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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE RICHARD SEEBORG

In re: SONY PS3 "OTHER OS" )  
LITIGATION ) C 10-01811 RS  
 )  
 ) San Francisco, CA  
 )  
 ) Thursday  
 ) July 21, 2011  
 ) 1:54 p.m.

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**For Plaintiffs**

Calvo Fisher & Jacob, LLP  
One Lombard Street  
San Francisco, CA 94111  
(415) 374-8370  
(415) 374-8373 (fax)

**BY: JIM QUADRA  
REBECCA COLL**

**For Plaintiffs**

Pearson Simon Warshaw & Penny LLP  
15165 Ventura Blvd., Suite 400  
Sherman Oaks, CA 91403  
(818) 788-8300  
(818) 788-8104 (fax)

**BY: DANIEL L. WARSHAW**

**For Plaintiffs**

Finkelstein Thompson LLP  
100 Bush Street, Suite 1450  
San Francisco, CA 94104  
(415) 398-8700  
(415) 398-8704 (fax)

**BY: ROSEMARY M. RIVAS**

(Appearances continued on next page)

Reported by: Lydia Zinn, CSR #9223, RPR, CRR  
Official Reporter, USDC

**APPEARANCES (Continued)**

**For Defendants**

DLA Piper, LLP  
555 Mission Street, Suite 2400  
San Francisco, CA 94105  
(415) 836-2555  
(415) 659-7355 (fax)

**BY: LUANNE SACKS**

DLA Piper LLP US  
203 North LaSalle Street  
Chicago, IL 60601  
(312) 368-2143  
(312) 630-7385 (fax)

**BY: JOSEPH EDWARD COLLINS**

1           **THE CLERK:** C.10-1811, *In Re: Sony PS3 "Other OS"*  
2 *Litigation.*

3           Counsel, please state your appearances.

4           **MS. SACKS:** Good afternoon, your Honor. Luanne Sacks  
5 and Joe Collins, of DLA Piper, on behalf of Sony Computer.

6           **MR. QUADRA:** Good afternoon, your Honor.  
7 James Quadra, on behalf of the plaintiffs.

8           **THE COURT:** Good afternoon.

9           **MS. RIVAS:** Good afternoon. Rosemary Rivas, on  
10 behalf of the plaintiffs.

11           **THE COURT:** Good afternoon.

12           **MR. WARSHAW:** Good afternoon, your Honor.  
13 Daniel Warshaw, Pearson Simon Warshaw, appearing for  
14 plaintiffs.

15           **THE COURT:** Good afternoon.

16           **MS. COLL:** Good afternoon. Rebecca Coll, for  
17 plaintiffs.

18           **THE COURT:** Good afternoon.

19           This matter's on calendar for Defendants' Motion to  
20 Dismiss the First Amended Consolidated Class Action Complaint.

21           I have spent sometime with the papers that you've all  
22 submitted. What I'd like to do is -- let me start with  
23 focusing on the implied -- express and implied warranty claims,  
24 and then we'll proceed to discuss the other claims.

25           And why don't I start with the plaintiffs first; with

1 Mr. Quadra, or whoever else is proposing to address this.

2 **MR. QUADRA:** Sure, your Honor.

3 **THE COURT:** I suppose I can start with my first  
4 question, which is --

5 **MR. QUADRA:** Sure.

6 **THE COURT:** -- the big difference between the last  
7 complaint and this one, in terms of an item that is being  
8 presented as a basis for these claims, particularly the express  
9 warranty claim, is the statements by Mr. -- I think his name is  
10 "Harai" -- about the life cycle, if you will, of the PS3.

11 And I suppose my question is: Aren't you expecting  
12 that statement to carry an awful lot of water here, in terms of  
13 providing any kind of warranty that the Other OS function is  
14 going to be maintained in seeming perpetuity, and in no way  
15 will be affected going forward; at least, with respect to this  
16 ten-year period that you're identifying? It's a very general  
17 statement about the market cycle of a product. And to  
18 transform that into the flagship of your warranty claim seems  
19 to be expecting a lot out of that statement.

20 **MR. QUADRA:** Well, your Honor, let me at least  
21 clarify one point. Our allegation is not that it is a  
22 market-cycle statement; that, in fact, it refers to the life of  
23 the product, itself.

24 When it was first made, that specific statement in  
25 its entirety, which I believe -- the defense counsel sort of

1 cut part of the quote -- goes on to say that they're not  
2 envisioning putting out a new product, because they purposely  
3 make their products to last this period of time.

4 **THE COURT:** But the fact that they will not be  
5 putting out a new product is very different than saying,

6 "We are warranting that all of the  
7 functionality of the existing product will  
8 be maintained for ten years."

9 I mean, that's essentially what I see you saying I  
10 should read that statement to mean; and I think that's a very  
11 tall order.

12 **MR. QUADRA:** I understand the Court's concern.

13 What I'm trying to say, first, is that it's -- it's  
14 not a product cycle; it's a life cycle. It's based on the PS2,  
15 as they then claimed, lasting that long. And in this  
16 particular case, it's also coupled with the representations  
17 that the product, itself, would last -- would last that long.

18 And later on, actually, after the product was then  
19 marketed, they then reiterated that statement. As recently as,  
20 I think, 2011, they talk about the fact that the product lasts  
21 ten years. And so, coupled with the representations regarding  
22 what the product features are going to be -- those express  
23 statements -- that's our position; that --

24 **THE COURT:** Yes, but you're now saying that I should  
25 take that statement, and interpret that statement to say -- and

1 I know we're at the pleading stage, so, you know, all  
2 inferences go to you; but I'm supposed to interpret that fairly  
3 basic statement as saying,

4 "We are warranting that the OS feature  
5 will be maintained for ten years, and that  
6 consumers will be able to upgrade all other  
7 aspects of this product, and get the  
8 benefit of that. And all of that is what  
9 we're warranting to."

10 **MR. QUADRA:** Correct.

11 **THE COURT:** That's an awfully tall order.

12 **MR. QUADRA:** I understand the Court doesn't -- and we  
13 had the same -- similar issues last time when we addressed them  
14 to you.

15 Our position is that the case law supports the notion  
16 that the express statements made regarding the product, its  
17 functionality, its features, coupled with the fact that  
18 management at Sony was saying, "This product will last you ten  
19 years, and it will be an evolving product. It will be a  
20 computer that gets updated through firmware," is clearly  
21 conveying to consumers something they can rely on as a  
22 warranty.

23 **THE COURT:** Well, and let me just make sure that I am  
24 clear on this. You're saying "statements made." Is there any  
25 statement made before these particular plaintiffs purchased

1 their product, other than this ten-year statement by Mr. Harai?  
2 Is there anything else?

3 **MR. QUADRA:** Regarding the temporal issue, you're  
4 saying?

5 **THE COURT:** Pardon me?

6 **MR. QUADRA:** Regarding the time? The time that the  
7 product would be available? The life cycle?

8 **THE COURT:** Well, I'll broaden the question.

9 Anything about the OS feature and its continued  
10 maintenance, and how the OS feature would interact in any  
11 respect with respect to the other functionality of the PS3.  
12 What are the other -- where are the statements?

13 **MR. QUADRA:** All right. As we pled in the complaint  
14 here -- I mean, in the complaint, your Honor, there are  
15 numerous statements made.

16 The statements are not specific regarding a time.  
17 It's not specific about the OS -- Other OS system; but there  
18 is, both on the box it references the OS system; websites that  
19 Sony put out that inform the consumer about the OS system.  
20 And -- and it's touting it as a primary feature of this  
21 product, and saying -- later on, you know, it's saying before  
22 the sale that it was a huge factor in this particular product  
23 that was a computer; that it would have updates to its  
24 software. So there were plenty of statements regarding the  
25 importance of this feature prior to the sale.

1           Now, if you're asking, "Did they say, 'We will never  
2 take it off'" in those particular words, no; but then again,  
3 that's not what a reasonable consumer would believe. If you --  
4 if I sell you a car, I'm not going to have to tell you that I'm  
5 going to take out the GPS. If I sell you OfficeSuite, I'm not  
6 going to tell you, "I may take out Excel."

7           I think it's a reasonable conclusion of a consumer  
8 that is informed by all of these aspects of sale: By the  
9 website; by the packaging.

10           **THE COURT:** But for how long? For how long?

11           **MR. QUADRA:** For the life the product. The product  
12 -- this is hardware, basically. And you're not expecting it to  
13 last for perpetuity. That is not the case.

14           The case is that it has a life cycle -- the product,  
15 itself. And to expect that within that life cycle, I'm going  
16 to remove an important feature is unreasonable for a consumer.

17           **THE COURT:** But again, you're not removing anything.  
18 They're upgrading. And, in the process, If you want the  
19 upgrade, as I understand it, it will then have a deleterious  
20 effect on this other feature.

21           They're not removing the other feature. You can  
22 maintain the other feature if you elect not to have the  
23 upgrade, right?

