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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

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

13 Plaintiff,

14 v.

15 GEORGE HOTZ; HECTOR MARTIN
16 CANTERO; SVEN PETER; and DOES 1
through 100,

17 Defendants.
18

CASE No.: CV 11-00167 SI

**MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION AND
IMPROPER VENUE**

Fed. R. Civ. P. 12(b)(2)-(3)

Date: March 11, 2011

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: Hon. Susan Illston

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1 Now comes Defendant George Hotz by and through his attorney of record who specially
2 appears and respectfully submits this Motion to Dismiss for Lack of Personal Jurisdiction and
3 for Improper Venue. Mr. Hotz hereby moves this Court, pursuant to Fed. R. Civ. P. 12(b)(2)
4 and 12(b)(3) to dismiss the present action against him. Mr. Hotz is a resident of New Jersey,
5 and he lacks sufficient contacts with California to confer personal jurisdiction over Mr. Hotz.
6 and venue is improper.

7
8 **I. INTRODUCTION**

9 Sony Computer Entertainment America, LLC (“SCEA”) does not make the Sony
10 Playstation 3 console (“Playstation computer”). Complaint [Dkt. No. 1] ¶¶18-19. The
11 Playstation computer is made by Sony Computer Entertainment Inc. (“Sony Inc.”) which is not a
12 party to this action. *Id.* Sony Inc. is a Japanese corporation with its headquarters in Tokyo,
13 Japan. Second Declaration of Kellar Exh. A. SCEA “develops and publishes video game
14 software” for the Playstation computer and couches that limited role under the broad term
15 “SUBJECT WORKS.” Complaint at ¶¶22-23. Further, SCEA does not state in its complaint
16 that it makes firmware or anti-circumvention technological protection measures (“TPMs”) for
17 the Playstation computer. In fact, SCEA hides the ball with respect to “who does what” within
18 the Playstation computer. Complaint ¶31 states that “SCEA’s affiliates have invested hundreds
19 of millions of dollars developing the PS3 System, including the PS3 System’s TPMs.” SCEA
20 uses the slippery term “affiliates” to characterize the developers of the TPMs. Because the
21 complaint alleges violation of the DMCA via circumvention of TPMs, the fact that SCEA has
22 not claimed to have developed or own the TPMs at issue is troubling. Complaint ¶48 further
23 bounces between SCEA and Japan’s Sony Inc., discussing “SCEA firmware that operates the
24 PS3 System. That firmware contains SCEI’s copyrighted PS3 Programmer Tools.” SCEA is not
25 Sony Inc. and has not been a subsidiary of Sony Inc. since April 1, 2010. Complaint ¶19.

26 Mr. Hotz is not subject to personal jurisdiction in California. In its complaint, SCEA
27 asserts Mr. Hotz is subject to jurisdiction based on acts “directed to SCEA in California.” *Id.* at
28 ¶15(a) ln.28. As is shown below, Mr. Hotz has not purposefully directed his activities towards

1 SCEA in California. SCEA further asserts jurisdiction over Mr. Hotz is proper based on the
2 mere existence of Twitter and Paypal accounts in Hotz's name, an assertion that has not held
3 water with this Court. Next, SCEA claims Mr. Hotz must be subject to the Playstation Network
4 ("PSN") Terms of Service and User Agreement (hereinafter the "PSN TOS"), which includes a
5 forum selection clause. The PSN is an online service facilitated by SCEA that allows, among
6 other limited activities, certain Playstation computer owners in conjunction with the PSN to
7 participate in multiplayer gaming with one another. In support of its position that Mr. Hotz is
8 subject to the PSN TOS, SCEA puts forth unauthenticated and contradictory hearsay evidence
9 that Mr. Hotz has an Online ID for the PSN, and further makes deceptive and blatantly false
10 statements that Mr. Hotz's is subject to the PSN TOS by mere virtue of Mr. Hotz updating his
11 Playstation computer via a firmware update. In fact, Mr. Hotz demonstrates that he is not
12 subject to the PSN TOS. Second Affidavit of Hotz [Dkt. No. 44] ¶13. Moreover, contrary to
13 SCEA's assertion, and as demonstrated herein, updating a Playstation Computer does not
14 subject a user to the PSN TOS or any other agreement with Plaintiff. Affidavit of Heidari [Dkt.
15 No. 45] ¶12. Finally, SCEA asserts that Mr. Hotz conspired with other defendants in California.
16 As is shown below, no named defendant is alleged to live in California and no conspiracy exists
17 between Mr. Hotz and California Does.

18 Therefore, Mr. Hotz is not subject to personal jurisdiction in California and this action
19 against Mr. Hotz should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal
20 jurisdiction.

21
22 **II. MR. HOTZ IS NOT SUBJECT TO PERSONAL JURISDICTION IN**
23 **CALIFORNIA.**

24 Due Process requires that, in order for a forum to exercise personal jurisdiction over a
25 nonresident defendant, that "he have certain minimum contacts with it such that the maintenance
26 of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International*
27 *Shoe Co. v. Washington*, 326 US 310, 316 (1945). In California, a court may exercise
28 jurisdiction on any basis not inconsistent with the state or federal constitutions. CCP § 410.10.

1 The plaintiff bears the burden of establishing the district court's personal jurisdiction over the
2 defendant. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003).

3 Because he does not live in California and does not have continuous, systematic or
4 substantial contact with California which would subject him to personal jurisdiction, Mr. Hotz is
5 unquestionably not subject to general jurisdiction in California.

