STEWART KELLAR (SBN 267747)
stewart@etrny.com
E-ttorney at Law™
148 Townsend Street, Suite 2
San Francisco, California 94107
Telephone: (415) 742-2303

JACK C. PRAETZELLIS (SBN 267765)
jack@mbvlaw.com
MBV LAW LLP
855 Front Street
San Francisco, California 94111
Telephone: 415-781-4400
Facsimile: 415-989-5143

YASHA HEIDARI (Admitted *Pro Hac Vice*)
yasha@hplawgroup.com
Heidari Power Law Group LLC
P.O. Box 79217
Atlanta, Georgia 30357
Telephone: 404-939-2742
Facsimile: 404-601-7852

Attorneys for Defendant George Hotz

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SONY COMPUTER ENTERTAINMENT AMERICA LLC, a Delaware limited liability company,

Plaintiff,

v.

GEORGE HOTZ, et al.,

Defendants.

Case No. 11-CV-000167 SI

DEFENDANT GEORGE HOTZ'S REPLY TO PLAINTIFF'S OPPOSITION BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Code

I. INTRODUCTION

The message that Sony Computer Entertainment America ("SCEA") is conveying to George Hotz ("Mr. Hotz") and the public is of great consequence. SCEA advocates and encourages the Court to accept that simply by connecting to the Internet, you are consenting to jurisdiction anywhere in the world. SCEA has taken advantage of these unfamiliar concepts in order to present the Court with misleading sets of facts and affidavits.

Mr. Hotz is a 21-year-old individual who resides in New Jersey. He is not a multinational company, or even a company at all--he is just one person. He did not profit from his actions in question and he did not sell any circumvention devices. He is however, known for being a prodigy in the computer programming field. Mr. Hotz's actions which gave rise to the controversy are simple: (1) Mr. Hotz published code he independent created (“Code”)(2) Mr. Hotz used the Code on his Playstation Computer, and (3) Mr. Hotz posted his findings on his personal blog.

SCEA filed this action, claiming jurisdiction over Mr. Hotz is proper in California. SCEA then flooded the docket with affidavits from its lawyers and employees, offering ambiguous and misleading information. SCEA then indicated that it would undoubtedly confirm that jurisdiction in California is proper for Mr. Hotz through jurisdictional discovery. Now, after Mr. Hotz's computer hard drives, and a graphing calculator have been impounded, and Mr. Hotz' discovery responses have been timely submitted, SCEA still is unable to present evidence to refute the jurisdictional challenges asserted by Mr. Hotz. Instead, SCEA has only continued to flood the docket with dubious information, such as irrelevant hearsay blog postings filed under seal, and misleading affidavits from enigmatic employees with no explanations of the source of their personal knowledge.

II. SCEA ATTEMPTS TO BLUR THE SEPARATION BETWEEN SCEA AND SONY JAPAN TO ESTABLISH JURISDICTION IN CALIFORNIA, WHERE NONE EXISTS

One of the biggest charades SCEA has enacted in this lawsuit is its masquerade as Sony Computer Entertainment Inc. (“Sony Japan”), a Japanese corporation headquartered in Japan

and duly incorporated in the state of Delaware. To be clear, Sony Japan-- not SCEA-- is responsible for manufacturing, distributing, and marketing the Playstation Computer. Sony Japan is the owner of all rights, title, and interest in, to and under the copyrights in the PS3 Programmer Tools, although SCEA misleadingly lists this information under the heading "SCEA's Copyrights and Copyright Licenses". Complaint, ¶30.