24           **MR. QUADRA:** Well, if you get the upgrade, 3.21, what  
25 you have to do is decide: Do I give up some features for



1 others? And that's deleting it. That's taking it away. You  
2 get --

3 **THE COURT:** If you elect to take the upgrade.

4 **MR. QUADRA:** It's not much of an election.

5 If I had, at the purchase price, been told, "Two or  
6 three years from now" -- I'm buying this because of the  
7 combined package being sold to me. It's got Blu-ray;  
8 game-playing capacity; and I can go on use it as a computer.

9 If I buy that, and it's priced with those features,  
10 and instead, you tell me,

11 "No. You know what I'm going to do?

12 I'm going to sell it to you with those  
13 features now. I make no promises it's  
14 going to keep them. So tomorrow, after you  
15 give me \$600, I can take it away from  
16 you" --

17 -- they wouldn't have been able to sell it. That's  
18 why they didn't make those representations. That's why they  
19 didn't disclose. And there's an omission of a fact that's  
20 crucial here: That the consumer could rely on the validity of  
21 thee statements to last the lifetime of this product; but they  
22 didn't do that. They didn't say that.

23 In fact, they made statements subsequent to the sale  
24 of the PS3.

25 (Reporter requests clarification)

1           **MR. QUADRA:** They made statements in which they  
2 reassured consumers when they put out the Slim that it didn't  
3 have this feature -- "Be reassured we're not going to take this  
4 away" -- confirming that they understood that consumers who had  
5 purchased it would have been worried about that, because they  
6 relied on it.

7           **THE COURT:** Is it your position that they were  
8 obliged, through some warranty concept, to keep access to the  
9 network always available? I mean, what are the aspects of the  
10 features of this product that you say they have to maintain?  
11 And isn't that critical, also, for your argument?

12           I mean, in order for you to say that somehow they  
13 have breached the warranty when they offer this upgrade,  
14 implicit in that is that they have an obligation also to  
15 maintain the access to the network; to all these other  
16 features. They have to maintain those, too, right?

17           **MR. QUADRA:** Correct, your Honor.

18           I think that the crucial features are identified in  
19 many of the representations made prior to the sale, and in the  
20 box, itself. I think access to the PSN network is a crucial  
21 feature that they did taut. Blu-ray -- being able to play  
22 those DVDs -- is important; and the game-playing capacity; and  
23 then to be able to do it on the PSN network.

24           But more importantly, you did raise the issue about  
25 these upgrades, these updates. Those are represented to be

1 upgrades. Firmware.

2 To say that there's nothing in the disclosure that  
3 they claim is a contract regarding the service and use of this  
4 product, that says that firmware can be used to make this kind  
5 of forced choice, and take away any of those features -- it is  
6 to upgrade. So the only reasonable conclusion, reading that,  
7 is going to be you're going to do something that improves the  
8 functionality; not deletes from it.

9 So again, I think the representations made, both  
10 prior to and during the sale, and subsequent, support both an  
11 express and an implied warranty, your Honor; but I understand  
12 the Court has concerns. Let me brief them.

13 **THE COURT:** Well, let's talk now about the implied  
14 warranty claim and, again, the privity issue that we had  
15 discussed before.

16 You had my prior ruling, obviously, with respect to  
17 those claims. What is it now, other than, you know, reasonable  
18 minds can differ, and you disagree with what my prior order  
19 reflected with respect to the implied warranty, how is it --  
20 why should I look at it differently this time, in terms of your  
21 first consolidated complaint, on the implied-warranty issue,  
22 other than to say, "Well, you were just wrong the first time"?

23 **MR. QUADRA:** I'll beg not to say that. How's that?

24 **THE COURT:** Well, it won't offend me.

25 **MR. QUADRA:** But what we say -- I think we've pled

1 more specifically, pursuant to what the Court did rule, to try  
2 to address your concerns. We pled specifically what is a novel  
3 issue that I think, simply by the fact that it's novel, should  
4 survive this, and allow us discovery to put it forth in more  
5 specific terms and various -- you know, as we present the case;  
6 but in particular, I think the issue here is that now Sony has  
7 admitted that they call the documents that -- a contract, at  
8 the beginning of this process: The warranty, the licensing  
9 agreement, the terms of service and use. And in those, they --  
10 they basically continue. They form a contract with the user.

11           And then it is required, if they want to be part of  
12 the PSN network, to then continue to deal not with a retail  
13 outfit; not with Best Buy or whomever they bought it from if  
14 they didn't buy it directly from Sony, which they could have;  
15 but with Sony directly. So they have a continuing relationship  
16 where they're directly addressing Sony on these issues.

17           **THE COURT:** The distinction your counterparts draw is  
18 they say, "Well" -- and this is -- I think *U. S. Roofing* is  
19 perhaps the case involved in this proposition. You know,  
20 that's all well and good when the direct relationship -- even  
21 if the purchase is not from, say, the manufacturer, if,  
22 presale, there is some contemplation of a transaction with the  
23 manufacturer, some ongoing relationship; but when you're  
24 already at the point that the product has been purchased, and  
25 then, down the line, there is some point in time where the

1 manufacturer gets back in the picture because you're doing some  
2 acquisition of ongoing services and the like, that's not what  
3 the case law says is the privity-establishing contact that you  
4 need.

5 So they draw this presale/post-sale distinction. And  
6 they read the case law as saying,

7 "If it's not presale, it's not going to  
8 get you where you need to go."

9 **MR. QUADRA:** To address that issue briefly,  
10 your Honor, because I don't want to take too much time on the  
11 warranty, because we have so much more to talk about, but  
12 *U. S. Roofing* and *Cardinal Health* stand for the proposition of  
13 a continuum. It begins in sale process, and it continues.

14 I would point out presale conduct by Sony was to taut  
15 not only the Other OS system, but the PSN network. And that  
16 then, prior to the sale, envisioned the continuing relationship  
17 and privity.

18 It isn't something that magically happens a year  
19 after. Oh, they now put out the PSN network, and we're going  
20 to have direct contact with them. It's contemplated presale  
21 and at the time of sale. And the date after you buy this  
22 product, people are on the PSN network having a direct  
23 relationship with Sony.

24 **THE COURT:** On the proposition that you presented a  
25 moment ago, about, well, you know, give us some discovery.

1 It's a novel concept, and we need to be able to flesh it out --  
2 if there is isn't support for that novel theory, isn't the  
3 appropriate approach that I make my ruling; you seek review;  
4 and on review, if a novel concept not otherwise existing is  
5 embraced -- okay? But is it -- is it for the District Court to  
6 decide: Well, while I can't find any support for it, it's an  
7 interesting possible approach, so I'll give them a chance to go  
8 forward? I mean, is it --

9           **MR. QUADRA:** Well, actually, we cited a case,  
10 your Honor. I don't remember the exact name of it. I could  
11 look it up in our brief; but it actually stands for the  
12 proposition that a novel theory does -- should survive a motion  
13 to dismiss, and stay in this court, and allow us discovery; but  
14 I agree with you if it was completely made out of, you know,  
15 the air, that would be different.

16           This is not. "Novel" meaning an interpretation of  
17 *U. S. Roofing* and *Cardinal Health*. It varies maybe a little  
18 bit from the facts, but the basic premise is the same; that  
19 there's this continuum, and that there is this ongoing  
20 relationship that was -- everybody knew they were going to  
21 enter even before they bought the product.

22           **THE COURT:** Why don't I hear from the defense on the  
23 warranties issue, and then we'll come back to the other claims.

24           **MS. SACKS:** Your Honor, I think Counsel misspoke,  
25 because he made a statement that the Other OS was represented

1 as a feature on the box. That is absolutely not so. It's  
2 never been pled. I'm assuming it was just a misstatement.

3 **THE COURT:** There are, however, some promotional  
4 materials, if I recall correctly, that, while it doesn't  
5 necessarily say specifically "the Other OS feature," it does  
6 suggest that the device can be used as a computer, and not  
7 simply a game console, right?

8 **MS. SACKS:** Yes, your Honor. There were some  
9 articles that came out. There was a press release that came  
10 out in advance of the release that mentioned it, among many  
11 other things; but when you talk about a core feature, I think  
12 it's very illuminating that it's not on the box. And so  
13 somebody couldn't have walked in, not having reviewed anything  
14 else, and said,

15 "Oh, I'm buying this because it offers  
16 this feature."

17 I'd like to turn for a moment to this idea of the  
18 ten-year market cycle. I'm looking at the statement that's  
19 attributed to Kaz Harai. It's at paragraph 122. And I think  
20 what's really important to focus on is: He's talking about a  
21 console; he's talking about hardware. Specifically, he said,

22 "Therefore, the PlayStation 3 is going  
23 to be a console that's going to be with you  
24 again for ten years. We're not going to  
25 ask the consumers to suddenly buy another

1 PlayStation console in five years' time."

2 Another statement was attributed to him at paragraph  
3 123:

4 "Last time I checked, Microsoft never  
5 had a console that's been on the market for  
6 more than four or five years."

