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SONY COMPUTER ENTERTAINMENT
AMERICA LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL WOLF,

Plaintiff,

v.

SONY COMPUTER ENTERTAINMENT AMERICA LLC, SQUARE ENIX OF AMERICA HOLDINGS, INC., and SQUARE ENIX, INC.,

Defendants.

Case No. CV-10-2436-JSW

DEFENDANT SONY COMPUTER ENTERTAINMENT AMERICA LLC'S MOTION TO DISMISS [FRCP 12(b)(6)]

Date: March 11, 2011
Time: 9 a.m.
Judge: Hon. Jeffrey S. White

INTRODUCTION

In this putative class action, Plaintiff Daniel Wolf is trying to use California consumer protection law to stretch the warranty on his PlayStation 3 ("PS3") video gaming console from the express, agreed-upon one year to a warranty that lasts forever. Even California consumer protection law has its limits, and it does not permit the judicial creation of a "forever" warranty. The balance of Mr. Wolf's claims, which plead strict products liability, negligence and unjust enrichment, also fail. Sony Computer Entertainment America LLC ("SCEA") therefore respectfully requests that Mr. Wolf's complaint against SCEA be dismissed without leave to amend.

STATEMENT OF ISSUES

(1) Must Mr. Wolf's claims for violation of the Consumer Legal Remedies Act, California's Unfair Competition Law, Breach of Express Warranty, and Breach of Implied Warranty be dismissed without leave to amend because Mr. Wolf admitted that his PS3 video gaming console fully fulfilled its promise under the one-year limited warranty?

(2) Must Mr. Wolf's claims for negligence and strict products liability be dismissed without leave to amend because they are barred by the economic loss rule?

(3) Must Mr. Wolf's claim for quasi-contractual relief be dismissed because a contract governs the rights of the parties, and because SCEA has not been unjustly enriched?

FACTS

Mr. Wolf alleges that when he played the video game Final Fantasy XIII, a game designed to be played on SCEA's PS3, his PS3 was rendered inoperable—a condition known as "bricking." First Amended Complaint ("FAC") ¶ 32.[1] Based on "over 100" complaints on SCEA's website, (*id.* at ¶ 28), Mr. Wolf is attempting to extrapolate his experience to the "millions of consumers"[2] who

[1] Plaintiffs filed a First Amended Complaint before SCEA's response in order to allege compliance with certain procedural requirements of the Consumer Legal Remedies Act.

[2] As of January 3, 2010, the website "Metacritic.com", a website which collects, analyzes, and summarizes reviews of various media, including video games, gives Final Fantasy XIII a very positive review of 83 out of 100. *See* http://www.metacritic.com/game/playstation-3/final-fantasy-xiii. This summary includes 73 positive reviews out of 83 published critical reviews (and only 1 published negative review that does not mention any technical problems), and 1053 positive user reviews out of 1283 total user reviews (and only 174 negative reviews, with no mention of bricking or freezing).

have purchased and played the game on their PS3 consoles, and indeed will ask this Court to certify a class of "all United States residents who purchased Final Fantasy XIII for Playstation 3." *Id.* at ¶¶ 2, 42.

However, Mr. Wolf in his complaint admits that he purchased his PS3 in August of **2007**. *Id.* ¶ 31. He admits that SCEA provided him with a limited warranty that the PS3 would be free from material defects in material and workmanship for **one year** from the date of purchase. *Id.* at ¶ 85. Mr. Wolf further admits that his PS3 functioned normally until about March of 2010, when he purchased and attempted to play the video game Final Fantasy XIII. *Id.* at ¶¶ 31, 36. Accordingly, by Mr. Wolf's own admission, his PS3 did exactly what it was supposed to do for nearly three years, more than two and a half times the length of the contractual warranty period. *Id.* at ¶¶ 31, 36.

Mr. Wolf attempts to plead around these admissions by asserting that SCEA and Defendants Square-Enix of America Holdings, Inc. and Square Enix, Inc. ("Square Enix") "visibly labeled and co-branded Final Fantasy XIII as compatible with PS3 Systems." *Id.* at ¶ 21. Mr. Wolf also asserts that SCEA and Square Enix has not attempted a recall, disseminated a "fix", or attempted to make the public aware of the danger posed by the products being used together.[3] *Id.* at ¶ 25.

Based on these facts, Mr. Wolf has alleged against SCEA the following claims: (1) violation of California's Unfair Competition Law (Cal. Business & Professions Code § 17200, et seq.); (2) violation of California's Consumer Legal Remedies Act (Cal. Civil Code § 1750, et seq.); (3) breach of express warranty; (4) breach of the implied warranty of merchantability; (5) strict products liability; (6) negligence; and (7) alternative relief based on quasi-contract.