On the other hand, SCEA, which is not even a subsidiary of Sony Japan, focuses on the *sales* of products and video games. Complaint, ¶22. SCEA develops, markets and distributes video games, and speaks extensively about video games in its pleadings. Opposition, p2. However, Mr. Hotz' actions have nothing to do with video games and the Code does not provide users the ability to run pirated video games or any other pirated software, as SCEA claims. Opposition, p2. Presumably, had one of Sony Japan's hundreds of affiliates initiated a lawsuit in a different forum, such affiliate would modify the discourse to argue that Hotz focused on music (e.g., Sony Music Entertainment, Inc.), movies (e.g., Sony Pictures Classics, Inc.), electric components (e.g., Sony Corporation, Inc.), or some other aspect tangentially related to the Playstation Computer in an attempt to confer jurisdiction in such forum. The Playstation Computer provides for many functions-- in fact, it's slogan is that "It Only Does Everything". The fact that Mr. Hotz purportedly impacted the Playstation Computer does not mean that all of these affiliates, including component manufacturers in China, can suddenly claim that Mr. Hotz directed his activities toward them.

When one purchases a Playstation Computer and looks at its outer box, it has plastered on numerous places that it is a product of Sony Japan and all rights belong to Sony Japan. It only references Sony Japan-- not SCEA. When one takes the Playstation Computer out of its box and inspects it, it states it is a product of Sony Japan and all rights belong to Sony Japan. It does not reference California. When one installs the Playstation Computer firmware update that Mr. Hotz allegedly circumvented, which can legally be obtained through the internet as Mr. Hotz did, upon installation, it only refers to Sony Japan.

SCEA boldly asserts that Mr. Hotz knew-- not that he should have known or could have known-- but that Mr. Hotz did know about SCEA's existence. These are bold words, especially in

light of Mr. Hotz's declaration to the contrary. What is SCEA's justification? SCEA claims that within Mr. Hotz's sealed instruction manual, it refers to Plaintiff's website for warranty information. One would assume this website is www.scea.com or a similar website, but in reality, it is us.playstation.com-- not even www.playstation.net, which incidentally, leads to a site that belongs to Sony Japan. SCEA miraculously claims that such a tenuous connection indicates Mr. Hotz knew of SCEA's existence and makes the further logical leap that such preposterous knowledge means Mr. Hotz purposefully directed his activities toward SCEA. This is despite the fact that the Playstation Computer packaging, the Playstation Computer itself, and the click through agreements one has to accept when upgrading the Playstation Computer all indicates they are the products and property of Sony Japan, which is incorporated in Delaware. This is also despite the fact that all of the agreements put forth by SCEA indicate that Sony Japan is the owner and manufacturer of the Playstation Computer. Kellar Dec., Ex. F. This is also despite Mr. Hotz's explicit declarations, which SCEA has ignored.

II. NO PURPOSEFUL AVAILMENT ANALYSIS: THE PSN DOES NOT ESTABLISH PERSONAL JURISDICTION OVER MR. HOTZ

As its last saving grace, SCEA tries to use the Playstation Network ("PSN") and its Terms of Service ("TOS") as a method of establishing jurisdiction over Mr. Hotz. Even assuming *arguendo* that Mr. Hotz acquiesced to the PSN TOS, it alone would be incapable of establishing jurisdiction over Mr. Hotz. Additionally, SCEA has proffered no proof that Mr. Hotz is subject to the PSN TOS.

The PSN is merely an online gaming service that allows individuals to play video games jointly over the Internet. The PSN is a single application on the Playstation Computer, among many, that contains its own unique terms of service. Accepting any PSN TOS is analogous to accepting terms of service for a single application, such as Microsoft Word, on your personal computer-- it does not control the terms of using your personal computer, nor does it mean you have accepted the terms of such application for any other computer other than the one on which it

was accepted. Such would exceed the scope of authorization. *See Swensen's, Inc. v Corsair Co.*, 942 F.2d 1307 (8th Cir. 1991).