7 Another statement attributed to a Sony executive  
8 that's way back in spring 2009 -- so, long after anyone did  
9 their purchase -- he describes the platforms; the Playstation 3  
10 console platform. Similarly, 2011 -- February 2011 -- again,  
11 long after anyone purchased, the description is:

12 "We provide hardware that will stand  
13 the test of time."

14 Very clearly, this discussion is about the  
15 PlayStation console as a product.

16 **THE COURT:** But is it so clear that on a motion to  
17 dismiss, you can find that that's the only possible reading of  
18 it?

19 I mean, you may well win the day when you make your  
20 motion for summary judgment, but at this stage of the game, is  
21 it really something that I can determine, if you can give any  
22 plausible reading to that statement that it is suggesting that  
23 the functionality of this PS3 for a ten-year period is going to  
24 be maintained? If you can read that --

25 And even if I was to find I don't think that's what



1 it means, but perhaps I can see how someone could read into the  
2 "ten-year" comment that it applies to the functionality will be  
3 maintained for that period, don't I have to let it go to the  
4 next stage, at the very least?

5 **MS. SACKS:** Your Honor the difficulty with that is  
6 that we're talking about this, first, in the context of an  
7 express-warranty claim. And, as your Honor previously said, to  
8 stay an express warranty, there has to be an explicit  
9 affirmation of fact that is material, and it is reasonably  
10 relied upon.

11 Now, two of the five named plaintiffs concede they  
12 never heard about this "ten-year."

13 The other three claim that they saw it somewhere, and  
14 at the same time, they also looked at Sony's website  
15 prepurchase.

16 So what's very, very prominently displayed on Sony's  
17 website? The express warranty for one year.

18 How can you say that it was reasonable for someone to  
19 assume this was a guarantee of continued product performance --  
20 not just product, but software performance -- when, in fact,  
21 the actual written statement that is being provided to  
22 people -- and it is displayed to them when they're doing their  
23 prepurchase research -- says exactly the contrary?

24 Another part of the reasonableness of it is that they  
25 state in here that no other consoles have ever been around this

1 long. This is just the PS3's platform.

2 Counsel said that this would be the time the product  
3 would be available.

4 So what basically we have to accept, if you're going  
5 to accept this precept, is that if, for any reason, any aspect  
6 of the PS3 or any software associated with it fails before ten  
7 years, it's a defect; it's a breach of that express warranty.

8 How can you get there, when you have the actual  
9 statement that was made to consumers?

10 The other part of it is that when this research was  
11 being done on the website, the other thing sort of prominently  
12 displayed are the terms of service with regard to the PSN and  
13 the system software license agreement.

14 **THE COURT:** Which they claim is contract of adhesion.

15 **MS. SACKS:** Well, I'm interested in the dichotomy  
16 here. In one instance, it's the things that establish direct  
17 privity. It's a contract, so that there's a relationship  
18 there; but on the other hand, it's a contract of adhesion, and  
19 it's not enforceable because nobody saw it until after they  
20 made the purchase, although, of course, we know if people are  
21 reviewing the website, especially to the degree that the  
22 plaintiffs allege they did, that those statements -- those  
23 contracts -- are right there.

24 And both the systems software license agreement and  
25 the terms of service made clear that they can be disrupted,

1 changed, altered, terminated at any time. And that's reserved.

2 So again, you can't take this statement about a  
3 ten-year market cycle, standing in complete isolation. You  
4 have to look at the context of it.

5 The other thing is materiality. And if, in fact,  
6 this statement was so material to the purchase decisions by  
7 three of the plaintiffs, why is it that the first time we heard  
8 about it as a representation that they relied upon was more  
9 than a year into this lawsuit?

10 I have to remember it was not alleged in their  
11 original complaints prior to consolidation. It was not alleged  
12 in the first consolidated complaint. It only suddenly came up  
13 when your Honor demanded that plaintiffs produce some aspect of  
14 a temporal statement.

15 **THE COURT:** Well, but isn't that always the way it  
16 is? I mean, you start out with a complaint that perhaps  
17 doesn't have the level of detail that you think it does, but  
18 the Court determines that it doesn't. And so you replea. So  
19 the idea that there was something that is now added by virtue  
20 of the response to my order that dismisses the complaint, to  
21 then say,

22 "Well, not only is that the not going  
23 to be sufficient, but we think it indicates  
24 that you don't really mean it" --  
25 -- is a bit harsh.

1           **MS. SACKS:** Your Honor, if the original complaints  
2 that we referenced had been vague, had been nonspecific about  
3 the representations that the plaintiffs originally relied upon,  
4 I might agree with you; but in fact, they alleged everything  
5 else. They alleged all of the functions, all of the features  
6 that supposedly induced these people to buy it; but now we're  
7 hearing for the first time that this ten-year promise was truly  
8 material to their purchase.

9           What suddenly prompted that lightbulb to go on?

10           Obviously, it may be that somebody forgot it, but to  
11 suddenly have three individuals who say that this was material,  
12 none of whomever said it before, is a little striking.

13           **THE COURT:** But, even were I to agree with that, I'm  
14 not sure at the pleading stage that that determination can be  
15 made.

16           **MS. SACKS:** This does highlight a problem, though,  
17 your Honor. If this is going to be the basis of an express  
18 warranty, what do we do with all of the people who never saw  
19 it, like two plaintiffs here: Mr. Baker and Mr. Stovell?  
20 We're going to start talking about plat certification issues  
21 again.

22           **THE COURT:** Well, that's for another day.

23           **MS. SACKS:** Well, it is, except that, if this is  
24 really something that people believed was the promise about the  
25 life of the unit, why wouldn't purchasers have heard it

1 ubiquitously?

2           **THE COURT:** Well, but my point is that if, indeed,  
3 that is the basis for the claim going forward, the class would  
4 be defined in a way that addresses your concern, because  
5 perhaps it's those who -- the class consists of those who have  
6 seen and relied upon -- can present an undertaking that they  
7 did, in fact, see and rely on it. I'm not suggesting that  
8 that's how the class would be defined, but you understand my  
9 point.

10           I mean, to the extent that you're saying there are  
11 certain people who would be outside of the contours of the  
12 claim, that's something that can be addressed in the  
13 class-certification process.

14           **MS. SACKS:** Essentially, your Honor, we would be  
15 eviscerating completely the manufacturer's express warranty;  
16 the written warranty that came with these products that said  
17 one year, which also disclaimed implied warranties, which we'll  
18 talk about in just a second; but when you're sitting there, and  
19 people are handed that, they have it in advance, available to  
20 them in the course of their research.

21           How can they say that they reasonably relied on a  
22 statement in an interview? It's not something that came with  
23 the purchase. It really turns express warranty on its head.

24           **THE COURT:** Why don't we now move to implied  
25 warranties?

1           **MS. SACKS:** We talked a little bit about the idea  
2 that the -- it seems like the terms of service, the systems  
3 software license agreement, and that written express  
4 warranty -- they're good for the goose, but not good for the  
5 gander. They're good to create some kind of direct privity  
6 relationship, but they're not enforceable.

7           And the idea that somehow, based on things that the  
8 plaintiffs say they didn't see and didn't rely upon, creates  
9 this type of direct-dealing relationship that is demanded,  
10 creates privity with regard to the purchase of the product,  
11 just runs afoul of the law.

12           You know, you have to think about the setting of  
13 *U. S. Roofing*. There was money that exchanged hands before the  
14 purchase between the two people who then were alleged to be in  
15 privity. This would turn the entire law of warranties with  
16 regard to consumer products on its head.

17           The reason for a privity relationship that's required  
18 is because you're buying a product from a retailer who -- all  
19 they did was sell it. So they'd only have that liability.

20           You get to the manufacturer. That's where you come  
21 up with an express warranty, if something was made; but  
22 suddenly, we're melding them all together. So from now on,  
23 every time somebody buys a washer at Circuit City, it's going  
24 to have an implied warranty also from the manufacturer of that  
25 washer. And it's just -- there's no basis for it.

1           **THE COURT:** But in this day and age, as plaintiffs  
2 suggest, the nature of product purchase could be that,  
3 virtually simultaneously with the purchase, you go and you load  
4 it on.

5           So let's assume you buy some computer-related game,  
6 or whatever else. And you load it on to your system. And  
7 you're almost immediately in contact with the manufacturer for  
8 ongoing services.

9           Do you really think that the dividing line is the  
10 moment that that transaction has occurred?

11           If you don't have this prior contact, if you will,  
12 with the manufacturer, then implied warranty is out the window,  
13 because there's no privity?

14           I mean, in other words, is privity as severely  
15 delineated as the moment of purchase is what we have to look  
16 at; and *U. S. Roofing* only gets you to that point? And if  
17 you're beyond the moment of purchase, you don't have privity?  
18 No implied warranty?

19           **MS. SACKS:** I would say yes, your Honor.

20           **THE COURT:** Okay.

