

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

L. PETIT

NO: 500-06-000483-095

Petitioner

-vs.-

(...)

(...)

**SONY COMPUTER ENTERTAINMENT
AMERICA INC.**, legal person duly
incorporated, having its head office at
919 East Hillsdale Boulevard, Foster
City, State of California, 94404, U.S.A.

and

**SONY COMPUTER ENTERTAINMENT
AMERICA TRADING INC.**, legal person
duly incorporated, having its head office
at 919 East Hillsdale Boulevard, Foster
City, State of California, 94404, U.S.A.

Respondents

AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:



- all residents in Canada who own Sony PS3s and have either repaired or require repairs to the hardware systems of their PS3s to resolve problems caused by the Firmware 3.0 and/or 3.01 update since September 1st 2009, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own Sony PlayStation 3s (PS3s) and have either repaired or require repairs to the hardware systems of their PS3s to resolve problems caused by the Firmware 3.0 and/or 3.01 update since September 1st 2009, or any other group to be determined by the Court;
2. Petitioner contends that the Respondents created and/or circulated a mandatory system software update which, once downloaded, caused users' Sony PlayStation 3s to malfunction and require repair at their own cost;
 3. By reason of these actions and omissions, the Petitioner and the members of the class have suffered damages which they wish to claim;

B) The Respondents

4. Respondent Sony Computer Entertainment America Inc. ("SCEA") is an electronics company;
5. Respondent SCEA is the distributor of Sony PS3s in the United States, is responsible for all of the Sony PS3 customer service in North America, and is the provider of software updates and downloads for Sony PS3s in North America;
6. Respondent Sony Computer Entertainment America Trading Inc. ("SCEA Trading") is a wholly owned subsidiary of SCEA and is the distributor of Sony PS3s in Canada, including the Province of Quebec;
7. Respondents SCEA and SCEA Trading have either directly or indirectly designed, manufactured, marketed, and distributed the Sony PlayStation 3 (PS3), as well as, all software updates in respect to said PS3 throughout Canada, including the Province of Quebec;
8. Given the close ties between the Respondents and considering the preceding, both Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, both Respondents will be referred to as "Sony" for the purposes hereof;



C) The Situation

9. Sony released the PS3 home video console in North America in approximately November 2006. The PS3 competes with other video game consoles such as Microsoft Xbox 360 and Nintendo Wii. It has been sold for a price ranging from \$300 to \$600. Sony has sold approximately 23 million PS3 units to date;
10. Sony occasionally issues software updates for the PS3 system. Sometimes these updates provide security patches, new features, or other modifications to the PS3 operating system. PS3 owners are unable to play certain games or utilize certain game features unless they install the latest upgrades;
11. On or about September 1st 2009, Sony released a mandatory software update called "Firmware 3.0";
12. Almost immediately after the release of Firmware 3.0, PS3 owners began experiencing problems with their PS3s such as excessive freezing during game play and loss of use of their controller;
13. Sony was well aware of this problem, as they operate an online forum where many PS3 users posted these complaints;
14. In response to these complaints, on or about September 15th 2009, Sony released another software update called "Firmware 3.01", in the hopes that it would correct the problem;
15. Instead, this new Firmware 3.01, not only failed to address the problem, but apparently caused users' built-in Bluray disk players to malfunction;
16. When PS3 owners contacted Sony about these issues, they were told that they must pay a minimum fee of \$150 (it could run higher) plus shipping to have their system repaired;
17. On or about October 2nd 2009, a class action was taken alleging all of the above in the United States District Court, Northern District of California, San Francisco Division, the whole as appears fully from a copy of said Class Action Complaint, produced herein as **Exhibit R-2**;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

18. Petitioner purchased a Sony PS3 on or about December 2006 for approximately \$600 (plus taxes) at the Maxi store on Jean-Talon East, Montreal, Quebec;



19. On or about the beginning of September 2009, Petitioner downloaded a mandatory system software update called “Firmware 3.0” onto his Sony PS3;
20. Immediately following the download, Petitioner experienced problems with his games freezing during play, as well as, the controller sticking; these problems were worst when using the game “Uncharted”;
21. Petitioner called Sony’s 1-800 number (1-800-345-7669) to report the issue and ask for help;
22. Sony responded that his PS3 was no longer under warranty, and further, that he would have to send his equipment to Sony to be repaired at a cost of at least \$150 (although it could be higher) and to pay for all shipping costs;
23. Instead, Petitioner took his PS3 to a private repair company called ModMtl on Somerled in N.D.G and paid \$120 (taxes included) for his system to be repaired;
24. It was there that the Petitioner learned that this problem had been happening to many PS3 users who had also brought their systems in to be repaired;
25. Petitioner then did some research on the internet and discovered that there were many postings of PS3 owners who had suffered the same fate as he did, and further, that a class action had been instituted in the United States for the same problem;
26. Petitioner’s damages are a direct and proximate result of the Respondents conduct and his downloading of the mandatory system software upgrade “Firmware 3.0”, which was designed and circulated by Sony;
27. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