In the present case, SCEA is claiming, with dubious information, that the PSN TOS was accepted to access the PSN on a single Playstation Computer that Mr. Hotz owns. This would not subject the other Playstation Computers to the PSN TOS. More important, however, the PSN TOS does not apply to any hardware-- namely, the Playstation Computer. To the contrary, the PSN TOS explicitly states it "applies to software, content and access to software, content and services **provided through** or in connection with" the Playstation Network and a service known as "Qriocity." Dkt No. 1, Complaint Ex. A.[1]

Notwithstanding, in paragraph 15 of its Complaint, SCEA alleges that "on information and belief", Hotz has used software updates delivered by SCEA on one or more PS3 Systems he is using. Although SCEA is not explicit, it implies that Mr. Hotz had obtained said software updates through the PSN, and that the PSN includes a forum selection clause. **Fatal to SCEA's claim that the PSN TOS creates jurisdiction over Mr. Hotz, however, is the fact that Mr. Hotz has affirmed that he did not obtain any software he is alleged to have circumvented through the PSN.** Mr. Hotz has stated unequivocally that he did not acquire any upgrade or firmware that he purportedly circumvented through the PSN. Hotz Dec. ¶ 13. Moreover, this fact has remained uncontroverted. It is axiomatic that "mere allegations of the complaint, when contradicted by affidavits, are [not] enough to confer personal jurisdiction of a nonresident defendant. In such a case, facts, not mere allegations, must be the touchstone. For example, if an accident occurred in California, we doubt that an Oregon plaintiff, merely by alleging that it occurred in Oregon, could give Oregon jurisdiction of a California defendant, in face of a showing that the accident in fact occurred in California." *Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967).

Equally significant, this case is fundamentally a tort case that is unrelated to the PSN. Contrary to SCEA's assertion, merely agreeing to a Terms of Service does not automatically con-

[1] It is also worth noting that SCEA has failed to proffer any PSN TOS that could be applicable to Mr. Hotz, even assuming everything SCEA has said is true, because the PSN TOS SCEA has proffered was created after Mr. Hotz purportedly created a PSN account.

fer jurisdiction over an individual.[2] To the contrary, jurisdiction is only proper over a defendant pursuant to a Terms of Service Agreement if the dispute arises from such agreement. In the present case, the substance of Plaintiff's Complaint is a tort involving breaching the DMCA and similar claims. SCEA asserts that this also constitutes a breach of PSN Agreement. Plaintiff's claims, however, do not "arise out of" the contract but rather sound in tort. Accordingly, ignoring the issues raised above, the activities Mr. Hotz allegedly engaged in are still not enough to confer jurisdiction pursuant to the PSN TOS. "Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). In the present case, none of the claims SCEA has asserted in any way relate to the PSN-- nor could they be since the alleged torts involve Mr. Hotz's alleged circumvention outside the scope of the PSN.

Finally, SCEA has yet to offer any proof that Mr. Hotz accepted the PSN TOS. From the start of this case, SCEA has asserted dubious arguments, which are often contradictory, pertaining to the PSN. Initially, SCEA stated that Mr. Hotz had a PSN account under the name "Geo1Hotz", which incidentally, does not include ***any*** information relating to Mr. Hotz. Dkt No. 31, Gilliland Dec. Ex. A. Nonetheless, SCEA argues that jurisdiction exists as a virtue of this account and points to the fact that Mr. Hotz frequently utilizes the username "geohot", wholly ignoring that all other information indicates it has no connection with Mr. Hotz.

Now, SCEA claims that Mr. Hotz must have created a PSN account for the name "blickmaniac" because the serial number of one of the 4 Playstation Computers that Mr. Hotz purchased-- including 3 Playstation Computers that were purchased used-- was used to register a PSN account. The serial number utilized by SCEA, however, is different from the serial number proffered by Mr. Hotz's attorney. *Compare* Law Dec., Ex. A, *with* Kellar Dec., Ex. I. Moreover, such information does not include ***any*** information relating to Mr. Hotz.[3] The sole way SCEA

---

[2] SCEA has attempted to argue, because Mr. Hotz accepted TOS for Twitter and Youtube, jurisdiction exists over him in California. SCEA also makes the same argument with the PSN TOS. Despite the fact that the PSN utilizes the word "Playstation", the PSN does not apply to all aspects of the Playstation Computer, but is rather limited to certain video games and content provided through the PSN.

