

United States District Court  
For the Northern District of California

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E-FILED on 9/22/09

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ERIK ESTAVILLO,  
Plaintiff,  
v.  
SONY COMPUTER ENTERTAINMENT  
AMERICA,  
Defendant.

No. C-09-03007 RMW  
  
ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS  
  
[Re Docket No. 9]

Defendant Sony Computer Entertainment America Inc. ("Sony") moves to dismiss plaintiff's claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to allege facts sufficient to state a First Amendment claim against Sony, and for insufficient justification for the exercise of supplemental jurisdiction over the remaining claims. Having considered the papers submitted by the parties and the arguments of plaintiff Estavillo and counsel for Sony, and for good cause appearing for the reasons set forth below, the court grants the motion.

**I. BACKGROUND**

Plaintiff was banned from Sony's Playstation 3 Network (the "Network") after participating in its public forums. (Compl. ¶ 6.) This ban, which was purportedly due to plaintiff's alleged multiple violations of the agreement governing his use of the Network (Compl. ¶ 5; Def.'s Mot. 1),

1 allegedly caused the plaintiff substantial pain and suffering. (Compl. ¶ 4.) As a result, plaintiff  
 2 alleges three counts against Sony. The first claims that the ban violates plaintiff's First Amendment  
 3 free speech rights. (Compl. ¶ 6.) The second two counts allege what appear to be contract-related  
 4 claims. (Compl. ¶¶ 7, 8.) Plaintiff prays for \$55,000 in relief for these counts, along with  
 5 "additional relief to which the plaintiff is entitled." (Compl. ¶ 10.)

## 6 II. ANALYSIS

### 7 A. Estavillo's complaint does not contain sufficient factual matter to state a 8 plausible federal claim to relief.

9 Sony argues that the First Amendment does not apply to the Network because Sony is not  
 10 part of the government, does not behave similarly to a municipality, and does not have either a  
 11 functional or structural nexus to the government. (Def.'s Mem. 1-2.) Estavillo cites a blog posting  
 12 and two cases to argue that online gaming forums carry out a public function within the meaning of  
 13 the First Amendment. (Pl.'s Opp. 3-4.) The court agrees with Sony.

14 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a  
 15 plaintiff's allegations fail to state a claim upon which relief can be granted. To survive a motion to  
 16 dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to  
 17 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1940 (2009). A  
 18 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
 19 the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In deciding a  
 20 motion to dismiss, the court must accept as true all factual allegations, but not legal conclusions, in  
 21 the complaint. *Id.* at 1949.

22 The First Amendment guarantee of free speech is only a guarantee against abridgment by  
 23 state or federal governments, and not private actors. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).  
 24 However, the Court has acknowledged an exception for company towns where the private  
 25 corporation behaves similarly to a municipality by performing as if they were the government in a  
 26 company town. *Id.* at 513-14 (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)). This exception is  
 27 narrow, and does not extend to public areas such as shopping malls. *Id.* at 519-20 (citing *Lloyd*  
 28 *Corp. v. Tanner*, 407 U.S. 551 (1972)).

1 A second exception exists where a private corporation has "a sufficient structural or  
2 functional nexus to the government." *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996).

3 A structural nexus exists "(1) when the corporation is created for the furtherance of governmental  
4 objectives and (2) when government retains for itself permanent authority to appoint the majority of  
5 directors of the corporation." *Id.* When considering whether a functional nexus exists, a court  
6 considers "(1) the nexus between the government and the challenged action, (2) whether the alleged  
7 government actor performed functions traditionally reserved to the government, and (3) whether the  
8 government coerced or encouraged the challenged action." *Id.* at 922.

9 Sony's Network is not similar to a company town. The Network does not serve a substantial  
10 portion of a municipality's functions, but rather serves solely as a forum for people to interact subject  
11 to specific contractual terms. Every regulation Sony applies in the Network is confined in scope  
12 only to those entertainment services that Sony provides. Although the Network does include "virtual  
13 spaces" such as virtual "homes" and a virtual "mall" that are used by a substantial number of users  
14 (Pl.'s Reply in Supp. of Opp'n. to Dismiss 1), these "spaces" serve solely to enrich the entertainment  
15 services on Sony's private network. In providing this electronic space that users can voluntarily  
16 choose to entertain themselves with, Sony is merely providing a robust commercial product, and is  
17 not "performing the full spectrum of municipal powers and [standing] in the shoes of the State."  
18 *Hudgens*, 424 U.S. at 519 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972)).

19 Sony does not have a sufficient structural or functional nexus to the government. Plaintiff  
20 has not suggested that Sony is part of the state or federal government. The Network was not created  
21 to further government objectives. The government retains no permanent authority to appoint any  
22 directors of Sony or the Network, or any other private body associated with the Network. There is  
23 no indication that Sony has assumed functions traditionally reserved to the government, or that the  
24 government had any part in encouraging Sony to create the Network. Count one of the complaint  
25 does not state a plausible First Amendment claim for relief, and therefore must be dismissed. *Iqbal*,  
26 129 S.Ct. at 1940.