21           **MS. SACKS:** I mean, otherwise, what's the point of  
22 having it in the language of an implied warranty requirement?

23           **THE COURT:** But you understand my point? It's that  
24 the nature of the transactions are changing now, and that the  
25 classic, old-style transaction of buying a toaster and, you

1 know, you take it home, and you plug it in -- you're not going  
2 to have any kind of immediate service connection with a  
3 manufacturer; but if you have some software that you're buying,  
4 you may -- in the process of downloading it, you're already  
5 getting involved with the upgrades and all the rest of it.  
6 It's a slightly different world.

7 **MS. SACKS:** One of the problems, your Honor, is --  
8 and I don't mean to go outside the record, but I think this is  
9 undisputed. Roughly 40 percent of the PS3 purchasers never  
10 went onto the PSN; never got that direct dealing. And so they  
11 don't have an implied warranty, but the people who went onto  
12 the system do. And when they went onto the system, they were  
13 presented, before they could access it, with the system  
14 software license agreement. And it told everybody what the  
15 nature of the relationship was.

16 So to simply say that you go online and you -- you  
17 have some interaction begs the question of what that  
18 interaction is.

19 Do you have any other questions on implied warranty?

20 **THE COURT:** No. I think why don't we now move to  
21 the --

22 **MS. SACKS:** If I may add one thing that I'm sorry I  
23 forgot --

24 **THE COURT:** Yes.

25 **MS. SACKS:** We were talking before about the



1 obligation to keep the PSN available forever.

2 **THE COURT:** Yes.

3 **MS. SACKS:** The *Leong* case.

4 **THE COURT:** It was a question I asked.

5 **MS. SACKS:** The *Leong* case, which we've cited in our  
6 papers, goes directly to that. That's a clickwrap agreement.  
7 It came after the purchase. It told people that if you didn't  
8 conform with the terms of service, that you could be  
9 terminated.

10 The notion that any service provider has some  
11 unending requirement to provide a service that it's providing  
12 as a license -- I mean, this is not something that people  
13 bought. This is something that was provided to them under  
14 specific, strict terms. And, unless they told them,

15 "By the way, the PSN's going to be here  
16 forever" --

17 -- they had no expectation that it would. And, in  
18 fact, as we know, as a result of the massive hacking event of  
19 Sony's servers, the PSN was down for weeks, because it couldn't  
20 otherwise, you know --

21 **THE COURT:** Is that, by itself, from your  
22 perspective, a defect in plaintiffs' claims?

23 I mean, in other words, the very fact -- is an  
24 essential premise of any claim that the Other OS feature has  
25 been somehow impacted -- would only be viable if there was some

1 obligation to keep the other functions going: The PSN?

2 In other words, if you can say your position is we  
3 can shut off the PSN, then, to some extent, there's nothing  
4 that someone who's focused on the OS feature is really harmed  
5 by. In other words, they can continue to operate the OS  
6 feature; they just can't get the upgrades.

7 Well, if they don't have a right to the upgrades,  
8 they don't even have a right to the access to the PSN system,  
9 then how do they have a claim that somehow, by virtue of the  
10 upgrade being there, they're somehow impacted, if you can  
11 follow my question?

12 **MS. SACKS:** Yes, your Honor. And that's what the  
13 system software license agreement tells everybody; that we can  
14 provide update to you. And those could be security patches.  
15 Those could change features or functions. They can alter  
16 things; but I think if we go back to the allegations of the  
17 most recent complaint, you'll probably recall that there are  
18 paragraphs and paragraphs and paragraphs about all of these  
19 people -- typically, governmental agencies; the U.S. Air  
20 Force -- that purchased the PS3 solely to use it as an  
21 operating system computer, and never bothered to go on the PSN,  
22 and didn't buy games, and didn't buy movies.

23 Well, the release of this firmware update that people  
24 were choosing between having the PSN access or having the  
25 Other OS access -- those folks who were using the OS in that

1 capacity were in no way injured at all. They bought the  
2 product for that purpose. They still have it for that purpose.  
3 And we know two of the plaintiffs are still using the Other OS.  
4 Sony is still supporting the Other OS function, which just --  
5 since I'm at that point, I'll loop around, and then I'll  
6 finish.

7           You know, this new idea that plaintiffs have that the  
8 reason for the release of the Other OS update was to save  
9 money -- your Honor, it just doesn't make any sense. If the  
10 idea is that we don't want to incur the continued costs of  
11 supporting a function, we would just stop supporting the  
12 function. That's the easy and cheap way to do it.

13           We wouldn't go through the expense of  
14 creating/engineering and the ability for people to either have  
15 the function that plaintiffs say made us a lot of money --  
16 access to the PSN -- or continue to have access to this  
17 function that costs us a lot of money, and doesn't reap any  
18 rewards for us. We'd just stop.

19           **THE COURT:** Do you think that supports the notion  
20 that it's a security motivation?

21           **MS. SACKS:** Absolutely, your Honor. And I think all  
22 we have to do is read the newspaper. I mean, Sony was the  
23 victim of the largest hack ever. 75 million people's data was  
24 taken.

25           **THE COURT:** I think I have those cases also, so yes.

1 Okay.

2 **MS. SACKS:** Thank you, your Honor.

3 **THE COURT:** Let's go to the other claims.

4 **MR. QUADRA:** Just a couple -- could I address a  
5 couple of those?

6 **THE COURT:** Yes. Go ahead.

7 **MR. QUADRA:** In *Cardinal Health*, the Court held that  
8 although direct dealings between a purchaser and manufacturer  
9 after the purchase are generally insufficient to create an  
10 exception to the privity requirement, whereas here, the  
11 essential -- here, the essentially -- they essentially adopt  
12 the benefit and the initial sales negotiations, and there are  
13 numerous direct dealings between the parties, the requisite  
14 privity can be established. And that's the basis for our  
15 novel, you know, claim. At the time of purchase, people were  
16 thinking we're going to use the PSN. We're going to have  
17 continuing relationships with them.

18 And, aside from the fact that Counsel doesn't like  
19 our pleadings, much of what she said lies outside of the  
20 pleadings. It's fact disputes that are for a later date.

21 **THE COURT:** Well, but when you just told me about the  
22 motivation of various purchasers, I'm not sure that's in part  
23 of this --

24 **MR. QUADRA:** Yeah.

25 **THE COURT:** -- as it's currently constituted.

1           **MR. QUADRA:** Well, I think our complaint sets forth  
2 that there was this continuum that begins with the purchase,  
3 and continues into the sales.

4           What Counsel is saying is only --

5           **THE COURT:** No, no. My point is you were just  
6 telling me that particular purchasers have particular notions  
7 of what's going to happen.

8           Well, that may well be, but I don't think, with  
9 respect to the particular class members -- for example, the  
10 representative plaintiffs -- I have that in here, about what  
11 their intention was, and all of the rest. I'll go back and  
12 look at it.

13           **MR. QUADRA:** Well, your Honor, to use the Other OS  
14 system, to continue to use it, you had to be on the PSN  
15 initially. So there was this understanding that they were  
16 going to be part of it.

17           And -- and what I'm saying is when plaintiffs'  
18 counsel sits here and says, "40 percent of this," and "We've  
19 been hacked" -- this -- these are outside of the pleading.

20           And their arguments regarding our facts and the  
21 credibility of those facts -- that's not for today.

22           **THE COURT:** All right. We have --

23           **MR. QUADRA:** I think --

24           **THE COURT:** Pardon?

25           **MR. QUADRA:** Yeah. One more point is just -- in

1 February of '07, just because of the importance of the future,  
2 which I think carries on to these other issues, Phil Harrison,  
3 from Sony, tells *Newsweek* that the Other OS feature is a  
4 powerful feature of this product. So, to the extent -- and  
5 there are numerous representations to that effect.

6 To the extent that Counsel's trying to diminish the  
7 importance of this feature, it just does not comport with the  
8 facts as pled in the complaint.

9 **THE COURT:** But doesn't diminish -- the feature can  
10 remain.

11 Your point is that it's not just that the OS feature  
12 is a valuable aspect of this product. You're -- critical to  
13 your claim is: You want it all.

14 In other words, it's not only a critical part of the  
15 product; but every other functionality has to be able to  
16 operate with it.

17 So simply establishing that the OS feature to some  
18 people is of importance doesn't really get you very far.

19 **MR. QUADRA:** Well, it does, your Honor, because I  
20 think that the Other OS feature -- people could buy a cheap  
21 computer and put Linux on it, potentially, right?

22 **THE COURT:** Sure.

23 **MR. QUADRA:** I mean it wasn't -- it was the  
24 combination of all of these factors that made it a particularly  
25 important feature for this product. And the product had all of

1 these aspects to it.

2 I mean, it isn't like the -- the PS3 is the only  
3 hardware you can load a Linux on.

4 **THE COURT:** Some of this now may segue into your  
5 other claims --

6 **MR. QUADRA:** Right, right.

