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 Los Angeles Superior Court

NOV 01 2005

John A. Clarke, Executive Officer/Clerk
 By _____, Deputy
D. GILES

6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 7 **COUNTY OF LOS ANGELES**

9 ALEXANDER WILLIAM GUEVARA, an
 individual

Plaintiff,

v.

12 SONY BMG MUSIC ENTERTAINMENT, a
 corporation, and DOES 1 through 100,

Defendants.

CASE NO.: BC342359

COMPLEX LITIGATION
CLASS ACTION

CLASS ACTION COMPLAINT
FOR

JURY TRIAL DEMAND

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 19
 20 Plaintiff, as and for his complaint, alleges as follows upon information and belief, based
 21 upon, inter alia, investigation conducted by and through his attorneys, except as to those allegations
 22 pertaining to Plaintiff and his counsel personally, which are alleged upon knowledge:

24 **INTRODUCTION**

25 1. This is a class action brought on behalf of a class of all persons and entities who
 26 have purchased or acquired one or more SONY BMG MUSIC ENTERTAINMENT ("Sony")
 27 music CDs that contain XCP2 (Extended Copy Protection) technology

28 2. As more fully alleged herein, certain recent Sony music CDs contain a hidden

1 "rootkit" program disguised as song playing software that surreptitiously installs directly into the
2 "root" of a users computer system. Once installed on the system, the rootkit hides itself by cloaking
3 all associated files, labeling certain operational files with misleading names, and assumes a
4 continuous resource-depleting (and copy prevention) monitoring of the computer system in
5 perpetuity. The rootkit program cannot be uninstalled without damage to the system. Sony does
6 not advise consumers of the existence or true nature of the rootkit program, and it misleads
7 consumers into believing that the program may be uninstalled.
8

9 3. As a result of Sony's failure to disclose the true nature of the digital rights
10 management ("DRM") system it uses on its CDs, thousands of computer users have unknowingly
11 infected their computers, and the computers of others, with this surreptitious rootkit. This rootkit
12 has been responsible for conflicts within computer systems, crashes of systems, and other damage.
13

14 4. These actions by Sony constitute fraud, false advertising, trespass, and violation of
15 state and federal statutes prohibiting malware, and unauthorized computer tampering.

16 JURISDICTION AND VENUE

17 5. This action is brought to remedy violations of state consumer and computer
18 protection statutes in connection with defendant's surreptitious installation of a rootkit program
19 onto users computers when installing CD song playing software from Defendant's music CDs..
20

21 6. The amount in controversy of each class representative does not exceed \$75,000,
22 exclusive of interest and costs. As a result, federal courts do not have subject matter or removal
23 jurisdiction over this case and controversy, or any of the claims alleged herein, under Article III of
24 the United States Constitution, or under 28 U.S.C. Section 1332 and 1441, because the federal
25 courts do not have original federal jurisdiction over any of the claims alleged herein, and therefore
26 the federal courts cannot exercise supplemental jurisdiction over Plaintiffs' state law claims as
27 required by 28 U.S.C. Section 1367.
28

1 7. The class on which this complaint is brought consists of persons and entities that are
2 residents of the state of California only. All claims herein are brought exclusively on behalf of
3 California residents. As a result, the Class Action Fairness Act does not apply to this action.

4 8. As a result of the fact that the federal courts do not have original federal jurisdiction
5 under by 28 U.S.C. Section 1367, the Superior Court of the State of California, County of Los
6 Angeles, has jurisdiction over this action pursuant to Cal. Business and Professions Code Sections
7 17202 and 17203, Cal Civil Code Section 1780, and Cal Code of Civil Procedure Section 410.10.

8 9. Venue is proper in this Court pursuant to Code of Civil Procedure section 395.5,
9 Civil Code Section 1780, and Business and Professions Code Sections 17202 and 17203. Venue is
10 also proper in Los Angeles County, because defendant conducts substantial business activity,
11 including advertising, marketing, and sale of Sony music CDs, at locations throughout this county.

12 Venue is also proper in Los Angeles County as Plaintiff Guevara resides here.

13 10. The amount in controversy exceeds the jurisdictional minimum of this Court.

14 **PARTIES**

15 11. Plaintiff Alexander Guevara ("Plaintiff"), is an individual and a resident of Los
16 Angeles County.