[3] Curiously, the exhibit proffered by SCEA regarding the purported "blickmanic" account indicates that there was some form of purchase or transaction relating to this account. Law Dec. Ex. A. Consistent with SCEA's general refusal to provide Mr. Hotz with its requested discovery responses, SCEA has not provided

attempts to demonstrate that "blickmaniac" is Mr. Hotz is an unauthenticated and hearsay blog posting where an individual attempts to sell an unlocked cell phone -- which is not unusual and major product retailers like Amazon.com sell. Curiously, a search for "blickmanic" also yields a hearsay blog posting where an individual using the name "eepog" claims that he is the owner of the "blickmanic" account and states "the PSN account was created by me!!!" Kellar Dec., Ex. K.

It is important to recognize the dubious nature of creating a PSN account. Just as someone can enter a false name or fake e-mail when entering personal information on a sweepstakes card, someone can enter the same false information when registering for a PSN account. Gillilland Dec. Ex. A.[4] Similarly, an individual can also use a fake serial number or an improperly obtained serial number to create a PSN account.

III. PURPOSEFUL DIRECTION CLAIMS MUST FAIL: PERSONAL JURISDICTION CANNOT BE FOUND BECAUSE MR. HOTZ' ACTS WERE NEITHER DIRECTED AT SCEA NOR CALIFORNIA

1. Because SCEA Does Not Make the Playstation Computer, Mr. Hotz has not Purposefully Directed His Activities at the Forum and is not Subject to Specific Jurisdiction in California

SCEA admits the Playstation Computer and its firmware is made by Sony Japan. Kellar, Ex. M, Irogs 7, 9. If SCEA neither makes the firmware for the Playstation Computer, nor the Playstation Computer itself, Mr. Hotz could not have directed his alleged acts at SCEA. Indeed, in its document production, SCEA marked the license agreement between it and SCEI as "Highly Confidential – Attorneys' Eyes Only." Kellar Dec. Ex. F.

a) Mr. Hotz Had No Concept of SCEA's Existence Prior to SCEA's Ill Conceived Decision to Sue Him and SCEA Has Not Proven Otherwise

Mr. Hotz had never heard of SCEA until SCEA sued him. Hotz Dec. ¶ 2. Sony Japan is the one that manufactures the Playstation Computer and stamps its name all over it. Sony Japan created and owns the firmware for the Playstation Computer. In Mr. Hotz's mind, as well as the

---

any information pertaining to this transaction to Mr. Hotz's counsel.

[4] Indeed, after this lawsuit was initiated, someone other than Mr. Hotz created a PSN account using Mr. Hotz's well-known e-mail address.

mind of the rest of the world, the Playstation Computer hardware and software come from Sony Inc-- from Japan.

To prove its position that Mr. Hotz directed his activities at California, SCEA points to the absurd notion that Mr. Hotz must have been aware of not only SCEA's existence, but also its presence in California, because of the Playstation Computer manuals. SCEA incorrectly assumes that Mr. Hotz had a manual to begin with and read the manual cover to cover. The last Playstation he purchased did come with a shrink-wrapped manual-- and it remains shrink-wrapped and untouched to this day. Hotz Dec. ¶ 10.

SCEA cites *Autodesk, Inc. v. RK Mace Engineering, Inc.*, Not Reported in F.Supp.2d, 2004 WL 603382 (N.D. Cal. 2004), an unreported case (which SCEA inadvertently failed to mention) for the misplaced notion that a shrink-wrapped manual provides notice to the defendant that a plaintiff is located in a particular place. Of course, what SCEA fails to point out is that following a demand letter from the plaintiff, defendant wrote back to plaintiff and admitted to infringing the plaintiff's copyright. Obviously in order to respond to the letter the defendant must have been put on notice of the location of the plaintiff. *Id.* at *5.