[3] Mr. Wolf's allegations by themselves demonstrate the lack of merit in his case. When compared to the "millions" of consumers who have purchased and played the game, more than 100 "incidents of bricking" is a vanishingly small number. *See* FAC ¶¶ 2, 28. This incident rate is exceedingly low under industry standards. In similar circumstances, courts have refused to certify class actions based on the small number of complaints alone. *In re Microsoft X-Box 360 Scratched Disc Litigation*, 2009 U.S. Dist. LEXIS 109075 (W.D. Wa. Oct. 5, 2009); *Payne v. Fujifilm U.S.A., Inc.*, 2010 WL 2342388 (D.N.J. May 28, 2010).

ARGUMENT

I. Mr. Wolf Cannot Obtain A "Forever" Warranty Through Pleading Violation of California's Consumer Protection Laws.

Under Mr. Wolf's view of California consumer protection law, SCEA is liable to each of its purchasers unless every PS3 console (no matter when made) flawlessly plays every PS3 game (no matter when made) forever, irrespective of the length of the warranty that the purchasers were given. In other words, under Mr. Wolf's theory, he could have just as easily brought this lawsuit in the year 2017 if he had a problem playing a game designed in that year.[4] Unfortunately for Mr. Wolf, the California Court of Appeal foreclosed his arguments back in 2006 when it decided *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824 (2006).

A. Mr. Wolf Cannot Obtain a "Forever" Warranty Through The CLRA.

1. Because Mr. Wolf's PS3 Console Functioned as Warranted for the Entire Warranty Period, SCEA Made No Actionable Statement Under the CLRA.

The gravamen of Mr. Wolf's CLRA claim against SCEA is that it represented PS3 consoles as having "a characteristic they do not have" and are of a "standard or quality they are not"—specifically that the PS3 is capable of playing PS3 games safely and normally. FAC ¶¶ 72-73. In *Daugherty*, Plaintiff made this exact allegation, asserting that Honda concealed and failed to disclose a defect, specifically the tendency of a particular type of engine to leak oil in a way that could damage the engine. 144 Cal. App. 4th at 828-829, 833-834. As with Mr. Wolf's PS3, the Hondas in question functioned as represented throughout their warranty periods. *Id.* at 833-834.

The *Daugherty* trial court recognized the obvious problem with this theory:

> Opening the door to plaintiffs' new theory of liability would change the landscape of warranty and product liability law in California. Failure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself.

Id. at 829. The Court of Appeal agreed with the trial court, finding that the complaint failed "to identify any representation by Honda that its automobiles had any characteristic they do not have, or

[4] Indeed, this appears to be precisely Mr. Wolf's point, as he notes that his "now-outdated" PS2 system still works after 10 years. FAC ¶ 36.

are of a standard or quality they are not." As with Mr. Wolf's PS3, "all of plaintiffs' automobiles functioned as represented throughout their warranty periods" and – as no doubt with many, if not the vast majority, of the putative class, "many still have experienced no malfunction." *Id.* at 834. The Court found that plaintiffs stated no claim for violation of the CLRA under those circumstances because plaintiffs alleged no actionable representation that Honda made concerning the engine, which functioned as warranted. *Id.* at 835.

Here, similarly, there was no actionable representation made to Mr. Wolf. Taking the allegations of the complaint as true, SCEA represented that Mr. Wolf's PS3 would play PS3 games safely and normally. FAC ¶¶ 75-76. It did so, for more than two and a half times the warranty period. *Id.* at 31, 36. There was no representation that it would do so forever. To the contrary, the First Amended Complaint admits that SCEA represented otherwise, clearly providing a **one-year** limited warranty—as to which no breach occurred. *Id.* at ¶ 85. *Daugherty*, 144 Cal. App. 4th at 836 ("Honda's 'affirmative representations at the time of sale' were its express warranties, as to which no breach occurred.") Mr. Wolf's CLRA claim should be dismissed.

2. SCEA Had No Duty to Disclose a Defect that Manifested After the Warranty Period.

Plaintiff's CLRA claim must also be dismissed for an additional reason. A manufacturer's duty to disclose a defect that manifests after the expiration of an express warranty is limited to product safety. *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008) (citing *Daugherty*, 136 Cal. App. 4th at 835). Mr. Wolf has not alleged that his "bricking" defect related to product safety. Accordingly, SCEA had no duty to disclose information about the alleged defect, even if SCEA knew it existed. *Id.* at 970.

B. Mr. Wolf Cannot Obtain A "Forever" Warranty Through The UCL.

The thrust of Mr. Wolf's Unfair Competition Law claim against SCEA is that SCEA's conduct was "unfair" under that statute.[5] The conduct that Mr. Wolf alleges to be unfair involves

[5] Mr. Wolf also alleges that Sony's conduct was "unlawful," and borrows each of the other claims pled in the First Amended Complaint as the predicate violations for the unlawful business practices claim. FAC ¶ 62. Mr. Wolf's claim for "unlawful" business practices fails for the same reasons as the underlying statutory and common-law causes of action do. *See Daugherty*, 144 Cal. App. 4th at

SCEA's failure to disclose the alleged problem, or to issue a recall or "fix." FAC ¶¶ 59-60.