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

9 Plaintiff SCEA does not make the Playstation computer. The Playstation computer is
10 made by Sony Inc. which is a Japanese corporation and not a party to this action.

11 The Ninth Circuit has established a three-part test for determining when specific
12 jurisdiction may be exercised. See *Data Disc, Inc. v. Systems Tech Assocs, Inc.*, 557 F.2d 1280,
13 1287 (9th Cir. 1977). To properly exercise specific jurisdiction, (1) The nonresident defendant
14 must do some act or consummate some transaction with the forum or perform some act by
15 which he purposefully avails himself of the privilege of conducting activities in the forum,
16 thereby invoking the benefits and protections of its laws; (2) The claim must be one which
17 arises out of or results from the defendant's forum-related activities; and (3) Exercise of
18 jurisdiction must be reasonable. *Id.* All three prongs must be met, and the inability to satisfy
19 any of the aforementioned prongs will result in the failure to establish jurisdiction over the
20 defendant. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).
21 Moreover, the plaintiff bears the burden of satisfying the first two prongs of the test. *Id.*; *Slepian*
22 *v. Guerin*, 172 F.3d 58 (9th Cir. 1999). If the plaintiff succeeds in satisfying both of the first
23 two prongs, the burden then shifts to the defendant to "present a compelling case" that the
24 exercise of jurisdiction would not be reasonable. *Schwarzenegger*, 374 F.3d at 802.

25 The Ninth Circuit analyzes the first prong for personal jurisdiction, purposeful availment
26 and purposeful direction, as two separate analyses. In tort cases involving purposeful direction,
27 the Court evaluates such prong under the "effects" test from *Calder v. Jones*, 465 U.S. 783
28 (1984). See *Dole Food Co, Inc. v. Watts*, 303 F.3d 1104 (9th Cir. 2002). Under *Calder*, the

1 “effects” test requires that the defendant allegedly (1) committed an intentional act, (2)
2 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be
3 suffered in the forum state. *Id.*

4 In analyzing the second prong required for personal jurisdiction, that a claim must arise
5 out of the defendant's forum-related activities, the courts apply a “but for” test. *John Doe v.*
6 *Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001). The “but for” test is a simple test where the
7 Plaintiff must demonstrate that the claims against the Defendant would not have arisen “but for”
8 the Defendant's contact with the forum state. See *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th
9 Cir. 1995).

10 If the Plaintiff meets its burden in satisfying the first two prongs, then the Court must
11 analyze the third and final prong for jurisdiction, reasonableness, by consider the following
12 seven factors: (1) the extent of the defendants' purposeful interjection into the forum state's
13 affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with
14 the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute;
15 (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to
16 the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative
17 forum. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993). None
18 of the factors are dispositive, and they must be balance together. *Id.*

19
20 **B. Prong 1 Of The Personal Jurisdictional Analysis Must Fail Because Mr. Hotz's**
21 **Alleged Acts Were Not Directed Toward California, And SCEA Has Failed To**
22 **Satisfy Its Burden.**

23 Under the first prong of a specific jurisdiction test, SCEA must demonstrate that Mr.
24 Hotz "purposefully availed" himself of the privilege of conducting activities in California, or
25 purposefully directed its activities toward California. *Schwarzenegger*, 374 F.3d at 802. While
26 the Courts typically use "purposeful availment," in shorthand fashion to include both purposeful
27 availment and purposeful direction, “availment” and “direction” are two distinct concepts that
28 undergo two distinct analyses. *Id.*

In the matter at hand, SCEA alleges that Mr. Hotz directed his acts at SCEA, as opposed

1 to the Japanese makers of the Playstation computer Sony Inc., by posting information on his
2 passive website and making alleged unrelated statements regarding console makers. SCEA
3 further alleges that Mr. Hotz purposely availed of the benefits of this district by having a Paypal
4 account and then goes on to improperly allege that Mr. Hotz is subject to the PSN TOS.
5 Complaint ¶3. Mr. Hotz will demonstrate that the alleged acts are passive and are not directed
6 towards SCEA and that he is not subject to the PSN TOS.

7 Purposeful availment involves a showing that a defendant purposefully availed himself
8 of the privilege of doing business in a forum state typically consists of evidence of the
9 defendant's actions in the forum, such as executing or performing a contract in the forum. *Id.* at
10 803. Purposeful direction, by contrast, involves a showing that a Defendant purposefully
11 directed his tortious conduct toward the forum state, and applies the three-part Calder effects
12 test promulgated by the U.S. Supreme Court. *Id.*

13 SCEA fails to satisfy the first prong of a jurisdictional analysis irrespective of whether a
14 purposeful direction or purposeful availment test is utilized.

15
16 **1. Purposeful Direction Analysis: Mr. Hotz's Activities Relate to a Passive
Website and Statements Not Directed Toward SCEA or California.**

17 Mr. Hotz maintains a passive website at <www.geohot.com>. The site merely makes
18 information available and does not allow users to interact with the host computer or exchange
19 information. The Complaint also alleges Mr. Hotz made the statement "If you want your next
20 console to be secure, get in touch with me" and directed it at SCEA. Complaint ¶45. The
21 double-hearsay quote, derived from a screenshot within a forum post within a website at <psx-
22 scene.com>, omits the full statement, which undermines SCEA's claim that Mr. Hotz directed
23 any statement toward SCEA:

24 "if you want your next *console* to be secure, get in touch with me. *any of you 3.*"

25
26 Declaration of Bricker [Dkt. No. 42] Exh. T (emphasis added).