7 **THE COURT:** -- because what you've just said doesn't  
8 necessarily address the warranty claims.

9 Now, there may be arguments that you're going to make  
10 with respect to whether or not it's unfair practice to  
11 characterize a product as doing these things, when it doesn't  
12 do all of these things, or whatever; but in terms of the  
13 warranty claims, what you've just said is a bit amorphous, if  
14 you're trying to see how it actually does or does not make out  
15 a viable warranty claim.

16 **MR. QUADRA:** I was addressing Counsel's, sort of,  
17 trying to parcel out the word "console" versus "computer."

18 **THE COURT:** Okay.

19 **MR. QUADRA:** And in that setting, I think the console  
20 encompassed the computer in this product.

21 **THE COURT:** Okay. Now, as I understand it, there  
22 are -- you've got a CLRA claim; an FAA claim; a Magnuson-Moss  
23 Warranty claim, which I don't think -- I would suggest we don't  
24 need to really talk about it. It will rise or fall, I think we  
25 all agree, on the viability of the underlying warranty claims.

1 17500, false advertising.

2 1700 -- 17200 UCL claim.

3 And then unjust enrichment, which, I think, in  
4 response to my order where I was skeptical as to whether or not  
5 that was an independent claim, you've now come back and kind  
6 of, as I understand it, refined it to pertain to one of your  
7 plaintiffs, and also refined the class that would be impacted.  
8 And you told me,

9 "Well, for that defined group, an  
10 unjust-enrichment claim is appropriate."

11 So I don't know what order you want to discuss these  
12 things, but I would invite you to address them.

13 **MR. QUADRA:** Sure, your Honor.

14 The Computer Fraud and Abuse Act -- let's start  
15 there. That's a claim that the Court found was viable to  
16 continue.

17 **THE COURT:** Well, I want to make sure that that's  
18 not -- you don't read too much into my order.

19 My order was -- in part, I didn't quite know what  
20 type of claim you were formulating. And I wanted to see it  
21 fleshed out further. I didn't say that you've survived the  
22 motion for summary -- to dismiss on the FAA claim. I think I  
23 made it clear that I was going to look at it again in the  
24 context of all of the claims.

25 So go ahead.



1           **MR. QUADRA:** So starting there, your Honor, I  
2 think -- where I think Sony is incorrect is in looking at it  
3 from the wrong perspective. I think that the claim is clear;  
4 that what it says is that there is -- it's a violation Computer  
5 Fraud and Abuse Act to damage a product without authorization.

6           And here our position is -- and we spell it out in  
7 the complaint -- that there was no true authorization to do  
8 anything to the system to take away any valuable feature; that,  
9 in fact, 3.21 -- that upgrade was not an upgrade. It was, as  
10 my co-counsel said, a Hobson's choice, where you were forced to  
11 give up an important feature or another important feature. And  
12 therefore, it was not a true choice, and therefore, not  
13 authorized. It was forced upon the consumers.

14           And in that case, we have we cited the *Apple* case,  
15 where there was no authorization, and yet phones were destroyed  
16 when they were being kept; and also the *Cisco* case, where a  
17 password was demanded from an employee, and that was found to  
18 not be true authorization, because it violated policy.

19           So here, again, the promises regarding what was going  
20 to happen with the upgrades was that it would fix problems;  
21 that it would make the computer and the part of it in the  
22 console evolve.

23           If you look at the language of the warranty  
24 agreement, if you look at the language of the terms of use, if  
25 you look at the licensing agreement, the language is not

1 specific. And it does not disclose -- and it is an omission,  
2 if that's what they're relying on -- to say that that allowed  
3 for a feature to be discontinued.

4           And so our position is that the Computer Fraud and  
5 Abuse Act clearly demands that they not do that; that they  
6 can't reach into a product and damage it, without  
7 authorization. They lacked that authorization. That's what  
8 we're pleading. Again, this is the pleading stage. And  
9 therefore, we should be able to then do discovery on this if we  
10 need to, but there's -- there's -- our facts, as alleged, fit  
11 this model.

12           **THE COURT:** The CLRA claim?

13           **MR. QUADRA:** Well, before we go there, your Honor, if  
14 I could touch on the unlawful prong of 17200, because we have a  
15 claim there, that one is a claim that borrows, as the Court is  
16 aware, from any other violation of statute. And therefore, if  
17 the Court concludes that the Computer Fraud and Abuse Act  
18 survives, then that claim of 17200 should, by definition,  
19 survive as well.

20           And I would --

21           **THE COURT:** All right, but you also use other prongs  
22 of this statute.

23           **MR. QUADRA:** Correct. And so if we can move to  
24 those, if the Court prefers in that order, there's the unfair  
25 prong. And, as the Court is aware, that prong is loose in its

1 definition on purpose. The statute reads so it can actually  
2 prevent all kinds of new potential schemes that might arise.

3 And there's a great quote from the Supreme Court, "in  
4 the minds of men," and all that. I was told by Counsel that if  
5 I say "chicanery" now, I get \$20, so I just used it.

6 The unfair prong, I think, fits this description,  
7 your Honor, of what -- the events here. What we have is sale  
8 of product that is touted to be a computer. It is priced as a  
9 computer. It's -- or above the other consoles in the market.

10 It is touted to have the ability, and, in fact, Sony  
11 goes out of its way -- and it was mentioned about the  
12 Government creating -- using it to create supercomputers. That  
13 was a way of promoting it.

14 And, in fact, even the people who were not going to  
15 use it were going to be suitably impressed by the fact that  
16 they were buying not only a console, a computer, and therefore,  
17 that could be used for games that were going to be at a higher  
18 level -- they were clearly marketing it that way.

19 Now they're saying,

20 "Well, by the way, we have this right  
21 to take it away that is buried in documents  
22 that have to be okayed and clicked on after  
23 you purchase it."

24 And there was no reasonable basis that they can say a  
25 reasonable consumer needed to hunt those documents or be aware

1 of them.

2           **THE COURT:** Let's assume for a moment that I don't go  
3 with you on the warranty claims.

4           And I agree with you that this unfair prong of 17200  
5 is broad, but if there is no viable warranty claim that can be  
6 brought, how can the manufacturer be subject to essentially  
7 a -- well, this is really an unfair collection of  
8 representations. They don't violate a warranty, but they're  
9 just somehow unfair.

10           Doesn't that eviscerate the idea that you either have  
11 a warranty claim, or you don't?

12           I mean, because -- or another way to phrase it is:  
13 The really actionable claim that can be brought relative to a  
14 product and its functionality or lack thereof is either a  
15 warranty claim, or not?

16           **MR. QUADRA:** No, no, your Honor, because I think when  
17 we talk about warranties, we're looking at potential defects or  
18 breakdowns of -- of the machine. That's the context that  
19 Counsel wants to look at it.

20           We were talking of a warranty regarding express  
21 promises or implied promises regarding keeping a product, which  
22 -- that functionality, which is different.

23           If you look at the unfair prong, though, the one  
24 thing that I think highlights the issue that you're raising is  
25 that the unfair prong does not require reliance, which is

1 different than the fraudulent prong.

2           And because the unfair prong does not require  
3 reliance, it is much like the Computer Fraud and Abuse Act  
4 claim, wherein, if you reach without my authorization into this  
5 product, and force this choice on me which is not truly a  
6 choice, that's unfair. To take away something you promise to  
7 give me is unfair, without having disclosed -- and we say it's  
8 an omission; that they had the alleged, purported authority to  
9 reach in. And we're saying you didn't. You didn't disclose  
10 that, and so that's unfair.

11           And I don't think it negates warranty law.

12           What it says is you cannot act in a way that  
13 essentially, you know, a reasonable consumer will be basically  
14 misled, when combined with an omission, and take this away from  
15 me. And that is unfair. That's the classic definition of what  
16 a new scheme or a new thought or a new way of marketing that is  
17 inappropriate would fall within this provision.

18           And Court has to remember, as set forth in  
19 *Tobacco II*, the fraudulent prong, the Supreme Court said, does  
20 require a reliance. It has a reliance requirement. And they,  
21 in a footnote, spell it out. Other forms of unfair business  
22 practices do not. Unfairness is one of them. It does not  
23 require reliance.

24           And, of course, a warranty does talk about privity  
25 and communications. Here, you don't need that, so it's

1 different.

2           And then I -- quickly, on the 17200, the fraudulent  
3 prong, where I do think there is, obviously, a reliance  
4 requirement, there is, though, a relaxed reliance requirement  
5 since *Tobacco II*. The Supreme Court said you don't have to go  
6 out and find out what every class member thought. And we've  
7 laid out in our complaint what reliance our class  
8 representatives had, which is exactly what we were supposed to  
9 do under *Tobacco II*.

10           Now, one aspect of it is whether we've pled to the  
11 Court's satisfaction 9(b). We reserve the right, and  
12 respectfully disagree that that's required; but we did try to  
13 address the Court's concerns, and had a specific section on  
14 9(b) where we tried to address who, what, where, when, how.

