

COPY

1 **BERNS WEISS LLP**
2 Jeffrey K. Berns (SBN 131351)
3 jberns@bernsweiss.com
4 Alan J. Cooper (SBN 272000)
5 acooper@bernsweiss.com
6 6303 Owensmouth Ave., 10th Floor
7 Woodland Hills, CA 91367-2263
8 Tel.: (818) 961-2000; Fax: (818) 936-0232

9 -- and --

10 Lee A. Weiss
11 lweiss@bernsweiss.com
12 626 RXR Plaza
13 Uniondale, New York 11556
14 Tel.: (516) 222-2900; Fax: (818) 936-0232

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 STEPHEN FINEMAN, individually
18 and on behalf of all others similarly
19 situated,

20 Plaintiff,

21 v.

22 SONY NETWORK
23 ENTERTAINMENT
24 INTERNATIONAL LLC, SONY
25 NETWORK ENTERTAINMENT OF
26 AMERICA, LLC, SONY
27 COMPUTER ENTERTAINMENT
28 INC., SONY COMPUTER
ENTERTAINMENT AMERICA
LLC, and DOES 1-100,

Defendants

CASE NO. **C11-05680**

CLASS ACTION COMPLAINT FOR:

- (1) Violation of Bus. and Prof. Code, §§17200, et seq., "Unfair Business Practices"; and
- (2) Tortious Breach of the Covenant of Good Faith and Fair Dealing.

JURY TRIAL DEMANDED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

INTRODUCTION

1. This is an action pursuant to California's Unfair Competition Law, Bus. & Prof. Code, §§ 17200, *et seq.* (the "UCL") and common law. Plaintiff, individually and on behalf of all others similarly situated ("Class Members"), brings this action against Defendants Sony Network Entertainment International LLC; Sony Network Entertainment America Inc.; Sony Computer Entertainment, Inc., Sony Computer Entertainment America LLC; and Does 1-100 (collectively, "Defendants"), based on Defendants' unfair business practices related to the terms of use for the Sony PlayStation Network and Sony Entertainment Network Services (collectively, the "PSN"), an online gaming and entertainment network for which all Class Members purchased access at the time that they purchased the Sony PlayStation 3 ("PS3") video game console.

2. Prior to September 15, 2011, all versions of the Sony Entertainment Network Services' Terms of Service and User Agreement (the "pre-September 2011 PSN Terms of Use"), which PSN users were required to accept to access the PSN, did not contain an arbitration clause or class action waiver. Beginning on September 15, 2011, even though they had already paid for access to the PSN, users could no longer access the PSN unless and until they agreed to a revised version of the PSN Terms of Use, which, among other things, contained a mandatory arbitration clause and class action waiver provision (the "September 2011 PSN Terms of Use"). Defendants have not provided Plaintiff and Class Members with any consideration in exchange for their waiver of these valuable rights.

II.

THE PARTIES

3. Plaintiff STEPHEN FINEMAN is, and at all times relevant to this complaint was an individual residing in the county of Ventura, California.

1 Plaintiff purchased a PS3 and PSN access on or about December 19, 2010. Soon
2 thereafter, Plaintiff created an account on the PSN and accepted the pre-
3 September 2011 PSN Terms of Use, which did not contain an arbitration clause or
4 class action waiver.

5 4. Defendant SONY NETWORK ENTERTAINMENT
6 INTERNATIONAL LLC (“SNEI”) is, and, at all relevant times was, a foreign
7 corporation licensed to do business in California, and doing business in this
8 District. At all relevant times hereto, SNEI provided online entertainment
9 services through the PSN throughout the United States, including California.
10 SNEI is a party to the September 2011 PSN Terms of Use and currently is the
11 immediate provider of the PSN to Plaintiff and Class Members.

12 5. Defendant SONY NETWORK ENTERTAINMENT AMERICA
13 INC. (“SNEA”) was a foreign corporation licensed to do business in California,
14 and did business in this District during the relevant time period. SNEA was
15 engaged in and did provide online entertainment services through the PSN
16 throughout the United States, including California. SNEA was a party to the pre-
17 September 2011 PSN Terms of Use.