27 SCEA does not make the Playstation computer. The Playstation computer is made by
28 Sony Inc. which is a Japanese corporation and not a party to this action. The registered

1 trademarks for PLAYSTATION for computer game equipment [game consoles] and for
2 network-related gaming activities are and held by Sony Inc. Second Declaration of Kellar ¶¶ F-
3 G. SCEA likewise does not claim to have developed or own the TPMs alleged to have been
4 circumvented. See Complaint ¶ 31. Finally, the statement “any of you 3” clearly refers to
5 console makers, being Nintendo, Sony Inc. and Microsoft. Second Declaration of Kellar ¶¶ C-D.

6 With this background, SCEA has the burden of proving Mr. Hotz purposefully directed
7 his actions towards California as opposed to, say, Japan where Sony Inc. is located. Under the
8 well established “Calder effects” test, which pertains to purposeful direction, Mr. Hotz must
9 have expressly aimed his activity at California, causing harm that the defendant knows is likely
10 to be suffered in California.

11 The 9th Circuit has held “cases have struggled somewhat with Calder's import,
12 recognizing that the case cannot stand for the broad proposition that a foreign act with
13 foreseeable effects in the forum state will always give rise to specific jurisdiction. We have said
14 that there must be ‘something more.’ We now conclude that 'something more' is what the
15 Supreme Court described as 'express aiming' at the forum state.” *Pebble Beach Co. v. Caddy*,
16 453 F.3d 1151, 1156 (9th Cir. 2006). Accordingly, acts which are not expressly aimed at
17 California, regardless of foreseeable effect, are insufficient to establish jurisdiction. *Id.*

18
19 **a. Mr. Hotz’s Maintains a Passive Website**

20 First, Mr. Hotz maintains a passive, not an active website. “A passive Web site that does
21 little more than make information available to those who are interested in it is not grounds for the
22 exercise personal jurisdiction.” *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119, 1124
23 (W.D. Pa. 1997). Mr. Hotz’s website creates one of those “situations where a defendant has
24 simply posted information on an Internet Web site which is accessible to users in foreign
25 jurisdictions.” *Id.* “Creating a site, like placing a product into the stream of commerce, may be
26 felt nationwide--or even worldwide--but, without more, it is not an act purposefully directed
27 toward the forum state.” *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)
28 (quoting *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) affd. 126

1 F.3d 25 (2d Cir. 1997)). Mr. Hotz neither encourages nor facilitates illegal circumvention
2 devices to be downloaded on his website. More importantly, SCEA's claims are not related to
3 Mr. Hotz running a website or disclosing information he legally obtained; rather, SCEA's
4 allegation pertains to, once again, Mr. Hotz allegedly improperly accessing portions of his own
5 Playstation computer.

6 The facts here are almost identical to those of the California Supreme Court case of
7 *Pavlovich v. Superior Court*, 29 Cal. 4th 262 (2002). In *Pavlovich*, the California Supreme
8 Court declined to exercise jurisdiction over a nonresident defendant who posted to his passive
9 web site, source code allowing users to circumvent DVD encryption technology. *Id.* The Court
10 found that although Pavlovich knew that some entity owned the licensing rights to the encryption
11 technology, "he did not know that [Plaintiff] was that entity or that [Plaintiff's] primary place of
12 business was California until *after* the filing of this lawsuit." *Id.* at 275. After citing *Zippo*, the
13 *Pavlovich* Court held that Pavlovich's site

14 "merely posts information and has no interactive features. There is no
15 evidence in the record suggesting that the site targeted California. Indeed,
16 there is no evidence that any California resident ever visited, much less
17 downloaded the DeCSS source code from, the LiVid Web site. Thus,
Pavlovich's alleged "conduct in . . . posting [a] passive Web site on the
Internet is not," by itself, "sufficient to subject" him "to jurisdiction in
California."

18 *Id.* at 274 (citing *Jewish Defense Organization, Inc. v. Superior Court*, 72 Cal.App.4th 1045,
19 1060 (1999), (refusing to exercise jurisdiction under the effects test even though the defendant
20 had "passive Web sites on the Internet"); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-
21 420 (9th Cir. 1997) (refusing to exercise jurisdiction under the effects test even though the
22 defendant posted infringing material on its Web site). "Creating a site, like placing a product
23 into the stream of commerce, may be felt nationwide--or even worldwide--but, without more, it
24 is not an act purposefully directed toward the forum state." *Id.* (quoting *Cybersell*, 130 F.3d at
25 418).

26 As in *Pavlovich*, Mr. Hotz is alleged to have posted information on his passive website.
27 Mr. Hotz's activities do not indicate that he knows that there is a company, apart from the maker
28

1 of the Playstation computer (Japanese corporation Sony Inc.) that may be the licensee, licensor
2 or holder of any interest in the Playstation computer.

3 SCEA will attempt to, but cannot, characterize users of Google's Blogspot service or
4 Youtube service as hosts of interactive websites. Mr. Hotz does not maintain the website
5 <blogspot.com> or <youtube.com> and does not control who can or cannot create a Blogspot or
6 Youtube account. The interactivity of a Blogspot or Youtube page is borne from Google, not
7 from Mr. Hotz. Therefore, the publishing of a blog or video is not akin to hosting "an
8 interactive website" sufficient to find internet jurisdiction over Mr. Hotz or any other user of
9 such media. Thus, users of such services should not have to live in fear of jurisdiction asserted
10 by an unrelated company in the same jurisdiction.