15           We also had, in our parties section, where we talked  
16 about the individuals, what their reliance specifically was.

17           And throughout the complaint we talked about the  
18 different aspects that we believe meet clearly 9(b). So we  
19 have pled it with the sufficient heightened pleading  
20 particularity required. And it goes to both reliance and the  
21 heightened pleading.

22           And then the fraudulent prong, though -- one has to  
23 remember that it goes to the "likely to mislead." And there,  
24 again, it's the statements that Sony made regarding this  
25 product prior to sale and continued to make after sale that

1 clearly led everybody to believe, when, after launch, because  
2 people were still buying it, that, in fact, it was a key  
3 feature that they would maintain during the life of this  
4 product.

5           They said it as late as when they marketed the  
6 Slim -- "We're going to keep this up. Don't worry" -- again,  
7 giving credence to the fact that they knew a reasonable  
8 consumer with just this standard would have believed that it  
9 would have survived during the life of the product.

10           Then they -- it's a -- this claim is attacked on the  
11 notion that somehow there's no standing, because we can't seek  
12 restitution from Sony, since the money may have been paid --  
13 not always, because sometimes you can buy directly from Sony --  
14 to a third party.

15           Again, that is not correct. That's not a correct  
16 statement of the law.

17           The cases relied in the opening brief by Sony  
18 actually have been overruled.

19           And we asked the Court to look at *Clayworth*, which is  
20 a California Supreme Court case, and *Shersher*, which is another  
21 case, and *McAfee*, which is a Northern District case, that spell  
22 out clearly that consumers have the right to go, when they're  
23 subject to a fraudulent-prong claim, seek restitution directly  
24 from the manufacturer, even if they purchased the product  
25 through a third-party retailer. And that's because it's

1 obvious. I mean, basically, Sony profited from those sales.  
2 Okay? The money was paid to someone else, but ultimately, in  
3 the chain of commerce, they were profiting from the sales to  
4 the consumers. And therefore, 17200 spells out -- and the law  
5 that follows it -- that you can directly sue and seek  
6 restitution from Sony.

7           There was one issue that goes in conjunction with  
8 that that we wanted to at least address from the Court's last  
9 ruling was -- I think there was some confusion regarding  
10 whether injunctive relief could be sought in a case where  
11 there's no, quote, "money damages."

12           Well, under unfair-business law, that is the case.  
13 You can, in fact -- standing is defined whether you were --  
14 there was loss of money or -- but that doesn't mean you have to  
15 seek those damages or seek that restitution. Injunctive  
16 relief, after you get past standing, is a stand-alone remedy  
17 that you can seek. And we've cited the cases for that,  
18 your Honor, *Kwikset* in particular, was an issue in which --

19           (Reporter requests clarification)

20           **MR. QUADRA:** And *Kwikset* specifically spells out that  
21 injunctive relief is a stand-alone remedy that can be sought.  
22 And we seek restitution and injunctive relief here; but  
23 certainly our injunctive-relief claim can withstand challenge  
24 here.

25           That brings us a bit into the Consumer Legal Remedies



1 Act case, your Honor. Again, the 9(b) requirements are also  
2 met there. The Court asked us there, and we met them there as  
3 well. The same sections apply to those specific allegations.

4 And then when you look at the -- much is made about a  
5 statute of limitations, and when the injury occurred. I think  
6 *Rubio*, which we cite for the Court, and *Mass. Mutual*  
7 specifically spell out that, in fact, the statute begins to run  
8 upon discovery of the harm. That would have been, obviously,  
9 when the feature was removed.

10 The fact that that works in combination with  
11 potentially true statements made at the time about the fact  
12 that the -- the product contained this feature, but then, in  
13 conjunction with the alleged -- the alleged right that  
14 supposedly Sony keeps to remove it that is not readily  
15 disclosed -- that's an omission. And so it fits into the  
16 omission model of the Consumer Legal Remedies Act cases.

17 And there, it's like a -- and also, it fits into the  
18 *Gerber* case, which is a Northern District case, your Honor,  
19 Ninth Circuit. The issue there is that Sony makes -- makes a  
20 point of saying that somehow consumers were supposed to go on  
21 the website prior to purchasing, and somehow search there, and  
22 find the documents that would somehow disclose the right that  
23 they could come in and remove a feature.

24 Now, if you look at those documents, I don't think  
25 any reasonable consumer could be held to the standard to

1 understand that that's what Sony actually meant, because I  
2 don't think it actually says that; but more importantly,  
3 there's no duty to do so.

4           If they're making representations that lead  
5 reasonably a consumer to believe that this will last through a  
6 lifetime of the product, then there is no duty to go beyond  
7 that.

8           If you look at the *Gerber* case, where it says you  
9 don't have to try to look on the side of the box to see if that  
10 says, in the ingredients, something different than what is  
11 touted on the front of the box. And that was a product for  
12 kids that had supposedly natural juice or fruit in it. And  
13 somehow, if you looked at the side of the box at the small  
14 print, you would figure out that it didn't necessarily match  
15 the claims made.

16           Same concept here, your Honor. They're making claims  
17 about this product. They're making the consumer believe that  
18 it's going to last during the life of the product. And  
19 instead, they somehow say they have, buried on their website --  
20 you can go take a quick look; a prepurchase look -- at buried  
21 language that somehow gives them the right to take it away.  
22 There's no duty to find that or look for it.

23           And this temporal issue, your Honor -- it is true  
24 they we had put in ten years, but we also believe -- and I  
25 think it's stated in the complaint -- that a reasonable

1 consumer could simply believe it was going to be for the life  
2 of this product under this provision -- the Consumer Legal  
3 Remedies Act -- irrespective of those claims, because when you  
4 buy a product, and they tout this important feature, there's no  
5 reasonable consumer who is going to think, after they say that  
6 that's a reason for the pricing, that somehow, that's going to  
7 be taken away tomorrow or the day after or a week after; they  
8 can just take it away after you're paying for it. No  
9 reasonable consumer is going to believe that. And therefore,  
10 that's our allegation. At the pleading stage, we have a right  
11 to go forward and try to investigate and prove those claims.

12           Also, they talk about puffery. And our view, as we  
13 cited in the *Consumer Advocates v. Echostar* case, statements  
14 that can be confirmed through discovery are not puffery. So to  
15 the extent Sony is now trying to state that the statements made  
16 by senior officials from the company regarding this product or  
17 its feature were puffery, well, that's a question of fact we're  
18 going to have to go down the road and prove, because I think,  
19 through discovery, we can ascertain and prove to the Court that  
20 those are provable issues, rather than puffery, which you can't  
21 prove. It's an exaggerated statement.

22           There's also an unconscionability provision that  
23 we're citing there, your Honor. And that goes to something the  
24 Court already alluded to, which is it's a contract of adhesion.  
25 And the fact that it was buried in their documents that you

1 click on later, and the fact that actually the language is  
2 difficult to even decipher all goes to the unconscionability  
3 argument.

4           And if the Court has any questions, we can try to  
5 address those.

6           And then on the, I think, 17500, which is the  
7 false-advertising claim, your Honor, I would say it's  
8 basically, as the Court is aware, the same law as under 17200,  
9 so I won't spend time on that; but I would want to raise the  
10 issue of -- on the motion to dismiss the class allegations.  
11 That is basically, as far as we see, a rehash of the motion to  
12 strike, which the Court did deny.

13           **THE COURT:** You don't need to address that.

14           **MR. QUADRA:** Okay.

15           **THE COURT:** I will obviously go through each of these  
16 arguments, but the one that I'm not going to revisit is, if  
17 you -- put it this way. If you survive on the motion to  
18 dismiss, I do think that the class issues are for another day.  
19 And so that portion of my prior order will not be revisited.

20           **MR. QUADRA:** All right, your Honor. The one thing  
21 that was raised there was ascertainability. And I think this  
22 is easily a self-identifying class. They know who they are.

23           **THE COURT:** Okay. Let me hear from Ms. Sacks.

24           **MS. SACKS:** Your Honor, if I may start with the CFAA  
25 claim.

1           **THE COURT:** All right.

2           **MS. SACKS:** The authorization is not just the  
3 contractual authorization of the systems software license  
4 agreement. The authorization was the person by person clicking  
5 on saying, "Yes, I accept." And they knew -- as is pled in the  
6 complaint, they knew exactly what was going to happen when they  
7 clicked, which makes the *Apple* case completely inapposite.

8           The issue in the *Apple* case was they told you this  
9 download was going to do one thing. They didn't tell you it  
10 was going to brick your phone. So they had to no idea what the  
11 actual consequence was going to be.

12           Here, we told people,

13                    "If you do this download, you will no  
14 longer be able to access the Other OS."

15           We also told them what would happen if they didn't do  
16 it.

17           Now, plaintiff seems to think --

18           **THE COURT:** Their argument is that effectively, at  
19 that point, their hand is being forced, in a way; that any  
20 click-through, if you will, is no longer the function of  
21 voluntary authorization; but rather, their hand is being  
22 forced.