18 6. Defendant SONY COMPUTER ENTERTAINMENT, INC.
19 (“SCEI”) is, and at all relevant times was, a foreign corporation licensed to do
20 business in California, and doing business in this District. At all relevant times
21 hereto SCEI provided online entertainment services through the PSN throughout
22 the United States, including California. SCEI is a party to the September 2011
23 PSN Terms of Use.

24 7. Defendant SONY COMPUTER ENTERTAINMENT AMERICA
25 LLC (“SCEA”) is a foreign corporation licensed to do business in California, and
26 doing business in this District. At all relevant times hereto SCEA sold the PS3
27 and provided online entertainment services through the PSN throughout the
28

1 United States, including in California. SCEA is a party to the September 2011
2 PSN Terms of Use.

3 8. Plaintiff is informed, believes, and thereon alleges that DOES 1-100,
4 inclusive, are other Sony entities or affiliates of Defendants who participated in
5 the creation and promulgation of the September 2011 PSN Terms of Use and/or
6 provided online entertainment services throughout the United States, including
7 California, and/or are beneficiaries of the arbitration clause and class action
8 waiver in the September 2011 PSN Terms of Use. Plaintiff will seek leave of
9 Court to amend this Complaint when the names of said DOE defendants have
10 been ascertained.

11 9. The true names and capacities, whether individuals, corporations,
12 associations, or otherwise, of Defendants DOES 1-100, inclusive, and each of
13 them, are unknown to Plaintiff at this time, and Plaintiff therefore sues said
14 Defendants by such fictitious names. Plaintiff alleges, on information and belief,
15 that each DOE Defendant is responsible for the actions herein alleged. Plaintiff
16 will seek leave of Court to amend this Complaint when the names of said DOE
17 Defendants have been ascertained.

18 10. At all times relevant hereto, SNEI, SNEA, SCEI, and SCEA, and
19 DOES 1-100, acting in concert, created, approved, controlled and/or dictated the
20 terms of the pre-September 2011 PSN Terms of Use and/or the September 2011
21 PSN Terms of Use that are the subject of the complaint.

22 III.

23 JURISDICTION AND VENUE

24 11. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §
25 1332(d)(2), the "Class Action Fairness Act," as the amount in controversy exceeds
26 \$5,000,000.00 and many Class Members are citizens of different states than
27 Defendants.
28

1 15. On April 27, 2011, the U.S. Supreme Court issued a decision in
2 *Concepcion v. AT&T Corp.*, which broadened the potential validity of arbitration
3 clauses and class action waivers. Thereafter, Defendants conspired to change the
4 pre-September 2011 PSN Terms of Use such that in order to continue to access
5 the PSN, all existing PSN users would be compelled to waive their existing rights
6 to sue Defendants in a class action in exchange for no consideration. Beginning
7 on September 15, 2011, all PSN users who attempted to access the PSN were met
8 with the September 2011 PSN Terms of Use, provided by SNEI. The September
9 2011 PSN Terms of Use is the equivalent of twenty-one pages of text. At the
10 beginning of these Terms of Use, there is a Notice of Binding Individual
11 Arbitration and Class Action Waiver Provision; however, rather than placing the
12 actual arbitration clause and class action waiver anywhere near the notice, in order
13 to discourage Plaintiff and Class Members from carefully reviewing them,
14 Defendants placed the provisions near the end of the Terms of Use, on the
15 equivalent of page 17.

16 16. The September 2011 PSN Terms of Use was presented to Plaintiff
17 and Class Members on a take it or leave it basis as a “click-wrap” agreement after
18 which Plaintiff and Class Members either clicked “I agree” or “I do not agree.” If
19 a user did not agree he or she was informed that “[y]ou must accept the Terms of
20 Service/User Agreement and Privacy Policy in order to use Playstation Network
21 Services.”