11
12 **b. Mr. Hotz's Alleged Statement and Actions Not Directed at SCEA**

13 SCEA claims Mr. Hotz did "something more" towards the forum via the unauthenticated
14 hearsay statement "if you want your next *console* to be secure, get in touch with me. *any of you*
15 *3.*" Declaration of Bricker Exh. T. SCEA does not make the Playstation computer. Sony Inc.,
16 which is a Japanese corporation and not a party to this action, makes the Playstation computer.
17 Console is defined by the Merriam-Webster Dictionary as "an electronic system that connects to
18 a display (as a television set) and is used primarily to play video games." SCEA does not make
19 a console. Sony Inc. makes that console: the Playstation computer. Second and most important,
20 the phrase "any of you 3" negates any aiming at SCEA in California. There are three major
21 console makers, Nintendo, Sony Inc., and Microsoft. Second Declaration of Kellar Exhs. C-E.

22 In the present case, SCEA cannot demonstrate that Mr. Hotz's activity could even
23 arguably be construed as expressly aimed at California. To the contrary, the sole alleged
24 activity in this action involves Mr. Hotz-- who is located in New Jersey-- purportedly
25 improperly accessing portions of his own Playstation computer-- which is also located in New
26 Jersey. The Playstation computer is not made by SCEA. It is made by Sony Inc. which is a
27 Japanese corporation. The Playstation trademark is held by Sony Inc. Second Declaration of
28 Kellar Exhibits F-G.

1 Finally, SCEA includes various other inexplicable claims for good measure, including
2 Mr. Hotz violating the Computer Fraud and Abuse Act and the California Computer Crime Law
3 for allegedly "exceeding access" to Mr. Hotz's very own Playstation computer (made by Sony
4 Inc.), as well as for Mr. Hotz purportedly "trespassing" on the very Playstation computer he
5 lawfully purchased and owns (made by Sony Inc.). SCEA also alleges that, by engaging in such
6 conduct, Mr. Hotz has breached the PSN TOS (which is not applicable to Mr. Hotz as
7 demonstrated below). Nonetheless, this suit centers on the allegation that Mr. Hotz improperly
8 accessed portions of his own Playstation computer, made by Sony Inc. which is not a party to
9 this action and that Mr. Hotz circumvented TPMs that were developed by affiliates of SCEA,
10 not SCEA itself.

11 The distinguishable case *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir.
12 1998) will be cited and relied on heavily by SCEA to draw a comparison between Mr. Hotz and
13 the defendant in that case. Given the diverging facts from this case, reliance on *Panavision* here
14 is unwarranted. In *Panavision*, the Court found personal jurisdiction over a nonresident
15 defendant who maliciously registered hundreds of domain names including trademarks owned
16 by plaintiff Panavision in California and sent a letter to Panavision explicitly offering to sell
17 those domains for large sums of money in what the 9th Circuit characterized as an extortion
18 scheme. *Id.* at 1323, 1327. The Court in *Panavision* found the Defendant deliberately
19 registered domain names for a trademarked company in California and initiated extensive
20 contacts with such company to negotiate or extort money from such company. *Id.* at 1327. The
21 Court elucidated that such contacts were, in addition to having foreseeable effects in California,
22 deliberately aimed at California. *Id.* at 1321-22.

23 By contrast however, the Court stated that, had the defendant simply registered the
24 domain names belonging to the trademarked company in California, and done little more--
25 despite the fact that such actions would have foreseeable effects in California-- the Defendant
26 would not be subject to personal jurisdiction in California because such actions were not
27 deliberately aimed at California. *Id.* at 1322. Indeed, the 9th Circuit Court has specifically
28 rejected *Panavision*-like jurisdiction under such facts. See *Pavlovich*, 29 Cal. 4th 262; *Jewish*

1 *Defense Organization, Inc.*, 72 Cal.App.4th 1045; and *Cybersell, Inc.* 130 F.3d 414 (no
2 purposeful direction where defendant posted a noncommercial, passive website and no direct
3 solicitation of plaintiff).

4 In the present case, aside from SCEA's conclusory assertion that Mr. Hotz deliberately
5 aimed his activity at California, SCEA has provide **no** underlying facts that would indicate Mr.
6 Hotz directed any activity at California whatsoever. Even if Mr. Hotz's accessed his own
7 Playstation computer and SCEA, which is located in California, suffered foreseeable harm from
8 such access, such contacts would be insufficient to satisfy jurisdiction and fail to satisfy this
9 prong of the analysis. Just as someone in Nebraska registering a website using another's
10 trademark may result in foreseeable harm to a company in California, such contact alone is not
11 sufficient to confer jurisdiction. *Id.* Rather, there must be "something more"-- an express
12 aiming' at the forum state. "Creating a site, like placing a product into the stream of commerce,
13 may be felt nationwide-or even worldwide-but, without more, it is not an act purposefully
14 directed toward the forum state." *Cybersell*, 130 F.3d at 418 (quoting *Bensusan Restaurant*
15 *Corp., v. King*, 937 F. Supp. 295, 301 (S.D.N.Y.1996) (citing the plurality opinion in *Asahi*
16 *Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1992)). Mr. Hotz's site merely provides
17 information to those who seek access to it. The fact that SCEA alleges Mr. Hotz' maintained a
18 website site is not sufficient to confer jurisdiction over Mr. Hotz. *Pebble Beach Co.*, 453 F.3d at
19 1156 (9th Cir. 2006).

