For example, Stovell's admission that he never used the Other OS function on his PS3 during the over two year period before he downloaded Update 3.21 raises such questions.[126]

Finally, the Consolidated Complaint Plaintiffs admit that they have been affected and allegedly injured in different ways than other class members. First, they admit that, as a result of their differing decisions about downloading Update 3.21, their alleged injuries differ among themselves.[127] In addition, their concerns about obtaining relief stand in stark contrast to those of other class members who downloaded Update 3.21 without complaint.[128] Finally, the

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[Additionally,] because unique reliance issues will arise, plaintiff has not met his burden of proving that he is an adequate representative.") (citations omitted).

[124] Consolidated Complaint, ¶ 107.

[125] *See* Sections III(E) & F & VI, *supra*.

[126] *See Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 434 (C.D. Cal. 2007) ("adequacy of representation may be defeated when litigation of the matter could be overwhelmed by disposition of unique defenses"); see *also Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 U.S. Dist. LEXIS 53188, **12-17 (N.D. Cal. July 11, 2007) (finding that unique defenses defeated both typicality and adequacy); *see also Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner And Smith, Inc.*, 119 F.R.D. 344, 346-349 (S.D.N.Y. 1988) ("plaintiff did not see the Bulletin and did not rely on it when deciding to purchase CDs from defendants. … There is ample authority … for rejecting as class representative a claimant subject to unique defenses. … In the case at bar, the defenses of materiality [and] lack of reliance" prevent certification); *Gartin v. S&M NuTec, LLC*, 245 F.R.D. at 434 ("Plaintiff's claims are unique. … Plaintiff admits she never saw (let alone relied upon) any of NuTec's statements. This distinguishes Plaintiff's claim from those of many absent class members, as the Complaint alleges that NuTec's statements mislead class members."; "Plaintiff likely relied on entirely different representations than many absent class members [and is therefore] ill-suited to represent absent class members.").

[127] Section III(F), *supra*.

[128] Section III(E) and (F), *supra*.

Consolidated Complaint Plaintiffs allege a list of numerous additional injuries purportedly sustained by other class members, that they themselves did not sustain.[129] Clearly, resolution of these critical issues cannot be resolved based on common proof because Plaintiffs are not typical of the individuals they seek to represent.

VIII. INDIVIDUAL ISSUES REGARDING ENTITLEMENT TO MONETARY DAMAGES PRECLUDE SATISFACTION OF RULE 23(b)(2)

Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'"[130] Until recently, Ninth Circuit courts resolved whether monetary relief "predominates" over the equitable relief sought by looking to the plaintiff's subjective intent in bringing the lawsuit.[131] But nearly four months ago the Ninth Circuit Court of Appeals abrogated this rule and adopted another: "[t]o determine whether monetary relief predominates over injunctive or declaratory relief, a district court should consider, on a case-by-case basis, the objective 'effect of the relief sought' on the litigation."[132] In its ruling, the appellate court announced the following list of non-exclusive factors to be considered:

- "whether the monetary relief sought determines the key procedures that will be used,"
- "whether [the monetary relief] introduces new and significant legal and factual issues,"
- "whether [the monetary relief] requires individualized hearings, and"
- "whether [the monetary relief's] size and nature – as measured by recovery per class member – raise particular due process and manageability concerns."[133]

These factors weigh in favor of denying certification:

Whether the monetary relief sought determines the key procedures that will be used.

The request for damages "means that the key issue in this case, [SCEA's] liability, will be decided by a jury, rather than a judge."[134] "This significant procedural change weighs in favor of

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[129] Section III(F)(3), *supra*.
[130] *Dukes v. Wal-Mart, Inc.*, 603 F.3d 571, 623 (9th Cir. 2010).
[131] *See Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003) (*overruled on other grounds*).
[132] *Dukes*, 603 F.3d 571 at 617.
[133] *Id*. As of the date of this filing, no court other than the *Dukes* court has analyzed these factors in a published decision.
[134] *Id.*, at 621-22

finding that monetary relief would predominate if the punitive damages claims are certified…."[135]

Whether the monetary relief sought introduces new and significant legal and factual issues. The demand for compensatory, consequential, and punitive damages "will likely require [Plaintiffs] to introduce significant evidence and legal arguments that would not have otherwise been necessary; the need for such extra evidence and argument weighs in favor of a finding that monetary relief predominates."[136]

Whether the monetary relief sought requires individualized hearings. Because of the individual issues regarding each class member's entitlement to damages and in what amount, the damages demands will require individualized hearings. This also weighs in favor of finding that monetary relief predominates.[137]

Whether the size and nature of the monetary relief – as measured by recovery per class member – raises particular due process and manageability concerns. Depending on the facts of each class member's claim, the damages sought for the class could be substantial. The demand for restitution of the purchase price of their PS3s (between $599 and $299) along with their damages demands necessarily implicate due process and manageability concerns, and "militates in favor of finding that monetary relief predominates."[138]

IX. CONCLUSION

On the grounds set forth more fully above, defendant Sony Computer Entertainment America LLC respectfully requests that the Court enter an order striking the class allegations in the Consolidated Complaint.

Dated: September 10, 2010

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[135] *Id.*
[136] *Id.*
[137] *Id.* at 617.
[138] *Id.* at 622.