22 17. To further discourage users from carefully reviewing the September
23 2011 PSN Terms of Use, including the arbitration clause and class action waiver,
24 Defendants prevented users from easily accessing the terms on the Internet. The
25 September 2011 PSN Terms of Use could only be located if a user expended
26 significant time navigating through multiple Sony websites. In contrast, Plaintiff
27 is informed, believes, and hereon alleges that all versions of the pre-September
28

1 2011 PSN Terms of Use contained a web address to allow consumers to review
2 and print the terms of use.

3 18. Defendants also created substantial barriers for Plaintiff and Class
4 Members to opt out of the arbitration clause and class action waiver. In order to
5 opt-out, a user must first agree to the September 2011 PSN Terms of Use,
6 including the arbitration clause and class action waiver. After accepting the
7 September 2011 PSN Terms of Use, a user has thirty days to send written notice
8 to Sony's legal department (users cannot opt-out online, by e-mail or by
9 telephone), which must include a "clear statement that you do not wish to resolve
10 disputes with any Sony entity through arbitration."

11 19. In order to discourage users from invoking the arbitration clause,
12 Defendants included language that made it difficult for users to recover their
13 attorneys' fees. Even if a user prevails in arbitration against any Defendant or
14 other Sony entity, if the claim is less than \$75,000, a user can only recover his or
15 her attorney's fees if he or she first provided notice to, and negotiated in good
16 faith with, the Defendant before pursuing arbitration.

17 20. At all times relevant, Defendants jointly perpetrated the unfair
18 business practice alleged herein to force Plaintiff and Class Members to agree to
19 the arbitration clause and class action waiver, in exchange for no consideration, or
20 lose the access to the PSN for which they had already paid.

21 21. Defendants knew that by conditioning continued access to the PSN
22 upon agreement to the September 2011 PSN Terms of Use, including the
23 arbitration clause and class action waiver, Plaintiff and Class Members were likely
24 to agree to waive their rights to file class actions against Defendants so that they
25 would not be deprived of access to the PSN.

26 22. Defendants and each of them, created, composed, and/or wrote, the
27 September 2011 PSN Terms of Use in such a way as to deprive Plaintiff and Class
28

1 Members of their right to sue Defendants in a class action; rights which existed
2 prior to September 15, 2011.

3 23. Defendants knew that Plaintiff and Class Members' forced
4 acceptance of the arbitration clause and class action waiver would cause more
5 harm to Plaintiff and Class Members than utility to Defendants, as Plaintiff and
6 Class Members would give up valuable rights in exchange for no consideration.

7 24. On or about December 19, 2010, Plaintiff purchased a PS3 and PSN
8 access from a Target Store in Ventura County, California. Plaintiff connected his
9 PS3 to the Internet and was provided with the June 2010 version of the PSN
10 Terms of Use (Exhibit E hereto). Plaintiff agreed to the PSN Terms of Use and
11 was provided with access to the PSN thereafter.

12 25. On September 15, 2011, after logging onto the PSN, Plaintiff was
13 met with the September 2011 PSN Terms of Use, which, unlike the pre-September
14 2011 PSN Terms of Use to which he had previously agreed, contained a
15 mandatory arbitration clause and a class action waiver. Plaintiff could no longer
16 access the PSN unless he agreed to the September 2011 PSN Terms of Use. Thus,
17 Plaintiff's options were to agree to the September 2011 PSN Terms of Use or be
18 barred from accessing the PSN. As Plaintiff desired to access the PSN, which he
19 had been doing since December 2010, he agreed to the September 2011 PSN
20 Terms of Use.

21 V.

22 **CLASS ACTION ALLEGATIONS**

23 26. Plaintiff brings this action on behalf of himself and all others
24 similarly situated, pursuant to Federal Rule of Civil Procedure, Rule 23(a) and
25 23(b). The Class that Plaintiff seeks to represent is defined as follows:

26 All individuals in the United States of America who
27 (a) purchased a new Sony PlayStation 3 (PS3) prior to
28

1 September 15, 2011, and (b) accessed the Sony
2 PlayStation Network (PSN) through their PS3 prior to
3 September 15, 2011 and accepted the Sony
4 Entertainment Network Services' Terms of Service
5 and User Agreement. Excluded from the Class are
6 Defendants' employees, officers, directors, agents,
7 representatives, and their family members, as well as
8 the Court and its officers, employees, and relatives,
9 located in the United States of America.