23           **MS. SACKS:** But your Honor, that's not what the CFAA  
24 requires. The law here in the Ninth Circuit is very clear on  
25 this. Authorization in the context of a Consumer Fraud and

1 Abuse Act simply means with permission; and it doesn't mean why  
2 the person was asking for that permission.

3 In the --

4 **THE COURT:** Well, they would say it's with coerced  
5 permission. And you say that's not good enough?

6 **MS. SACKS:** Absolutely, your Honor. If I accept it,  
7 then there was not an unauthorized intrusion on my computer.  
8 That might be something for some other claims, but not for the  
9 CFAA.

10 The allegations of the CFAA -- I'm sorry. The  
11 requirements of the CFAA are very specific. And the courts say  
12 that authorization depends on actions by the one with power to  
13 grant it. Here, that would be the PS3 owner. In the *LVRC*  
14 case, it was the employer.

15 The Court notes that the defendant's state of mind --  
16 i.e., his intent; the reason he's asking for this access --  
17 does not determine whether authorization has been granted.

18 So this notion that we told people we were doing it  
19 for security reasons, and, in fact, we were doing it to save  
20 money, is not something that has any place -- any role -- in  
21 the CFAA.

22 And that's important, because if you look at the *LVRC*  
23 case the issues that were raised there by the employer said,

24 "Look. You know, this person was my  
25 employee. And all of a sudden at one

1 moment, he had a different motivation in  
2 accessing this. He went from being loyal  
3 to being disloyal. And I never authorized  
4 him to have access as a disloyal employee."

5 And the Court said,

6 "That is just not good enough."

7 The important part of the CFAA is it is a technical  
8 statute. It requires a physical intrusion. And there is no  
9 physical intrusion here that the user didn't know about.

10 **THE COURT:** Okay. Actually, why don't you move on to  
11 the -- well, in whatever order you want. You know, 17200 and  
12 the CLRA are the two that I would ask you to focus on.

13 **MS. SACKS:** Certainly.

14 With regard to the UCL claim, because that's a pretty  
15 quick one to get through, *Daugherty* makes clear that you can't  
16 end-run the requirements of an express warranty, in effect.  
17 You can't make an unfair claim under the UCL if you have an  
18 express warranty that tells people how long they can expect  
19 that product to work.

20 And as *Daugherty* says the only thing a reasonable  
21 consumer could reasonably expect was that the product would  
22 function for as long as it was expressly warranted to function.

23 Now we've got that one-year warranty here. And so  
24 there's -- it's just impossible for somebody to say that it was  
25 reasonable to expect that this would continue to last forever;

1 or ten years, in this instance.

2           And if I can just go on a tangent for one second  
3 about the ten years -- Counsel mentioned "puffery." I would  
4 submit to the Court that a statement that we expect our product  
5 to have a ten-year market cycle is the epitome of corporate  
6 puffery. It's a statement of expectation in the future. It's  
7 not a promise of how something is actually going to perform.

8           Corporate puffery is not actionable. It's certainly  
9 not something that will support the fraudulent prong of the  
10 UCL. And you have to really think: Did anybody hear that or  
11 see that, and think that meant that the PS3 that I buy is going  
12 to be here, doing everything, for ten years?

13           I'd submit that if that's the kind of warranty they  
14 were giving, this would have been a 5,099 product instead of a  
15 599 product.

16           **THE COURT:** But don't you think, at the very least,  
17 it's fair to say that when this product is made available in  
18 the marketplace, the suggestion is, in a very general sense,  
19 you're going to be able to use this to play games, to access  
20 the network, and, in fact, it can even be used as a computer.  
21 I mean, that sort of general message is out there, isn't it?

22           **MS. SACKS:** I don't disagree, your Honor. It's out  
23 there; but it's -- how long is it out there? At this point in  
24 time, every manufacturer of a consumer electronic product just  
25 took on liability that it never intended to. We can go back to



1 the *Sealey* case, where the Court said that you can't change the  
2 entire relationship between a manufacturer and a purchaser  
3 after the fact, because the manufacturer priced that product  
4 with the expectation that its obligations would be limited to  
5 its express warranty.

6           And so the societal costs of suddenly adding nine  
7 years onto the life of every PS3, without any consideration  
8 back -- I mean, if the plaintiffs wanted to have a longer  
9 warranty, they could have bought an extended warranty. That's  
10 why they're offered. When they're sitting there at  
11 Circuit City and they're buying this product, the Circuit City  
12 person says,

13                   "Well, you know, it only has a one-year  
14                   warranty. Do you want to buy our Circuit  
15                   City warranty?"

16                   How, then, could they reasonably suspect that it's  
17 ten years?

18           **THE COURT:** But the warranty notion really goes to,  
19 in a sense, you know, the mechanical operation of the device.  
20 Is it going to work in a certain way? Is it -- you know.  
21 Whereas the unfairness part of UCL kind of goes to -- it goes  
22 to expectations of the purchaser. And is there a -- not that  
23 we're warranting it's going to do this, that, or the other  
24 thing, but that the suggestion is out there that this product  
25 is going to be able to perform a certain collection of things

1 that you think it can do. And then -- lo and behold -- at a  
2 certain point, they pull the rug out from under.

3           Isn't there some room for the UCL claim to cover an  
4 area where it may not be covered directly by a warranty?

5           But what troubles me is that I do think it is not  
6 quite as simple as saying.

7           "If there's no warranty claim there,  
8 UCL has no place in the equation."

9           And I'm not sure you get there.

10           **MS. SACKS:** To reference a decision by Judge Fogel,  
11 *Barenblat* -- the second *Barenblat* decision -- Judge Fogel  
12 concluded that you couldn't state a UCL claim where the product  
13 conformed to the express written warranty, simply because the  
14 fact that it failed at some point after doesn't constitute a  
15 substantial injury to consumers of the type that --

16           **THE COURT:** Of course, we're not talking about the  
17 product failing. That's really not the question here.

18           The question here is: The rules of the road are  
19 being changed by the manufacturer down the line.

20           Not -- the device -- there's no dispute the device  
21 continues to operate in various ways. So it's not -- that  
22 case, I think, probably arises in a different context of, you  
23 know, a truly failed device. And so I don't remember it. I  
24 have to go back and look at it.

25           **MS. SACKS:** The facts, your Honor, were that Apple

1 had represented that this -- I think it was a notebook  
2 computer -- would have two gigs of memory available. And over  
3 time, for whatever reason, it didn't have two gigs available.

4 So what is the difference between that, and ours?

5 They're saying that it came out. It had the Other OS  
6 feature at the time it came out. And at some point after the  
7 expiration of the express warranty, it didn't have the Other OS  
8 feature.

9 There's no logical reason in law to draw the  
10 distinction between something not failing -- I'm sorry --  
11 something not working because it has a technical problem, and  
12 something not working because it has been technologically  
13 changed; but if I could go on for just one second about the  
14 17200 claim, Counsel was talking about injunctive relief. And  
15 the question here is whether or not you're seeking an  
16 injunction or whether you're seeking restitution. Under  
17 *Daugherty*, you can't do it. You can't end-run this issue.

18 Well, we also talk about an injunction. What is the  
19 continuing threat of harm that's being remedied here?

20 The Other OS has already been -- if -- if someone  
21 downloaded it, it's gone. If they didn't, they're continuing  
22 to use the other features. So the idea that you could get  
23 injunctive relief here for this just doesn't fit the -- the  
24 facts.

25 Then, moving on to the unjust-enrichment claim, this

1 is the claim with regard to just the subset.

2           **THE COURT:** Mr. Baker, yeah. Actually, I don't think  
3 I need any argument on that.

4           **MS. SACKS:** Okay. All right.

5           **THE COURT:** And false advertising is more or less --

6           **MS. SACKS:** It's covered.

7           **THE COURT:** -- covered, so --

8           **MS. SACKS:** So the CLRA claim --

9           **THE COURT:** Okay. Yes.

10           **MS. SACKS:** The problem is that the CLRA Claim 5, 7,  
11 and 9 -- those aspects of the statute are affirmative  
12 misrepresentations, or the failure to disclose a fact that you  
13 were duty bound to disclose. And none of the things that the  
14 plaintiffs have talked about establish either an affirmative  
15 misrepresentation or a duty to disclose at the time of sale.

16           And I heard Counsel comment on the fact that when  
17 people bought it, it performed as it was supposed to. And  
18 that's what the CLRA goes to. It's not this idea that at some  
19 point later on, something isn't there. It's a sale-type  
20 statute.

21           Now, the unconscionability argument, which also comes  
22 out of the CLRA -- again, I think it's the goose-and-gander  
23 issue.

24           If you're going to rely on the terms of service, and  
25 you're going to rely on the systems software license agreement

1 as something creating privity, then you can't suddenly walk  
2 away from them.