20 SCEA will also cite several cases that find specific jurisdiction while neglecting to
21 mention the highly distinguishable facts of each. *Dole Food Co, Inc. v. Wattss*, 303 F.3d 1104
22 at 1107 (9th Cir. 2002) finds specific jurisdiction over former officers of the plaintiff's
23 company who lied about their personal interests in business deals. Mr. Hotz is not a former
24 officer of SCEA and has not committed fraud against SCEA. *3DO Co. v. Poptop Software,*
25 *Inc.*, 1998 U.S. dist. LEXIS 21281 (N.D. Cal. 1998) involves cut and dry copyright
26 infringement committed by the defendants who encouraged infringement of plaintiff 3DO's
27 copyrighted material and used a California-based server to distribute the infringing files via an
28 interactive website. Even the sole unauthenticated evidence put forth by SCEA indicates Mr.

1 Hotz does not condone piracy, does not offer infringing copyrighted works for download, does
2 not utilize California-based servers, and does not provide a website that offers any interactivity.
3 Declaration of Bricker, Document Number [21] Exhs. A, B. Finally, *Autodesk v. RK Mace*
4 *Engineering, Inc.*, 2004 WL 603382 is distinguishable. In *Autodesk*, the defendant sent the
5 plaintiff two letters admitting willful infringement and violation of plaintiff's software licensing
6 agreement to which the defendant voluntarily agreed. No such admission exists here, Mr. Hotz
7 has not acquiesced to any agreement with SCEA, and there are disputed facts regarding whether
8 infringement of any kind has occurred in the present case.

9 Mr. Hotz's alleged acts are not directed towards the forum or towards SCEA. Mr.
10 Hotz's web site is clearly a passive one that does not allow users to exchange information with
11 the host computer. *Id.* Finally, the statement made generally on the internet is not directed
12 towards SCEA (which does not make consoles) and any reasonable inference would at most, see
13 it as directed towards console makers generally, not SCEA specifically, or even peripherally.

14 **2. Purposeful Availment analysis: Mr. Hotz is not subject to the PSN.**

15
16 SCEA alleges that all users who have updated their Playstation Computer via Playstation
17 Computer firmware update are bound by the PSN TOS. Plaintiff's Complaint, p.13, ¶ 53. SCEA
18 then alleges that Mr. Hotz must have updated his Playstation Computer, and uses this as
19 justification for why Mr. Hotz must be subject to the PSN TOS, which includes a forum
20 selection clause. SCEA's assertion is blatantly false and misleading, and Mr. Hotz has explicitly
21 averred that he is not subject to the PSN TOS. Affidavit of Hotz ¶ 6. Equally significant,
22 updating a Playstation Computer does not subject an individual to the PSN TOS. Affidavit of
23 Heidari ¶ 5.

24 With regard to the PSN TOS, the agreement is not a required step to access the 3.55
25 firmware and is not required to be entered into by end users to install the 3.55 Firmware onto a
26 Playstation computer. Affidavit of Heidari ¶¶ 5, 8-13. The 3.55 Firmware file may be
27 accessed, without encountering any agreements, directly from a website registered by Sony Inc.
28 <http://dus01.ps3.update.playstation.net/update/ps3/image/us/2010_1207_ca595ad9f3af8f1491d

1 9c9b6921a8c61/PS3UPDAT.PUP> or many other third party websites. Affidavit of Heidari ¶
2 4. The WhoIs information for <playstation.net> indicates that Sony Inc., not SCEA, controls
3 the website. Second Declaration of Kellar Exh. B. Upon installing the firmware, the only
4 agreement encountered by an end user is an agreement with Sony, Inc. which is not a party in
5 this lawsuit. Affidavit of Heidari ¶ 8. The agreement does not contain a forum selection clause
6 and raises serious questions of SCEA's standing to bring this lawsuit. *Id.* ¶ 9.

7 SCEA has not and cannot truthfully allege that Mr. Hotz has accepted the PSN
8 Agreement or has connected to the PSN Network to obtain the 3.55 Firmware. Notwithstanding
9 the foregoing, Mr. Hotz has explicitly stated that he has not obtained the Playstation computer
10 firmware update from the PSN. Second Affidavit of Hotz ¶ 11.

11 Equally problematic for SCEA, the only evidence it has put forth to prove Mr. Hotz has
12 entered the PSN Agreement is an improperly authenticated screen shot of a PSN Network
13 account with the username "Geo1Hotz." Declaration of Gilliland Exh. A. Mr. Hotz does not
14 own or have access to this account. Second Affidavit of Hotz ¶ 6. Mr. Hotz does not live in
15 Rhode Island, does not use the name "Geo1Hotz" which, in contrast to Mr. Hotz's common
16 handle, utilizes capital letters and a numeral, and Mr. Hotz was not born in 1995 as in the screen
17 grab. *Id.* SCEA further falsely states that Mr. Hotz is "referred to online as 'GeoHot.'" This is
18 untrue. All exhibits submitted by SCEA purport to show that Mr. Hotz goes by the internet
19 name "geohot" without any capitalized letters or numerals. See e.g. Declaration of Bricker,
20 [Dkt. No. 21] Exhs. A, B. Equally significant,

21 SCEA admits that the PSN account for Online ID "Geo1Hotz" "may show some specious
22 information because when a PSN user assents to the license agreement the user can enter any
23 address, phone number, or birthday he wishes." Gililand Declaration ¶ 2. SCEA also fails to
24 address that any PSN user can enter any name he or she wishes, as well as register any Online ID
25 he or she wishes to register. Undoubtedly, there are numerous individuals currently utilizing an
26 Online ID or names of celebrities or people widely recognized, including presumably the names
27 "Barack Obama," "George Bush," and "Michael Bluth."