10 Plaintiff reserves the right to amend or otherwise alter the Class definition
11 presented to the Court at the appropriate time, or to propose or eliminate sub-
12 classes in response to facts learned through discovery or legal arguments
13 advanced by Defendants or otherwise.

14 27. Numerosity: The Class is so numerous that the individual joinder of
15 all members thereof is impracticable under the circumstances of this case. While
16 the exact number of class members is unknown at this time, Plaintiff is informed
17 and believes that the proposed Class consists of hundreds of thousands if not
18 millions, of members.

19 28. Commonality: Common questions of law or fact are shared by Class
20 Members. This action is suitable for class treatment, because these common
21 questions of fact and law predominate over any individual issues. Such common
22 questions include, but are not limited to, the following:

23 (a) Whether Defendants violated Business and
24 Professional Code, §§17200, *et seq.*;

25 (b) Whether Defendants engaged in an unfair business
26 practice by forcing Plaintiff and Class Members to
27 agree to the September 2011 PSN Terms of Use,
28 containing an arbitration clause and class action

1 waiver, or lose access to the PSN for which they had
2 already paid;

3 (c) Whether Class Members are entitled to injunctive
4 relief.

5 29. Typicality: Plaintiff's claims are typical of the claims of absent Class
6 Members. Plaintiff and the other Class Members were subjected to the same type
7 of unfair conduct and the claims of Plaintiff and the other Class Members are
8 based on the same legal theories.

9 30. Adequacy: Plaintiff is an adequate representative of the Class he
10 seeks to represent because his interests do not conflict with the interests of the
11 other members of the Class. Plaintiff has retained counsel competent and
12 experienced in complex class action litigation, and Plaintiff and his counsel will
13 prosecute this action vigorously. The interests of Class Members will be fairly
14 and adequately protected by Plaintiff and his counsel.

15 31. Ascertainable Class: The proposed Class is ascertainable in that the
16 members can be identified and located using information contained in Defendants'
17 records.

18 32. This case is brought and can be maintained as a class action under
19 Rule 23(b)(2), and 23(b)(3):

20 (a) Injunctive and/or Declaratory Relief to the Class is
21 Appropriate:

22 Defendants, and each of them, have acted or refused to
23 act on grounds generally applicable to the Class, thereby
24 making final injunctive relief or corresponding
25 declaratory relief with respect to each class as a whole
26 appropriate; and
27
28

1 (b) Predominate Questions of Law and Fact: Questions of
2 law or fact common to all Class Members, including
3 those identified above, predominate over questions
4 affecting only individual Class Members (if any), and a
5 class action is superior to other available methods for the
6 fair and efficient adjudication of the controversy. Class
7 action treatment will allow a large number of similarly
8 situated consumers to prosecute their common claims in
9 a single forum, simultaneously, efficiently, and without
10 the unnecessary duplication of effort and expense that
11 numerous individual actions would require. Moreover,
12 absent class treatment of this controversy, the amount of
13 individual Class Members' losses in comparison to the
14 enormous cost of litigation makes it almost certain that
15 few Class Members would ever be able to even seek, let
16 alone obtain, redress for their injuries.

17 **VI.**

18 **FIRST CLAIM FOR RELIEF**

19 **Violation of California's Unfair Competition Law,**

20 **Bus. & Prof. Code § 17200, *et seq.*,**

21 **"Unfair" Business Acts or Practices**

22 33. Plaintiff incorporates by reference all preceding paragraphs as if fully
23 set forth herein.

24 34. This claim is brought by Plaintiff, individually, as a representative
25 on behalf of the Class Members, and in his capacity as private attorney general,
26 against Defendants for their unfair business acts and/or practices pursuant to
27
28

1 California Business & Professions Code, §§ 17200, *et seq.* (“UCL”), which
2 prohibits all unfair business acts and/or practices.