SCEA's outrageous claim that Mr. Hotz wrote to SCEA when he posted, "if you want your next console to be secure, get in touch with me. Any of you 3," is an affront to reason. SCEA admits that it does not make the PS3. Kellar Ex. F, Irog 7. SCEA admits it does not make the firmware for the PS3. *Id.* at Irog. 9. It defies reason that Mr. Hotz "directed" his comment at a company that does not create the hardware or the firmware that he is alleged to have hacked, and a company which, prior to this litigation, Mr. Hotz did not even know existed. Hotz Dec ¶ 2.

b) Mr. Hotz's Personal Website Is Passive And Does Not Constitute Purposeful Direction

Mr. Hotz's personal website where he posted his Code is passive for purposes of personal jurisdiction. *Pavlovich v. Superior Court*, 29 Cal.4th 262 (2002) is controlling law on this subject. It is an identical fact pattern in which the defendant posted a computer program, which could be downloaded by third parties, allowing them to circumvent DVD encryption technology. The Court found that merely posting the information for download was not sufficient for person-

al jurisdiction. SCEA alleges the exact same set of facts and comes to the opposite conclusion.

Although SCEA cites *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119 (W.D. Pa 1997) in its opp., SCEA chooses to ignore key fact in that case, and many other cases it cites, such as the well known *Burger King Corp. v. Rudzewich* case, regarding an important distinction between passive and interactive websites: interactive sites are always selling a product for profit or at the very least, are collecting revenue through the site. 471 U.S. 462 (1985). Mr. Hotz' site was a personal blog, which is akin to an internet diary where Mr. Hotz would post his thoughts, ideas, and findings.

We note that Mr. Hotz never charged anything for viewing his site, nor did he collect contributions for his Code. Mr. Hotz did not solicit donations or earn revenue from his site or the Code. He also did not solicit or track viewers or collect emails. Hotz Declaration ¶ 9, 14.

SCEA attempts to put a spin on this case by identifying a number of downloads in California. But that identification is a red herring. His Code was downloaded over 323,518 times. Stamos Dec. ¶ 8. In other words, (and taking for argument's sake the validity of SCEA's geolocation software objected to in connection with this reply brief) 4.1 percent of total downloads were performed by California residents. Is Mr. Hotz suddenly subject to jurisdiction in every single state where an individual downloaded this software? Further, SCEA identifies two numbers of downloads, 5,700 prior to filing of the lawsuit, and then the total number running until after the injunction issued, 13,300. As this Court well knows, a defendant must have sufficient contacts with California at the time the cause of action accrues or, at latest, when the complaint is filed. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990); *Klinggoffer v. SNC Achille Lauro*, 937 F.2d 44, 52 (2nd Cir. 1991).

We further note that none of these hypothetical contacts with California could possibly support personal jurisdiction. A defendant "'will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person.'" *Doe v. American Nat. Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997) (quoting *Burger King* at 475 (1985)). The fact that people who happened to be in California allegedly downloaded Mr. Hotz' Code (just like others all of the United States and the world) does not pro-

vide a basis for jurisdiction. These California downloads are random and fortuitous. Mr. Hotz "did not control the flow [of his Code] into California. *Id*. at 1051.

2. SCEA's Claims Do Not Arise Out Of Mr. Hotz's Intentional Contacts With California

SCEA sues Mr. Hotz for circumvention under the Digital Millennium Copyright Act ("DMCA"). Dkt. No. 1, Complaint ¶¶ 54-61. This claim arises out of Mr. Hotz's alleged circumvention of the technological protection measures in the Playstation Computer. Any circumvention was done in New Jersey, not California (SCEA does not even bother alleging that Mr. Hotz circumvented the Playstation Computer in California). No California nexus exists in this claim. The distribution aspect of the DMCA claim is similarly flawed. Nothing exists in the mountain of documents submitted by SCEA to suggest that California was an intentional target of the software release. According to Mr. Bricker, 13,400 people in California downloaded the Jailbreak, but over three hundred thousand people outside of California also downloaded it. If nothing else, this *proves* the release was not directed at California.