17 12. Plaintiff purchased a Sony music CD and installed the CD on his computer.
18 Plaintiff's installation of the CD for purposes of playing the music on the CD also installed
19 Content/Copy-Protected CD] [Enhanced]" protection onto his computer, including a rootkit
20 program which operated in a hidden manner to monitor the Plaintiff's use of the computer. This
21 rootkit program could not be uninstalled without damaging the computer.

22 13. Defendant BMG MUSIC ENTERTAINMENT ("Sony") is a Delaware corporation
23 with its principal place of business in New York.

24 14. Except as described herein, Plaintiff is ignorant of the true names of defendants sued

1 as Does 1 through 100, inclusive, and the nature of their wrongful conduct, and therefore sues these
2 Doe defendants by such fictitious names. Plaintiff will seek leave of the Court to amend this
3 complaint to allege the true names and capacities when ascertained.
4

5 15. Defendants, and each of them, are individually sued as a participant and aider and
6 abetter in the improper acts, plans, schemes, and transactions to induce Plaintiff and the Class to
7 purchase the Music CDs from Sony.

8 16. At all relevant times, Defendants pursued a common course of conduct, acted in
9 concert with one another, and conspired with one another to accomplish the offenses complained of
10 herein, and performed acts and made statements in furtherance thereof. In addition to the wrongful
11 conduct alleged herein, which gives rise to Defendants' primary liability, Defendants further aided
12 and abetted, and knowingly assisted one another, in perpetrating the illegal and wrongful conduct
13 complained of herein.
14

15 CLASS ACTION ALLEGATIONS

16 17. Class Plaintiff brings this Complaint against defendant, pursuant to Code of Civil
17 Procedure Section 382, on behalf of himself and all persons and entities that have purchased one or
18 more Sony music CDs with the rootkit program. Excluded from the Class are all defendants,
19 including Sony, its subsidiaries, parents, successors, predecessors, officers and directors, and any
20 entity in which any defendant has a controlling interests, and the legal representatives, successors or
21 assigns of any such excluded persons.
22

23 18. While the exact number of Class members in each class is unknown to Class
24 Plaintiff at this time, it is clear that the members of the Class are so numerous that joinder of all
25 members is impracticable. Similar CDs sold by Sony have sold tens of thousands of copies, and it
26 is anticipated that the Class will number in excess of ten thousand individuals. The information as
27 to the identity of the Class members can be determined from purchase receipts, the presence of the
28

1 rootkit program on the class members' computers and possession by Class members of the
2 offending CD's themselves.

3 19. Class Plaintiff's claims are typical of the claims of the members of the Class, as the
4 Class Plaintiff and other members of the Class sustained damages arising out of defendant's
5 wrongful conduct based upon the same transactions, upon the same misrepresentations, and upon
6 the same material omissions which were made uniformly to the Class Plaintiff and the public.
7

8 20. The Class Plaintiff will fairly and adequately represent and protect the interests of
9 the members of each of the Class, and has retained counsel competent and experienced in class
10 actions.

11 21. A class action is superior to all other available methods for the fair and efficient
12 adjudication of this controversy because joinder of all members is impracticable. Furthermore, as
13 the damages suffered by the individual members of the Class may be comparatively small, the
14 expense and burden of individual actions makes it impossible for the Class members to individually
15 redress the wrongs from which they have suffered. There will be no real difficulty in the
16 management of this action as a class action.
17

18 22. Common questions of law and fact exist as to all members of the Class and
19 predominate over any questions affecting solely individual members of the Class. Among the
20 questions of law and fact common to the Class are:
21

- 22 a) Whether Sony adequately disclosed the nature and purpose of its rootkit program on
23 its CDs;
- 24 b) Whether Sony made representations that the Sony music CDs had characteristics,
25 uses, benefits or qualities which it did not have;
- 26 c) Whether Sony made false and/or misleading statements of fact to the Class and the
27 public concerning the content of the music CDs;
28