28. Every member of the class owns a PS3 and has downloaded the Firmware 3.0 and/or 3.01 update, which has caused them to have their PS3 repaired or otherwise has suffered a reduced value and use of their PS3;
29. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. Costs or repairs (including shipping, if applicable) of their PS3s, whether by Sony or a third party;



- b. Loss of value of their PS3s;
 - c. Loss of use and enjoyment of their PS3s;
 - d. Trouble, inconvenience, and loss of time having to deal with the problem;
 - e. Punitive and/or exemplary damages;
30. All of these damages to the class members are a direct and proximate result of the Respondents conduct and his downloading of the mandatory system software upgrade "Firmware 3.0", which was designed and circulated by Sony;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
31. Sony PlayStation 3 has been sold in Quebec and Canada since approximately November 2006. Petitioner is are unaware of the specific number of persons who purchased the PS3, however, given its tremendous popularity, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
32. Class members are numerous and are scattered across the entire province and country;
33. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;
34. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
35. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;



36. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;

B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wish to have adjudicated upon by this class action

37. Individual questions, if any, pale by comparison to the numerous common questions that predominate;

38. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;

39. The recourses of the members raise identical, similar or related questions of fact or law, namely:

- a. Did the Firmware 3.0 and/or 3.01 update contain defects?
- b. Was the Firmware 3.0 and/or 3.01 update fit to be used as intended?
- c. Did Sony fail to perform adequate testing of the Firmware 3.0 and/or 3.01 update prior to releasing it?
- d. Did Sony know or should they have known that the Firmware 3.0 and/or 3.01 update was defective?
- e. Did Sony fail to adequately disclose to users that the Firmware 3.0 and/or 3.01 update was defective or did Sony do so in a timely manner?
- f. Is Sony responsible to reimburse the repair costs (including shipping, if applicable) paid by class members as a result of the problems caused by the Firmware 3.0 and/or 3.01 update?
- g. Is Sony responsible to pay for the reduced value and use of the class members PS3s as a result of the problems caused by the Firmware 3.0 and/or 3.01 update?
- h. Should an injunctive remedy be ordered to force Sony to repair class members' PS3 that were affected by the Firmware 3.0 and/or 3.01 update free of charge (including shipping)?



- i. Is Sony responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
40. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

41. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
42. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;



A) The Petitioner requests that he be attributed the status of representative of the Class

43. Petitioner is a member of the class;
44. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;
45. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
46. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
47. Petitioner, with the assistance of his attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;
48. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;
49. Petitioner understands the nature of the action;
50. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

51. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
52. (...)
53. The Petitioner's attorneys practice their profession in the judicial district of Montreal;



54. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who own Sony PS3s and have either repaired or require repairs to the hardware systems of their PS3s to resolve problems caused by the Firmware 3.0 and/or 3.01 update since September 1st 2009, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own Sony PlayStation 3s (PS3s) and have either repaired or require repairs to the hardware systems of their PS3s to resolve problems caused by the Firmware 3.0 and/or 3.01 update since September 1st 2009, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a. Did the Firmware 3.0 and/or 3.01 update contain defects?
- b. Was the Firmware 3.0 and/or 3.01 update fit to be used as intended?
- c. Did Sony fail to perform adequate testing of the Firmware 3.0 and/or 3.01 update prior to releasing it?
- d. Did Sony know or should they have known that the Firmware 3.0 and/or 3.01 update was defective?
- e. Did Sony fail to adequately disclose to users that the Firmware 3.0 and/or 3.01 update was defective or did Sony do so in a timely manner?
- f. Is Sony responsible to reimburse the repair costs (including shipping, if applicable) paid by class members as a result of the problems caused by the Firmware 3.0 and/or 3.01 update?



- g. Is Sony responsible to pay for the reduced value and use of the class members PS3s as a result of the problems caused by the Firmware 3.0 and/or 3.01 update?
- h. Should an injunctive remedy be ordered to force Sony to repair class members' PS3 that were affected by the Firmware 3.0 and/or 3.01 update free of charge (including shipping)?
- i. Is Sony responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;



DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondents' various websites with a link stating "Notice to PS3 users";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, April 4, 2010

Jeff Orenstein
CONSUMER LAW GROUP
Attorneys for the Petitioner