SCEA sues Mr. Hotz for violation of the Computer Fraud and Abuse Act ("CFA") for accessing "protected computers used for interstate commerce or communications . . . ." Dkt. No. 1, Complaint ¶63. Aside from being a speculative claim on its face, as to find liability under this claim would require a finding that the Playstation Computer ***that Mr. Hotz owns*** constitutes a "protected computer," like the DMCA claim, the CFA claim has no California nexus. There is no allegation Mr. Hotz accessed a so-called "protected" Playstation Computer in California. SCEA's claim that Mr. Hotz has attempted to extort employment from SCEA also has no factual basis and absolutely zero support in the record. In fact, the record supports the very opposite: that Mr. Hotz (like most Americans) had never heard of SCEA until SCEA sued Mr. Hotz, and SCEA does not make the hardware or the software that Mr. Hotz allegedly “hacked”.

There is no California nexus for SCEA's contributory infringement claim, claim under the Computer Crime Law, and tortuous interference claim, for the same reasons that the CFA and DMCA claim. And, although academic at this point, Mr. Hotz's software release does not allow for direct infringement without substantial modification and addition through non-intuitive

steps. See e.g., Dkt. No. 104, Ex. N. [filed under seal] (describing additional steps one needs to take to commit infringement).

Finally, Mr. Hotz is not subject to the PSN TOS as discussed above.

3. Personal Jurisdiction Must Fail Because Personal Jurisdiction Over Mr. Hotz Is Unreasonable

For SCEA to argue that it is reasonable to assert jurisdiction over the 21 year old Mr. Hotz-- who published his own code he created on his own website, whose sole conduct which underlies this action took place in New Jersey, who had no knowledge of the existence of SCEA, who faces the burden of having to litigate a case across the country against a multi-billion company-- is simply facetious. SCEA notes that Mr. Hotz had asked for donations to support his legal defense as if it supports the proposition that he is able to defend this lawsuit in California without difficulty. It wholly ignores the fact that Mr. Hotz, who is currently unemployed, actually had to ask for donations to defend this suit.

Incredibly, SCEA argues that because Mr. Hotz has been able to gain counsel to assist him, defending this matter in California must be reasonable. SCEA fails to recognize that Mr. Hotz was able to gain counsel to represent him solely because many attorneys have been watching the actions of SCEA, along with the rest of the world, in disbelief. SCEA argues that the fact that Mr. Hotz has retained counsel in Atlanta, Georgia to assist him ignores the fact that Mr. Hotz counsel had been actively assisting him pro bono, and ignores the fact that Mr. Hotz was actually required to find counsel 1,000 miles away in order to effectively combat a case in a jurisdiction that is even more alien and remote to him. The fact that Plaintiff would like to litigate this dispute in California does not obviate the fact that all actions allegedly committed took place in New Jersey and that exercising jurisdiction over Mr. Hotz is unreasonable

IV. MR. HOTZ' MOTION SHOULD BE GRANTED BECAUSE SCEA HAS ABUSED THE JURISDICTIONAL DISCOVERY PROCESS

On February 2, 2011, Mr. Hotz timely filed this Motion. Two days later, SCEA served a slew of premature and abusive discovery documents on Mr. Hotz and sent multiple third party subpoenas prior to any procedural milestone that would permit such acts. Clearly the tactic was

to overwhelm Mr. Hotz by thwarting proper discovery procedure. On February 10, 2011, the abusive discovery demands were thrown out from the bench and SCEA was required to call back its abusive subpoenas. Feb. 10 Hrg. Transcript [Dkt. 77] 32:9-11 and 33:22-34:8. Nevertheless, SCEA issued numerous frivolous subpoenas to harass Mr. Hotz. SCEA subpoenaed Twitter, Google, Youtube, Bluehost (webhost for Mr. Hotz's site), SoftLayer (webhost for psx-scene.com) and PayPal. As issued, none of those subpoenas limited categories of documents to "California" despite the limited jurisdictional discovery. After subpoenaing every entity it could think of, SCEA still has nothing (and certainly nothing admissible) to connect Mr. Hotz to California