3 35. Plaintiff asserts this claim as a representative of an aggrieved group
4 and as private attorney general on behalf of the general public and other persons
5 who have been faced with the unfair choice of either accepting the September
6 2011 PSN Terms of Use, including the arbitration clause and class action waiver,
7 or losing the access to the PSN for which they have paid. Plaintiff is seeking
8 injunctive relief to prevent users from being compelled to waive their valuable
9 rights to pursue class action litigation and to invalidate users’ agreements to waive
10 those rights. Alternatively, users who have agreed to the September 2011 PSN
11 Terms of Use are entitled to restitution, as they waived their valuable right to sue
12 Defendants in class actions, which has reduced the value of their PS3 and PSN
13 access.

14 36. The instant claim is predicated on the generally applicable duty of
15 any contracting party to refrain from unfair business practices. The instant claim
16 is predicated on duties that govern anyone engaged in any business and anyone
17 contracting with anyone else.

18 37. Plaintiff and Class Members are consumers who purchased a PS3 and
19 PSN access, and accessed the PSN prior to September 15, 2011, by agreeing to the
20 pre-September 2011 PSN Terms of Use, which did not contain an arbitration
21 clause or class action waiver. When Plaintiff and Class Members sought to access
22 the PSN on or after September 15, 2011, they were confronted with the new
23 September 2011 PSN Terms of Use, which contained an arbitration clause and
24 class action waiver. In order to continue using the PSN, Plaintiff and Class
25 Members were forced to agree to this arbitration clause and class action waiver. If
26 Plaintiff and Class Members declined to agree to the September 2011 PSN Terms
27 of Use, their PS3s would be substantially devalued and they would lose access to
28 the PSN for which they had already paid. Thus, Defendants conspired to obtain

1 Plaintiff and Class Members' agreement to the arbitration clause and class action
2 waiver in the September 2011 PSN Terms of Use by tying that agreement to
3 continued access to the PSN. Had Plaintiff and Class Members not been forced to
4 choose between waiving their right to class action litigation or losing access to the
5 PSN for which they had previously paid, Plaintiff and Class Members would not
6 have agreed to the September 2011 PSN Terms of Use in the absence of adequate
7 consideration.

8 38. Based on the unfair agreement forced upon Plaintiff and Class
9 Members, Plaintiff and Class Members had to agree to the September 2011 PSN
10 Terms of Use and waive their right to sue Defendants in class action litigation or
11 be left with a substantially devalued PS3 because it lacked access to the PSN.
12 Therefore, Plaintiff and Class Members were actually harmed.

13 39. By engaging in the above-described acts and practices, Defendants,
14 and each of them, committed one or more acts of unfair competition within the
15 meaning of the UCL.

16 40. Defendants' misconduct as alleged above and herein was unfair
17 because (i) it caused Plaintiff and Class Members substantial injury by, among
18 other things, requiring them to waive valuable rights in exchange for no
19 consideration or severely devalue their PS3 by losing the access to the PSN for
20 which they had already paid, (ii) there were absolutely no countervailing benefits
21 to consumers or to competition that could possibly outweigh this substantial
22 injury, and (iii) this injury could not have been avoided by the consumers because
23 they could not access the PSN for which they had already paid, and had been
24 using, without agreeing to the September 2011 PSN Terms of Use.

25 41. The harm to Plaintiff, members of the general public and Class
26 Members substantially outweighs the utility of Defendants' policies, acts and/or
27 practices, and consequently Defendants' conduct herein constitutes an unfair
28 business act or practice within the meaning of the UCL. Defendants' misconduct

1 as alleged herein also gave Defendants an unfair competitive advantage over
2 Defendants' competitors that did not engage in similar conduct.

3 42. Defendants' unfair practices, as fully described herein, present a
4 continuing threat to members of the public, as they can be compelled to agree to
5 an arbitration clause and class action waiver or lose access to the PSN for which
6 they have already paid. Plaintiff and other members of the general public have no
7 other remedy of law that will prevent Defendants' misconduct as alleged herein
8 from occurring and/or reoccurring in the future.