- 1 d) Whether Sony knew, or was reckless in not knowing, that its rootkit program would
2 detrimentally affect the computers of users who installed its CDs on their computers;
3 e) Whether, by its misconduct as set forth herein, Sony has engaged in unfair or
4 unlawful business practices with respect to the sale of its Music CDs;
5 f) Whether, by its misconduct as set forth herein, Sony has engaged in unfair,
6 deceptive, untrue, or misleading advertising of its Sony music CDs;
7 g) Whether, by its misconduct as set forth herein, Sony has violated Cal Bus & Prof
8 Code § 22947.3;
9 h) Whether plaintiff and the Class are entitled to relief, and the amount and nature of
10 such relief.
11

12 23. The claims of Plaintiff is typical of the claims of the members of the Class. Class
13 Plaintiff has no interest antagonistic to those of the Class, and defendant has no defenses unique to
14 Class Plaintiff.
15

16 24. Class Plaintiff will fairly and adequately protect the interests of the Class, and has
17 retained an attorney well-experienced in class and complex litigation.

18 25. A class action is superior to other available methods for the fair and efficient
19 adjudication of this controversy for the following reasons:

20 A. It is economically impractical for members of the Class to prosecute
21 individual actions;
22

23 B. The Class is readily definable; and

24 C. Prosecution as a class action will eliminate the possibility of repetitious
25 litigation.

26 26. A class action will cause an orderly and expeditious administration of the claims of
27 the Class. Economies of time, effort, and expense will be fostered and uniformity of decisions will
28

1 be ensured.

2 27. Class Plaintiff does not anticipate any difficulty in the management of this litigation.

3
4 **SUBSTANTIVE ALLEGATIONS**

5 28. Sony is one of the world's leading sellers of music CDs. Along with
6 Sony_BMG_Music_Entertainment, they own Arista Records, Columbia Records, Epic Records, J
7 Records, RCA Victor, RCA Records and others.

8 29. In approximately June, 2005, Sony began to issue certain music CDs with
9 "Content/Copy-Protected CD] [Enhanced]" protection. This protection provided for digital rights
10 management of the contents of the CD, and was designed to prevent copying of the CD beyond a
11 certain number of times by a user/ purchaser. What Sony did not disclose was that the Sony music
12 CDs contained a hidden "rootkit" program disguised as song playing software that surreptitiously
13 installed itself directly into the "root" of a users' computer system. Once installed on the system,
14 the rootkit hides itself by cloaking all associated files, labeling certain operational files with
15 misleading names, and assumes a continuous resource-depleting (and copy prevention) monitoring
16 of the system in perpetuity. The rootkit cannot be uninstalled without damage to the system. Sony
17 does not advise consumers of the existence or true nature of the rootkit program, and it misleads
18 consumers into believing that the program may be uninstalled.

19 30. Unaware that the CD was installing an administrative level program on each system
20 on which the CD was installed, thousands of computer users have unknowingly infected their
21 computers, and the computers of others, with this surreptitious rootkit. This rootkit has been
22 responsible for conflicts within computer systems, crashes of systems, and other damage.

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25 **FIRST CAUSE OF ACTION**

26
27 **(Violation of Consumer Legal Remedies Act)**

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1 31. Plaintiff incorporates the above allegations by reference as if set forth herein at
2 length.

3 32. The Consumer Legal Remedies Act ("CLRA") applies to defendant's actions and
4 conduct described herein because it extends to transactions that are intended to result, or which
5 have resulted, *in the sale of goods to consumers.*

6
7 33. Plaintiff and each member of the Class are "consumers" within the meaning of Civil
8 Code Section 1761 (d).

9 34. The Sony music CDs that are the subject of this litigation are "goods" within the
10 meaning of Civil Code Section 1761 (a).

11 35. Defendant has violated the CLRA in at least the following respects:

12 a) In violation of Section 1770 (a) (5), defendant has represented that the Sony music
13 CDs have characteristics and benefits that they do not have;

14 b) In violation of Section 1770 (a) (9), defendant has represented that the purchase of its
15 music CDs confers or involves rights, remedies, or obligations which it does not
16 have or involve, or which are prohibited by law.

17
18 36. Sony concealed material facts regarding its Sony music CDs from Plaintiff and other
19 Class members, including the existence of the rootkit program, and what it does once installed on a
20 users' computer. This type of information is relied upon by consumers in making purchase
21 decisions, and is fundamental to the decisions to purchase music CDs from one seller or another.
22

23 37. Had defendant disclosed this material information regarding the Sony music CDs to
24 Plaintiffs and the other Class members, they would not have purchased Sony music CDs.