28

1 Mr. Hotz has stated he does not have a PSN account, has not agreed to the PSN TOS, and
2 has not obtained a Playstation computer firmware upgrade from the PSN. Second Affidavit of
3 Hotz ¶ 11. Mr. Hotz has also demonstrated that a Playstation computer firmware upgrade does
4 not subject a user to the PSN TOS. Affidavit of Heidari ¶¶ 10-13. SCEA cannot satisfy its
5 burden that Mr. Hotz is subject to the PSN TOS because no such facts exist. Nonetheless, the
6 sole speculative and unauthenticated evidence SCEA has provided falls far short of its burden to
7 satisfy this prong of the personal jurisdiction analysis.

8
9 **C. Prong 2 Of The Personal Jurisdiction Analysis Must Fail Because Mr. Hotz
10 Has No Meaningful Contact With California And His Alleged Acts Do Not
11 Arise From Contact With California.**

12 The second requirement for specific personal jurisdiction is that plaintiff's claim arises
13 out of defendant's forum-related activities. *Core-Vent Corp.*, 11 F.3d at 1485. In analyzing the
14 whether the plaintiff's claim arises out of defendant's forum-related activities, the courts apply a
15 "but for" test. *John Doe v. Unocal Corp.*, 248 F.3d at 924. The "but for" test is a simple test
16 where the Plaintiff must demonstrate that the Plaintiff's claims against the Defendant would not
17 have arisen "but for" the Defendant's contact with the forum state. See *Ballard v. Savage*, 65
18 F.3d at 1500.

19 The evidence upon which SCEA relies is improperly authenticated evidence, it would
20 not be sufficient to find that SCEA's claims against Mr. Hotz would not have arisen but for Mr.
21 Hotz's alleged contacts with California.

22 As stated above, the crux of SCEA's claims against Mr. Hotz is that Mr. Hotz allegedly
23 "exceeded access" to his Playstation computer, made by Sony Inc., a Japanese corporation
24 which is not a party to this action. The claims of SCEA do not pertain to Mr. Hotz's alleged
25 connection to California, but rather, pertain to Mr. Hotz's alleged activity involving accessing
26 his own Playstation computer. Both Mr. Hotz and his Playstation computer are located in New
27 Jersey. Accordingly, SCEA's claims against Mr. Hotz are not asserted "but for" Mr. Hotz's
28 alleged contacts with California-- rather, those claims are solely focused on Mr. Hotz's activity
pertaining to his Playstation computer in New Jersey.

1 Finally, and most distressingly, SCEA has attempted to assert that Mr. Hotz' internship
2 with Google, that ended in 2008, should subject him to jurisdiction in California for acts alleged
3 to have been committed in 2010. SCEA's argument does not wash. Not only does SCEA fail to
4 assert that Mr. Hotz is subject to the general personal jurisdiction of this Court, but Mr. Hotz's
5 alleged acts do not arise from his contacts with the forum and thus, specific personal jurisdiction
6 must not be found. An individual who lived in California for some time does not automatically
7 become subject to the Court's general jurisdiction in the future for unrelated purposes. See
8 *Pebble Beach Co. v. Caddy*, 453 F.3d at 1153.

9 **D. Prong 3 Must Fail Because Exercise of Personal Jurisdiction Over Mr. Hotz Is**
10 **Unreasonable.**

11 SCEA cannot meet its burden in demonstrating Mr. Hotz's purposeful avilment of the
12 forum, nor has it satisfied its burden that its claim arises out of Mr. Hotz's forum-related
13 activities. Both of the aforementioned prongs must be met, and SCEA's failure to satisfy either
14 prong will result in this Court not having jurisdiction over Mr. Hotz. Nonetheless, Mr. Hotz
15 will still address the third prong of the jurisdictional analysis by demonstrating that jurisdiction
16 is unreasonable in this case.

17 In determining whether personal jurisdiction is reasonable, courts consider the following
18 factors: (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2)
19 the burden on the defendant of defending in the forum; (3) the extent of conflict with the
20 sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5)
21 the most efficient judicial resolution of the controversy; (6) the importance of the forum to the
22 plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative
23 forum. *Panavision Int'l, L.P.*, 141 F. 3d at 1323. No one factor is dispositive; a court must
24 balance all seven. *Id.* (citing *Core-Vent*, 11 F.3d at 1484). Minimum contacts must be
25 evaluated "in light of" the reasonableness factors. *Id.* (Citing *Burger King Corp. v. Rudzewich*,
26 471 U.S. 462, 476 (1985). Subjecting Mr. Hotz to jurisdiction on the other side of the country
27 would be unreasonable.

28 **1. The Extent of Defendant's Purposeful Injection Into the Forum State's**
Affairs

1 Mr. Hotz' interjection into the forum is not substantial, and only found by inferring Mr.
2 Hotz's contact with California via his use of the internet. SCEA cannot even stretch this
3 interjection far enough to rise to the level of "purposeful." Mr. Hotz has a passive website and
4 has not made any statement directed at SCEA.

5 "The smaller the element of purposeful interjection, the less is jurisdiction to be
6 anticipated and the less reasonable is its exercise." *Insurance Co. of North America v. Marina*
7 *Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). "Even if there is sufficient 'interjection' into
8 the state to satisfy the [purposeful avilment prong], the degree of interjection is a factor to be
9 weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness
10 prong]." *Core-Vent*, 11 F.3d at 1488.