Mr. Wolf's "failure to disclose" argument is another variant of his claim to a "forever warranty" and should be rejected for that reason. When Mr. Wolf bought his PS3 console, Final Fantasy XIII did not exist. FAC ¶ 31. Indeed, Final Fantasy XIII was not released until long after the expiration of Mr. Wolf's warranty period. *Id.* Thus, the defect that Mr. Wolf complains of did not exist at the time he purchased his PS3, or when his warranty expired; thus, there was nothing for SCEA to disclose. In any event, Mr. Wolf's "failure to disclose" theory was utterly refuted by the *Daugherty* court, which even went so far as to doubt whether such a failure to disclose constituted a "cognizable injury" at all:

> [T]he failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as warranted throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers, and accordingly does not constitute an unfair practice under the UCL.

144 Cal. App. 4th at 839 & n. 9. As to Mr. Wolf's claim that SCEA somehow violated the UCL by failing to issue a "recall" or "fix," the short answer is no. The UCL does not require SCEA to recall or fix Mr. Wolf's out-of-warranty console, and acting in accordance with the warranty terms Mr. Wolf was provided at purchase is not "unfair." Again, where a product performs as warranted during the warranty period, the consumer does not suffer substantial injury. *Id.* Thus, the UCL claim should also be dismissed.

II. Mr. Wolf's Breach of Express Warranty Claim Fails Because Mr. Wolf Alleges No Such Breach.

Mr. Wolf's express warranty claim alleges that SCEA breached its one-year express warranty because Final Fantasy XIII "bricked" his console two-and-a-half years after he bought it. FAC ¶ 86. Mr. Wolf does not explain why he should be able to make a warranty claim so far outside his warranty. In any event his claim is foreclosed by *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008). In *Clemens*, the plaintiff brought a breach of express warranty claim against

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837 (dismissing unlawful business practices claim where predicate CLRA violation could not itself withstand motion to dismiss). Mr. Wolf apparently does not allege a cause of action for "fraudulent" business practices even though Sony's "unfair" conduct involves a failure to disclose the alleged defect.

Chrysler after the head gasket in his Dodge Neon failed outside of the warranty period. *Id.* at 1021-22. The Ninth Circuit affirmed the trial court's dismissal of the claim, because the warranty period had expired. In dismissing the claim, the Ninth Circuit made an observation that applies equally to Mr. Wolf's claim:

> Every manufactured item is defective at the time of sale in the sense that it will not last forever; the flip-side of this original sin is the product's useful life. If a manufacturer determines that useful life and warrants the product for a lesser period of time, we can hardly say that the warranty is implicated when the item fails after the warranty period expires.

Id. at 1023. Mr. Wolf's claim against SCEA should be dismissed for the same reason.

III. Mr. Wolf's Claim for Breach of the Implied Warranty of Merchantability Must Be Dismissed Because He Lacks Privity with SCEA, and Because He is Outside the One-Year Warranty Period.

Mr. Wolf's claim for breach of implied warranty alleges that SCEA, by operation of law, provided an implied warranty that Mr. Wolf's PS3 unit was fit for the ordinary purpose for which it is used, such as playing video games co-branded as compatible with the SCEA system. FAC ¶ 92. Mr. Wolf argues that SCEA breached this implied warranty because the PS3 could not play Final Fantasy XIII without freezing, and being rendered totally inoperable. *Id.* at ¶ 93.[6]

Mr. Wolf's breach of the implied warranty claim fails first because he lacks privity with SCEA. Relying on California law, the Ninth Circuit has held that an "end consumer" who "buys from a retailer" has no breach of implied warranty claim under the Uniform Commercial Code against the manufacturer under California law. *Clemens*, 534 F.3d at 1023. Although California's Song-Beverly Act implies a warranty of merchantability from the manufacturer of a product to the consumer, this implied warranty only arises if the plaintiff purchased the product in California. Cal. Civil Code § 1792; *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1142 (C.D. Cal. 2005)

[6] Mr. Wolf's complaint also alleges that Sony warranted "other things" with respect to its PS3 consoles, and implies that Sony's PS3 has difficulties with other games as well. Complaint ¶¶ 91-92. These vague allegations are not sufficient to state a cause of action under *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007), and are inconsistent with Mr. Wolf's own experience (FAC ¶ 36). If Sony warranted "other things" that give Mr. Wolf a cause of action, and Mr. Wolf has had other problems than with Final Fantasy XIII, Mr. Wolf is required to set them forth in his complaint.