9 43. By virtue of Defendants' unfair acts and practices, Plaintiff and Class
10 Members were and continue to be improperly compelled to waive valuable rights
11 to sue Defendants in class action litigation in order to continue to access the PSN.
12 Thus, Plaintiff and Class Members are entitled to declaratory and injunctive relief
13 voiding their agreement to the arbitration clause and class action waiver in the
14 September 2011 PSN Terms of Use and preventing Defendants from conditioning
15 continued access to the PSN on Plaintiff and Class Members' agreement to the
16 arbitration clause and class action waiver. Alternatively, users who have agreed to
17 the September 2011 PSN Terms of Use are entitled to restitution, as they waived
18 their valuable right to sue in class action, which has reduced the value of their PS3
19 and PSN access.

20 44. As a direct and proximate result of Defendants' unfair conduct
21 alleged herein, Plaintiff and Class Members were forced to choose between the
22 loss of the PSN access for which they paid at the time that they purchased the PS3
23 or waiving their rights to sue Defendants in class action litigation. Plaintiff and
24 Class Members are direct victims of the Defendants' unlawful conduct, and each
25 has suffered injury in fact, and lost money or property as a result of Defendants'
26 unfair competition.

1 or on the Internet, and the procedure for opting out by mail was vague and
2 unclear.

3 51. Defendants uniformly and unfairly interfered with Plaintiff and
4 Class Members' rights to receive the principal benefit of the pre-September 2011
5 PSN Terms of Use – PSN access – by conditioning PSN access on the waiver of
6 valuable rights in exchange for no consideration.

7 52. Defendants unfairly placed their corporate profits over the rights of
8 others by compelling existing PSN users to choose between a substantially
9 devalued PS3, or the loss of class action litigation rights, while creating
10 substantial barriers to opt-out, and not providing Plaintiff and Class Members with
11 any consideration.

12 53. At all times relevant, Defendants' conduct, as alleged herein, was
13 malicious, oppressive, and/or unfair.

14 54. As a result of Defendants' conduct, Plaintiff and Class Members
15 suffered harm. Plaintiff and Class Members are left with substantially devalued
16 PS3s, which cannot access the PSN, or they have waived their rights to pursue
17 Defendants in class action litigation.

18 55. By virtue of Defendants' conduct in unilaterally and unfairly
19 changing the terms of the pre-September 2011 PSN Terms of Use and forcing
20 Plaintiff and Class Members to waive their right to class action litigation in order
21 to maintain access to the PSN, in exchange for no consideration, Plaintiff and
22 Class Members have been damaged

23 56. WHEREFORE, Plaintiff and Class Members are entitled to
24 declaratory relief, all damages proximately caused by Defendants' breach of the
25 implied covenant of good faith and fair dealing in the pre-September 2011 PSN
26 Terms of Use as alleged herein, pre-judgment interest, costs of suit and other
27 relief as the Court deems just and proper.
28

VIII.

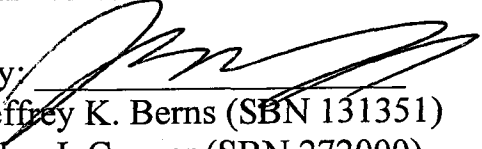
PRAYER FOR RELIEF

WHEREFORE, Plaintiff and all Class Members pray for judgment against each of the Defendants, jointly and severally, as follows:

- A. An order certifying this case as a class action and appointing Plaintiff and his counsel to represent the Class;
- B. For equitable relief, including restitution;
- C. For declaratory relief;
- D. For injunctive relief;
- E. For reasonable attorneys' fees and costs; and
- F. For such other relief as is just and proper.

Dated: November 23, 2011

BERNS WEISS LLP

By: 
Jeffrey K. Berns (SBN 131351)
Alan J. Cooper (SBN 272000)
6303 Owensmouth Ave., 10th Floor
Woodland Hills, CA 91367-2263
Tel.: (818) 961-2000
Fax: (818) 936-0232

-- and --

Lee A. Weiss
lweiss@bernsweiss.com
626 RXR Plaza
Uniondale, New York 11556
Tel.: (516) 222-2900
Fax: (818) 936-0232