11 The Ninth Circuit in *Core-Vent* found a libelous article written by defendants who
12 "allegedly intended their actions to cause harm in California" to nonetheless be an "attenuated"
13 contact. *Id.* SCEA's assertions of purposeful interjection rest on Mr. Hotz's attenuated use of
14 the internet. Mr. Hotz's alleged actions are attenuated in that they were alleged to have been
15 performed over the internet and not sent directly to any member of the forum state. It is telling
16 that SCEA is unable to explicitly assert Mr. Hotz's direct contact with a member of the forum.
17 The first reasonableness factor favors Mr. Hotz and weighs against personal jurisdiction.

18 **2. Burden of Mr. Hotz on Defending In This Forum**

19
20 The burden on Mr. Hotz defending in this forum is high. Mr. Hotz is a 21 year old New
21 Jersey resident with limited means to defend a suit on the other side of the country. Therefore,
22 forcing Mr. Hotz to defend a lawsuit literally across the country will deprive Mr. Hotz of due
23 process.

24 "The burden on the defendant must be examined in light of the corresponding burden on
25 the plaintiff." *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988). SCEA is
26 unquestionably a large international company. In *Core-Vent*, the burden on the respective
27 parties was found to be "asymmetrical" because the plaintiff was a "large international
28 corporation with worldwide distribution of products" while the defendants were individuals

1 “with little or no physical contacts with California.” *Core-Vent*, 11 F.3d at 1489. In *Pavlovich*,
2 the California Supreme Court discussed plaintiff’s ability to re-file the suit in the defendant’s
3 state of residence. “[Plaintiff] has the ability and resources to pursue Pavlovich in another
4 forum such as Indiana or Texas. Our decision today does not foreclose it from doing so.
5 Pavlovich may still face the music--just not in California.” *Pavlovich* at 29 Cal. 4th at 279. As
6 in *Pavlovich*, SCEA is unquestionably a large international company with worldwide product
7 distribution. Again, Mr. Hotz is an individual with “little or no physical contacts with
8 California.” *Id.* In light of the corresponding absence of burden on SCEA, personal jurisdiction
9 over Mr. Hotz in California would be highly burdensome.

10 The fact that Mr. Hotz has secured last-minute counsel to defend himself against
11 jurisdiction does not diminish the cost or burden of Mr. Hotz having to defend himself on the
12 other side of the country.

13 The second factor favors Mr. Hotz and weighs against personal jurisdiction.

14 **3. Extent of Conflict with Sovereignty of Mr. Hotz’s State**

15
16 There is a concern that hearing this case in California may conflict with New Jersey’s
17 sovereignty in its ability to exercise its own jurisprudence over cases where personal jurisdiction
18 is clearly found over both plaintiff and defendants.

19 The third factor favors Mr. Hotz and weighs against personal jurisdiction.

20 **4. Forum State’s Interest in Adjudicating the Dispute**

21
22 California has an interest in protecting its residents that have been tortuously injured.
23 However, contrary to what SCEA would assert, they maintain a strong presence in every state in
24 the Union and New Jersey would have an equal interest in protecting the interests of both SCEA
25 and Mr. Hotz alike. Further, Sony Inc., the maker of the Playstation computer, is not a
26 California company, it is a Japanese corporation. California’s interest in protecting the Japanese
27 company is therefore low.

28 The fourth factor favors Mr. Hotz and weighs against personal jurisdiction.

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5. The Most Efficient Judicial Resolution of the Controversy

“In evaluating this factor, we have looked primarily at where the witnesses and the evidence are likely to be located.” *Core-Vent*, 11 F.3d at 1489. SCEA clearly does not know where the other defendants reside and thinks they may in fact be located in foreign countries such as Spain, Hungary and the Netherlands. SCEA Complaint ¶¶5-9. SCEA *thinks* that an unnamed defendant called “Bushing” resides in California but this person remains a Doe defendant, is not named as a defendant, and has not been served with process. *Id.* at ¶5. Further, all evidence put forth by SCEA regarding “Bushing” is improperly authenticated hearsay. This court should not rely on SCEA’s speculation of a Doe defendant’s place of residence to assert jurisdiction over a nonresident who is actually named with an address that has been identified, in New Jersey. Further evidence in this matter is found primarily on the internet.

Contrary to SCEA’s assertions, most of the physical evidence and Mr. Hotz himself, are located in the state of New Jersey. The bulk of SCEA’s claims regard evidence found on Mr. Hotz’s media devices and in Mr. Hotz’s testimony as a witness. Other than those items, the bulk of the evidence SCEA puts forth may be found on the internet which is accessible just as easily in New Jersey as in California.

The fifth factor favors Mr. Hotz and weighs against personal jurisdiction.

6. Importance of the Forum to the Plaintiff’s Interest in Convenient and Effective Relief

The Northern District of California is only convenient to SCEA’s counsel, Kilpatrick Townsend & Stockton LLP which maintains its offices mere miles from the San Francisco division of the Northern District Courthouse. “[N]o doctrine in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff’s preference.” *Roth v. Garcia Marquez*, 942 F.2d 617, 624 (9th Cir.1991). SCEA “has not shown that the [claim] cannot be effectively remedied in [New Jersey] or [Spain, Hungary, or the Netherlands].” *Sinatra*, 854 F.2d at 1200. In fact, SCEA could have avoided any questions of personal

1 jurisdiction over Mr. Hotz had the initial TRO and complaint been filed in New Jersey. Thus,
2 effectiveness is not the purpose behind SCEA bringing this suit in the Northern District of
3 California.