(dismissing Song-Beverly claim by Massachusetts resident). Here, Mr. Wolf does not allege that he purchased his PS3 in California. Mr. Wolf's claim must be dismissed for this reason alone.

Even if Mr. Wolf did purchase his PS3 in California, his claim would still fail. Under the Song-Beverly Act, any implied warranty that the manufacturer extends lasts no longer than the manufacturer's express warranty. Cal. Civil Code § 1791.1. Here, the express warranty was limited to one year. FAC ¶ 85. Accordingly, the claim for breach of the implied warranty fails for the same reason as the claim for breach of the express warranty—Mr. Wolf's console failed well outside the warranty period.[7]

V. The Economic Loss Rule Bars Plaintiffs' Claims for Strict Products Liability and Negligence.

Plaintiff's claims for strict products liability and negligence fail. Mr. Wolf alleges nothing in support of these claims other than the fact that his PS3 did not work properly, and alleges no harm other than to his PS3 itself. Accordingly, his claims for strict liability and negligence are barred by the economic loss rule. *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988-89 (2004).

Mr. Wolf attempts to plead around the economic loss rule by alleging that SCEA was the "co-designer of Final Fantasy XIII and provided specifications and other design and manufacturing support to ensure compatibility of the game with PS3 systems." FAC ¶ 111. His attempt fails, because his base claim falls squarely within the policies that the rule protects.

Specifically, "[e]conomic loss consists of damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property." *Robinson*, 34 Cal. 4th at 988 (citing authorities):

[7] Assuming Mr. Wolf can plead a claim under the Song-Beverly Act, Mr. Wolf may attempt to rely on *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297 (2009), to oppose this last point. In *Mexia*, the purchaser of a boat had alleged a claim for breach of the implied warranty of merchantability where the defect manifested outside of the warranty period. The Court of Appeal held that such a claim could be brought outside the warranty period in the case of a latent defect which existed at the time the boat was sold, and the question of whether it existed was an issue of fact to be resolved by the jury. *Id.* at 1308. *Mexia* is distinguishable from this case because here there is no allegation that Mr. Wolf's PS3 contained a latent defect at the time it was sold; indeed, Final Fantasy XIII was not released until well after Mr. Wolf's warranty expired, and Mr. Wolf admitted that his PS3 had never experienced problems before attempting to play Final Fantasy XIII. (FAC ¶¶ 31, 36).

> This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.

Id. The economic loss doctrine "requires a purchaser to recover in contract for purely economic loss[.]" *Id.*

Mr. Wolf's claim under negligence and strict products liability is that SCEA somehow took actions that rendered his PS3 inoperable,[8] and thus disappointed his commercial expectations. Under the economic loss rule, Mr. Wolf's claim belongs in contract, not tort, and the claims should be dismissed.

VI. Plaintiff's Alternative Claim for Quasi-Contract Relief Must Be Dismissed Because A Contract Governs the Rights of the Parties, and Because SCEA Has Not Been Unjustly Enriched.

Plaintiff's final cause of action against SCEA is for alternative relief based on quasi contract. FAC ¶¶ 115-120. Plaintiff alleges that SCEA was unjustly enriched because SCEA "did not provide a PS3 product that was capable of playing all PS3 games, as it was indicated to do." FAC ¶¶ 119, 120. The cause of action fails because Mr. Wolf admits that a valid express contract—the one-year express warranty—governs his rights against SCEA. FAC ¶¶ 85-86. Under California law, an action in quasi-contract does not lie "when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996); *see also Total Coverage, Inc. v. Cendant Settlement Servs. Group*, 252 Fed. Appx. 123, 126 (9th Cir. 2007).

The cause of action also fails because nothing in the First Amended Complaint suggests that SCEA was unjustly enriched. Although Mr. Wolf claims that SCEA "did not provide a PS3 product that was capable of playing all PS3 games, as it was indicated to do," Mr. Wolf admits that SCEA did provide such a product that functioned nearly three times as long as SCEA warranted it would. FAC ¶¶ 31, 85. He does not explain how SCEA could have been unjustly enriched by providing a product which was fully operational for almost three times the warranted time period. As noted

[8] Whether SCEA took those alleged actions in the "co-design" of Final Fantasy XIII, or the design and manufacture of the PS3 console is irrelevant.

above, the California Court of Appeal has questioned whether this states a cognizable injury at all. *Daugherty*, 144 Cal. App. 4th at 839 & n. 9.

CONCLUSION

There can be no question that Mr. Wolf got everything he bargained for—and more—when he purchased his PS3. California consumer protection law cannot be used to stretch SCEA's one-year warranty into a forever warranty. For this reason, and others expressed above, Defendant Sony Computer Entertainment America LLC respectfully requests that Mr. Wolf's complaint be dismissed, without leave to amend.

DATED: January 10, 2010

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