3           And what is it about the language in either of those  
4 agreements that is so shocking to the conscience? It's a  
5 license agreement. Anybody who buys any kind of software,  
6 anybody who goes on to the Internet and downloads, whether it's  
7 software protection; whatever it is, it comes with a license,  
8 and it tells you: Here's the terms under which I'll let you  
9 use it.

10           **THE COURT:** Well, that's true; but it doesn't  
11 necessarily mean that it's not a contract of adhesion.

12           **MS. SACKS:** But we're jumping to the next step. Just  
13 because it's a contract of adhesion doesn't mean it's  
14 unconscionable. Everything is a contract of adhesion these  
15 days, because somebody hands you a contract and says,

16                   "Do you want to sign this, or not?" --

17                   -- other than in a commercial context; but the  
18 important part here that Counsel acknowledged is the PS3 wasn't  
19 the only ball in the game. He could have gawn out and bought a  
20 computer and run it --

21           **THE COURT:** Counsel points out that some of those  
22 arguments are a bit beyond the pleadings. I mean, the  
23 marketplace and how competitive it was or wasn't is not really  
24 part of what's before me.

25           **MS. SACKS:** Well, what the complaint doesn't include

1 is an allegation that the plaintiffs were forced to buy this  
2 product. And that was acknowledged by Judge Fogel in the  
3 *Barenblat* decision also, that post-sale terms -- in that case,  
4 it was the warranty; express written warranty -- don't become  
5 unconscionable just because somebody decided to buy a product.  
6 As Judge Fogel said,

7            "If you get it home and you look at the  
8            express warranty and you don't like it, you  
9            return it. You get your money back."

10            That doesn't make the warranty unconscionable. To  
11 say that people can accept a warranty at the time that it's  
12 delivered, and continue to use the product, and then whenever  
13 they see fit, say, "Oh, I don't like this warranty term," takes  
14 away the whole notion of the ability to project your costs,  
15 your business expenses from a manufacturer.

16            And it's so one-sided, you know. They're talking  
17 about the warranty being one sided from Sony's perspective.  
18 Well, how about the idea that somebody can just say, "All bets  
19 are off?"

20            So -- and I want to keep moving on, because I know  
21 that you've got a lot to cover. We did CFAA. If I can just  
22 look over my notes for one minute.

23            If I covered this already, I apologize. Sometimes I  
24 think I said it when I wrote it down; but under the fraudulent  
25 prong, under the CLRA, all of these things have to have been

1 untrue at the time they were stated.

2           And so in order to get to any of those claims, you  
3 would have to accept the proposition that in 2006, when SCEA  
4 was first releasing this product which plaintiffs say it  
5 invested millions and millions of dollars in -- this Other OS  
6 feature, as well as other features of it -- it intended at some  
7 point down the road to disable/take away/remove that feature.  
8 And there's just no allegation in the complaint.

9           And it's so beyond the pale, that it makes no sense.  
10 They've already sunk the money into the research and  
11 development at the time that they released the products.  
12 People have already bought the products. What would be the  
13 motivation for a manufacturer, who, as they've talked about --  
14 this is a long line of products: The PlayStation; the  
15 PlayStation 2; the PlayStation 3. What would be the motivation  
16 to go out there and say all of these great things about a  
17 feature, knowing that you were going to take it away?

18           I think I've covered everything, your Honor.

19           **THE COURT:** Very well.

20           **MS. SACKS:** That's it. Thank you.

21           **THE COURT:** Very well. Thank you.

22           Anything further? Very short.

23           **MR. QUADRA:** Okay, your Honor. On the 17200 issue  
24 that Counsel just raised, I don't think they can have it both  
25 ways. They're saying they reserve the right to take it away.

1 We're arguing that, in conjunction with the statements  
2 regarding the sale and that omission, is both fraudulent and  
3 unfair.

4 **THE COURT:** Why don't you, though, address the last  
5 point that Counsel made, about the temporal aspect of this?  
6 Isn't it critical that at the time of sale, this nefarious  
7 scheme, if you will, from your perspective, to do this -- I'm  
8 putting a lot of characterization in this. The bait-and-switch  
9 sort of thing, that's got to be in the plan, the get-go, for  
10 these claims to survive?

11 **MR. QUADRA:** No.

12 I think, your Honor, if you look at the Consumer  
13 Legal Remedies Act cases and the 17200 cases, if you combine  
14 what -- and *Gerber* says this.

15 "An arguably true statement combined  
16 with an omission creates sufficient grounds  
17 for a cause of action."

18 That's in the *Gerber* case.

19 **THE COURT:** Well, that doesn't go to the -- that may  
20 well be, but that doesn't really go to the temporal aspect of  
21 it.

22 **MR. QUADRA:** Well, the temporal aspect of it, if your  
23 Honor's saying -- I mean, if you're talking about --

24 **THE COURT:** Are the statements and representations  
25 and, if you go to omissions -- doesn't it all have to happen at



1 the time that these transactions occurred that the device is  
2 purchased?

3 **MR. QUADRA:** Correct. And more --

4 **THE COURT:** They have to know that they're going to  
5 take -- from your perspective, take the Other OS feature away,  
6 or impact it in a negative fashion down the line?

7 **MR. QUADRA:** I think that simply preserving the  
8 right, allegedly, to take it away is sufficient.

9 In other words, they're saying,

10 "Look. Here's the product. Here's the  
11 product. Here's the product. It's great.  
12 It can do this."

13 -- implying: Look. Ten years, you're going to have  
14 it.

15 And the language, your Honor --

16 **THE COURT:** You don't think they have had to  
17 formulate the plan at that point to change the rules down the  
18 line?

19 **MR. QUADRA:** No. In fact, 17200 fraudulent prong  
20 does not require intent. It's just likely to deceive.

21 And those cases don't talk about intent at all. They  
22 talk about: Will the consumer be misled by ultimately what  
23 happens?

24 And here there's no disclosure of that. And what I  
25 think I heard Counsel say is it couldn't have taken it away

1 during the first year.

2           So now they're saying,

3                   "Well, but if it's after the first  
4           year, then I can take it away."

5           Well, they didn't disclose that. They didn't say  
6 that. And she's saying the warranty was one year.

7           In *Rubio*, there's the case where they disclose a  
8 certain rate of interest. And then they popped it up later.  
9 And that was found to be actionable, your Honor; whether they  
10 had a plan or not to do it -- irrelevant. It's about  
11 misleading the public.

12           And I would say that *Daugherty* -- I think we have to  
13 make that clear, your Honor. That case addressed fixing a  
14 defect, as the Court has raised; completely different than  
15 reaching into a product and removing a feature.

16           And I have to remind the Court that the people who  
17 clicked and said "No" to the update lost the use of Blu-ray;  
18 lost the use of some games. That was clearly a huge feature in  
19 this product, yet they were denied that. I mean, clearly, that  
20 was a way of pushing them to do this.

21           And then in February of 2011, they made these  
22 statements where -- and we're putting in paragraph 125 -- where  
23 they said the ten-year life cycle -- they say "life cycle"; not  
24 "product cycle"; "life cycle," or "marketing cycle" -- is a  
25 commitment; a commitment we've made with every PlayStation

1 consumer to date. It's a commitment, they're saying. They're  
2 not just throwing it out there. They clarified that as it  
3 applied all of that to the PS2, to the PS3.

4 So I think, your Honor --

5 **THE COURT:** See, I have to tell you -- and I'm not  
6 saying this necessarily is dispositive for purposes of your  
7 motion, because, as I said at the outset, if you -- if there's  
8 is any plausible interpretation, then the inferences go to you;  
9 but that statement, to me, says,

10 "We're not going to come out with a new  
11 model, such that you're going to feel like  
12 you bought something obsolete two years  
13 from now. This is going to be our product  
14 for ten years."

15 I don't think it -- I think the obvious reading does  
16 not connote a representation that functionality of the device  
17 will remain unchanged. And that's what you're suggesting it  
18 means. And I don't think that's the meaning of it, but I have  
19 to --

20 **MR. QUADRA:** But a reasonable consumer.

21 **THE COURT:** Well, I have to decide that question,  
22 but --

23 **MR. QUADRA:** And then finally, your Honor, one thing  
24 on the computer fraud. I would ask the Court to look at  
25 Cisco Systems, because in that case, there was an employee who

1 was basically forced to give up his password. So he knew he  
2 was giving it up, yet ultimately, that was found to be  
3 actionable, because it was a violation of the policies of the  
4 company.

5 Same here. It's a choice under duress, which is not  
6 a choice under the Computer Fraud Act. It's not authorization.

7 **THE COURT:** All right. Thank you. I'll take the  
8 matter under submission, and do my homework, and give you an  
9 order.

10 (At 3:07 p.m. the proceedings were adjourned)

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**CERTIFICATE OF REPORTER**

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C. 10-1811 RS, *In re Sony PS3 "Other OS" Litigation*, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

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/s/ Lydia Zinn, CSR 9223, RPR

Monday, July 25, 2011