SCEA also propounded extensive discovery requests on Mr. Hotz. SCEA sought 31 categories of documents (SCEA eventually withdrew five categories). Mr. Hotz timely and appropriately produced documents and/or provided an appropriate statement of compliance for each request. In contrast, SCEA's document production failed to comply with the instructions to produce TIFF files and SCEA intentionally sabotaged its produced files to prevent the use of OCR software, disabling Mr. Hotz from searching for text therein. Kellar Dec. Ex. L (*compare* Bricker Dec. filed with Court *with* Bricker Dec. produced to Mr. Hotz). SCEA also propounded nine interrogatories on Mr. Hotz. Similarly, he responded to each one. Finally, SCEA demanded an inspection of Mr. Hotz's impounded hard drives and Mr. Hotz's PS3s. SCEA subsequently withdrew its request to inspect the impounded hard drives, but now has reasserted this request

At a hearing with Judge Spero, SCEA said it needed to search Mr. Hotz's hard drives for a Software Developer's Kit ("SDK") because, they claimed, it contains information that SCEA is in California. Dkt. No. 93, 10-12. Judge Spero ordered the parties to meet and confer and submit a joint letter by March 16. Order Dkt. No. 96 3:16-18. SCEA refused to meet in person regarding the letter. Once Mr. Hotz's counsel discovered the SDK does not contain what SCEA stated, Mr. Hotz sought to bring this matter to the Court's attention in the joint letter. To prejudice Mr. Hotz's position, SCEA refused to timely provide its portion of the letter, preventing Mr. Hotz from rebutting its arguments. Dkt. 99. SCEA's bad faith acts caused the March 16 letter to be delayed. *Id*. SCEA is not in a position to vilify Mr. Hotz when it is SCEA that continues to proceed

in bad faith.

SCEA's task, which it failed at, was to connect Mr. Hotz, in some concrete way to California. Rather than submit admissible evidence, SCEA provided the declaration of an unqualified expert Dkt. No. 105-2,Peirce Dec. SCEA submitted the declaration of SCEA employees provided without any foundation beyond a vague title. Dkt. No. 105-1, Liu Dec.; Dkt. No. 105 Law Dec.) Further, the Law declaration was not even signed under penalty of perjury; its contents are clearly misleading and inadmissible as discussed above. SCEA also submitted the declaration of Ryan Bricker, which nearly entirely consisted of hearsay printouts from the Internet. Dkt. No. 104, e.g., Exhs. F, I, J, K, L, N, O, T, & U.

Further, SCEA abuses the sealing process by filing documents under seal which have no business being sealed. SCEA seals periodicals and publicly accessible web pages, falsely designating such items as Confidential. *See e.g.* Bricker Dec. Exhs. H, L, M, N, P (publicly available documents and web pages filed under seal). SCEA is thwarting the openness of the Courts with its abusive sealing, yet in its latest filing, SCEA intentionally published Mr. Hotz's home address despite the fact it knows the massive media coverage this case receives. Dkt No. withheld for Mr. Hotz's privacy. SCEA even withholds information from this Court. Pierce Dec. Exh. A, filed under seal, redacts all IP Address information, tainting any claim of California connections to Mr. Hotz' site. SCEA is preventing the Court from doing its job.

These acts are indicative of SCEA's pattern of abuse throughout this action. SCEA's counsel has not conferred in good faith with Mr. Hotz's counsel regarding the scope and method of jurisdictional discovery. SCEA's counsel refuses all efforts to meet and confer in person on essential matters, in direct violation of Judge Spero's standing order regarding disputes of parties and moots any argument SCEA has made about Mr. Hotz's noncompliance with discovery. Contrary to SCEA's assertions, Mr. Hotz has complied and continues to comply with SCEA's discovery requests. Mr. Hotz has not thwarted discovery by going on a planned vacation. Mr. Hotz has scheduled his deposition and the inspection of his Playstation Computers.

To put a cap on SCEA's bad faith acts, SCEA waited until the eve Mr. Hotz's reply brief was due to produce the most damning evidence of all: agreements between Sony Inc. and SCEA

that eviscerate SCEA's position that George's acts were aimed at SCEA. SCEA produced these documents well after it agreed to produce all discovery documents. SCEA cannot be permitted to pervert the discovery process in this way.