4 The sixth factor favors Mr. Hotz and weighs against personal jurisdiction.

5 6 **7. The Existence of an Alternative Forum**

7 This factor favors Mr. Hotz because there is an alternative forum: New Jersey. SCEA
8 relies on the unsubstantiated residency of the unnamed defendant “Bushing” as a basis for
9 California being the best forum. Complaint ¶15(a). However, “Bushing” has not been
10 identified, named, served, or connected with Mr. Hotz in any way that would warrant bringing
11 the only identifiable defendant out to California. If “Bushing” does exist and can be ascertained
12 at a later date, SCEA would have to amend the complaint to properly name him/her which has
13 not occurred. Thus, New Jersey is an alternative forum that exists to provide SCEA with
14 adequate relief. If SCEA can obtain jurisdiction by merely including a hypothetical defendant
15 by the name of “Bushing” that may live in California, then any Plaintiff can file suit in
16 California and obtain jurisdiction by adding “Bushing” as a defendant.

17 The facts and parties involved in this case demonstrate that the only locatable defendant
18 involved, as well as the physical evidence in this case exist is New Jersey.

19 This factor favors Mr. Hotz and weighs against personal jurisdiction.

20 21 **III. VENUE IS IMPROPER FOR THE PRESENT ACTION**

22 SCEA claims venue is proper pursuant to U.S.C. § 1391(b) and (c). Complaint, ¶16.
23 U.S.C. § 1391(c) applies exclusively to actions in which a corporation is a Defendant. U.S.C. §
24 1391(b), however, provides that

25 A civil action wherein jurisdiction is not founded solely on diversity of
26 citizenship may, except as otherwise provided by law, be brought only in (1) a
27 judicial district where any defendant resides, if all defendants reside in the same
28 State; (2) a judicial district in which a substantial part of the events or omissions
giving rise to the claim occurred, or a substantial part of property that is the
subject of the action is situated; or (3) a judicial district in which any defendant
may be found, if there is no district in which the action may otherwise be
brought.

1 *Id.*

2 In the present action, a corporation is not a Defendant, and therefore U.S.C. § 1391(c) is
3 inapplicable. Similarly, U.S.C. § 1391(b)(1) is inapplicable because SCEA asserts that the
4 Defendants are residents of numerous states, and even admits that defendants reside in Spain,
5 Hungary and the Netherlands. Complaint, ¶¶4-9. Likewise, U.S.C. § 1391(b)(3) is also not
6 applicable because Mr. Hotz may be found in New Jersey, which is where an action may be
7 brought.

8 Accordingly, U.S.C. § 1391 (b)(2) is the only venue provision asserted by SCEA, which
9 provides that venue may be brought in a judicial district in which a substantial part of the events
10 or omissions giving rise to the claim occurred, or a substantial part of property that is the subject
11 of the action is situated. In the present action, none of the named defendants reside in California,
12 and no conduct is alleged to have taken place in California. Complaint, ¶¶4-9. Without asserting
13 more or providing an underlying basis for its belief, SCEA simply asserts that it believes one of
14 the Doe defendants resides in California.

15 Nonetheless, the use of Doe Defendants is not favored in the Ninth Circuit. *Gillespie v.*
16 *Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). *Badwi v. Hedgpeth*, 2011 U.S. Dist. LEXIS 4092
17 (N.D. Cal. 2011); *Cranford v. Ayers*, 2010 U.S. Dist. LEXIS 136269 (N.D. Cal., 2010).
18 Moreover, complaints made against Doe defendants should be dismissed without prejudice.
19 *Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir., 2003); See *Badwi v. Hedgpeth* 2011
20 U.S. Dist. LEXIS 4092; See also *Cranford v. Ayers* 2010 U.S. Dist. LEXIS 136269.

21 In fact, all events described by Plaintiff pertaining to Mr. Hotz took place in Mr. Hotz's
22 home in New Jersey. All events described by Plaintiff pertaining to the other Defendants, whom
23 Mr. Hotz contend are improperly joined and have no association with him, are actually described
24 as taking place in Berlin, Germany. Complaint, ¶¶39-42. Further, the subject property at issue in
25 this matter is not, as SCEA claims, located in California. *Id.* at ¶16. That statement is a
26 bootstrap for SCEA's venue assertion and is contradicted within SCEA's own complaint.
27 Complaint ¶¶43-52 refer to Mr. Hotz's utilizing and publishing activities relates to the
28 Playstation computer. All those activities and equipment are located in New Jersey. All other

1 named defendants are located outside the country as is likely their equipment and any property at
2 issue in this matter.

3 Accordingly, SCEA has failed to satisfy U.S.C. § 1391(b)(2) by failing to allege that any
4 part of the events or omissions giving rise to its claim occurred in California. Similarly, SCEA
5 has failed to satisfy U.S.C. § 1391(b)(2) by alleging that any part of property that is the subject
6 of the action is situated in California. Thus, venue in this Court is improper.

7
8 **IV. CONCLUSION**

9 In sum, all three prongs of the personal jurisdiction analysis must be satisfied in order
10 for Mr. Hotz to be subject to the personal jurisdiction of this court. In the present situation
11 however, none of the three prongs are satisfied. Moreover, SCEA bears the burden of
12 demonstrating that Mr. Hotz satisfies the first two prongs of the analysis-- a burden which
13 SCEA has failed to meet.

14 Accordingly, this Court should dismiss the Complaint against Mr. Hotz, as well as
15 SCEA's Ex Parte TRO, Proposed Order of Impoundment, and Proposed Order to Show Cause,
16 for lack of jurisdiction over Mr. Hotz and for improper venue.

17
18
19 DATED: February 2, 2011

Respectfully Submitted,

20
21 _____
/s/ Stewart Kellar

22 STEWART KELLAR

23 Attorney for Defendant
24 GEORGE HOTZ