25 38. Plaintiffs and other Class members relied upon Defendant's misrepresentations to
26 their detriment.

27

28

1 39. Sony's failure to disclose the rootkit program on Sony music CDs are omissions and
2 concealments of material fact that constitute unfair, deceptive, and misleading business practices in
3 violation of Civil Code Section 1770 (a).

4 40. Sony's deceptive acts and omissions occurred in the course of selling a consumer
5 product and have occurred continuously through the filing of this Complaint.

6 41. As a direct and proximate result of Sony's violation of Civil Code Section 1770, et
7 seq., Plaintiffs and other Class members have suffered irreparable harm. Plaintiffs, on behalf of
8 themselves and on behalf of the Consumer Class, seek injunctive relief.
9

10
11 **SECOND CAUSE OF ACTION**

12 **(Breach of Cal Bus & Prof Code § 22947.3)**

13 42. Class Plaintiff incorporates the above allegations by reference as if set forth herein at
14 length.
15

16 43. Cal Bus & Prof Code § 22947.3 prohibits the taking control of a consumer's
17 computer, modifying computer settings, and the prevention of a user's efforts to block or disable
18 software. Sony's rootkit program violated each of these prohibitions.

19 44. As a result of Sony's breach of Cal Bus & Prof Code § 22947 Class Plaintiff and the
20 class have suffered damages in an amount to be determined at trial.
21

22
23 **THIRD CAUSE OF ACTION**

24 **(Violation of Bus. & Prof. Section 17200 by All Plaintiffs,**

25 **Individually, on Behalf of the General Public, and on Behalf of All Classes)**
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27
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1 45. Class Plaintiffs incorporate the above allegations by reference as if set forth herein at
2 length.

3 46. Class Plaintiffs bring this cause on action on behalf of themselves, on behalf of the
4 Class, and in their capacity as private attorneys general.

5 47. Defendant has engaged in unfair, unlawful and fraudulent business acts and practices
6 as set forth above.

7 48. By engaging in the above-described acts and practices, defendant has committed one
8 or more acts of unfair competition within the meaning of Business and Professions Code Section
9 17200, et seq.

10 49. Defendant's acts and practices have and/or are likely to deceive members of the
11 consuming public.

12 50. Defendant's acts and practices are unlawful because they violate Civil Code Sections
13 1770 (a) (5), and 1770 (a) (9), and Business and Professions Code Section Cal Bus & Prof Code §
14 22947 et seq..

15 51. Plaintiffs, on behalf of themselves and on behalf of each member of the Class, seek
16 individual restitution, injunctive relief and other relief allowed under Section 17200, et seq.

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21 **PRAYER FOR RELIEF**

22 WHEREFORE, all Class Plaintiffs, on behalf of themselves, members of the Class,
23 and/or in the public interest, pray for judgment and relief as follows:

24 1. With respect to the class claims, declaring the action to be a proper class action and
25 designating Plaintiffs and their counsel as representatives thereof;

26 2. Awarding injunctive and equitable relief, including restitution, on the First through
27 Third Causes of Action in an amount to be determined at trial including, inter alia: (a) prohibiting
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1 defendant from engaging in the acts of unfair competition; (b) requiring defendant to disgorge all of
2 its ill-gotten gains to Plaintiff and members of the Class, or to the State of California, or to
3 whomever the Court deems appropriate; (c) awarding Plaintiff and members of the Class full
4 restitution of all monies wrongfully acquired by defendant by means of the wrongful conduct
5 alleged herein; and (d) ordering such funds or assets to be impounded, or a trust imposed, to avoid
6 dissipation, fraudulent transfers, and/or concealment of such monies or assets by defendant;
7

8 3. Awarding damages on the First and Second Causes of Action in an amount to be
9 determined at trial;

10 5. Awarding Plaintiffs reasonable attorney's fees and costs;

11 6. Awarding pre- and post-judgment interest; and

12 8. Granting such other and further relief as the Court may deem just and proper.
13

14 Dated: November 1, 2005

Respectfully submitted,

15 **LAW OFFICES OF ALAN**
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JURY TRIAL DEMAND

Class Plaintiff hereby demands a trial by jury of all factual issues so triable under California law.

Dated: November 1, 2005

Respectfully submitted:

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