V. VENUE IS IMPROPER AND THIS COURT HAS AUTHORITY TO TRANSFER THIS CASE TO NEW JERSEY

This Court has authority to transfer this case to the district court in New Jersey. 28 U.S.C. § 1404(a). It can do so *sua sponte,* and it should because SCEA could not prove that venue is proper in California through U.S.C. § 1391 (b)(2). *Mills v. Beech Aircraft Corp*., 886 F.2d 758, 761 (5th Cir. 1989). In order for venue to be proper in California, SCEA would have to show that a substantial part of the events or omissions giving rise to the claim occurred in California, or a substantial part of property that is the subject of the action is situated in California. In this situation, all events have taken place exclusively in New Jersey, and all property that is subject of this action is situated in New Jersey. The only events that give rise to SCEA's claim is the alleged act of Mr. Hotz modifying the firmware on his PS3 and the Code, which exclusively took place in New Jersey.

It is within the Court's inherent power to transfer this case under § 1404(a) even if it were to find jurisdiction based on a forum selection clause. *Stewart Org. v. Ricoh Corp*., 487 US 22, 29-30 (1988). Mr. Hotz is 21 years old and unemployed. Dkt. No. 104, Bricker Decl. Ex. C, Interrogatory No. 9. He lives, literally, across the country from this Court house. He has limited funds available for his defense and SCEA has made it very apparent that it intends to spend vast quantities of money attempting to grind him to dust. A simple examination of the 100+ documents filed on the docket verifies this. Litigating this case in California will place a major strain on Mr. Hotz. He cannot see his attorneys and he cannot be present in the courtroom. Even though Mr. Hotz contends no jurisdiction exists, if the Court finds it has jurisdiction, it should transfer the case to New Jersey-- where Mr. Hotz lives and all his actions occurred.

VI. CONCLUSION

SCEA has filed this action in bad faith, knowing that it did not have a reasonable basis for jurisdiction, and has attempted to distract the Court by flooding the record. SCEA knows that

Mr. Hotz did not create the PSN Accounts it has put forth, yet has claimed that he created them nonetheless and conveniently omitted the information that demonstrates they do not belong to him. SCEA knows that the majority of people who have downloaded the Code Hotz created are not from California, yet it conveniently omits these figures. SCEA knows that this matter is supposed to pertain to jurisdiction, yet it constantly includes irrelevant and prejudicial exhibits with sealed documents of public web pages that include hearsay statements from users with dubious names like 'dragon ninja" to make Mr. Hotz look bad. We hope the Court notes that although there is no shortage of articles, commentators, and legal scholars that have scoffed at SCEA's actions and find SCEA's assertion of jurisdiction over Mr. Hotz unbelievable, Mr. Hotz has nonetheless chosen to focus on the matter at hand, jurisdiction, rather than utilize inadmissible arguments to prejudice SCEA.

The fact of the matter is, even if this Court could accept SCEA's absurd notion that Mr. Hotz could have "directed" his activities by publishing his own lawfully created code on his personal website in New Jersey, there is quite simply no way to argue that Mr. Hotz directed such activity at SCEA. Mr. Hotz did not know of SCEA's existence prior to this suit, and in reality, no reasonable person owning a Playstation Computer would have arrived at such a conclusion. Indeed, pursuant to SCEA's own statements, it is essentially nothing more than a distributor and marketing company. If SCEA can claim it has the power to assert jurisdiction over Mr. Hotz, then there is no reason that other lawful distributors of the Playstation Computer, such as a Wal-Mart in Hawaii or Alaska, could attempt to gain jurisdiction over Mr. Hotz. SCEA is asking this Court to find that jurisdiction exists over Mr. Hotz, an individual, by performing an analysis that was explicitly rejected by the Supreme Court when considering a business that places goods into the stream of commerce. *World-Wide Volkswagen Corp. v. Woodson*. For those reasons, Mr. Hotz's motion to dismiss or transfer should be GRANTED.

DATED: March 25, 2011 Respectfully submitted,

Stewart Kellar E-ttorney at Law

By /s/ Stewart Kellar
Stewart Kellar
Attorneys For George Hotz