March 14, 2011

Magistrate Judge Joseph C. Spero
United States District Court
Northern District of California
Courtroom A, 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Sony Computer Entertainment America LLC v. Hotz, et al.*,
Case No. C-11-00167 (JCS) SI (N.D. Cal)

Dear Judge Spero:

Plaintiff Sony Computer Entertainment America LLC ("SCEA") and Defendant George Hotz respectfully submit this joint letter regarding their dispute relating to the proposed order for the March 10, 2011 hearing.

SCEA's Position

A. Introduction

Plaintiff SCEA's proposed order, submitted as Exhibit 1 to this letter, accurately reflects the Court's orders during the March 10, 2011 hearing. Mr. Hotz refuses to agree to this proposed order, instead seeking to revisit the orders that this Court issued on the record during the hearing and delay the jurisdictional discovery already ordered by this Court. Among other things, Mr. Hotz is now rearguing whether or not SCEA is entitled to take his deposition. This issue was decided by the Court last Thursday. Mr. Hotz is also requiring language in the draft order stating that the third party subpoenas (ordered by the Court on March 3, 2011) must be redrafted and reissued. The Court never imposed such a requirement. With regard to the PayPal subpoena, Mr. Hotz rejects SCEA's proposed language – the exact language that the Court used at the hearing to describe the scope of the information being sought, and instead argues that the subpoena must be narrowed further. And with regard to the protocols for (1) isolating, segregating, and removing information "relating to the circumvention on the technological protection measures in the PS3 System" and (2) conducting the jurisdictional discovery, Mr. Hotz rejects language that requires the parties to meet and confer with input from TIG, the third party neutral. In light of TIG's expertise in forensic analysis and the unreasonable positions that Mr. Hotz has taken to date with regard to the impoundment, SCEA believes that TIG's involvement is imperative. These are just some of the examples of Mr. Hotz's attempt to revisit the Court's orders. SCEA's positions with regard to each of the disputed items in the proposed order are set forth below.

B. Background Information on Parties' Meet and Confer Process

Mr. Hotz contends that the parties have not sufficiently met and conferred and that SCEA is acting in bad faith. This is simply not true. On Thursday March 10, 2011, shortly after the hearing, SCEA ordered an expedited transcript, attached hereto as Exhibit 2. After reviewing the hearing transcript carefully, SCEA wrote the initial draft of the order, attempting to tailor it as closely as possible to the language used by the Court at the hearing. SCEA provided the draft to Mr. Hotz for review and comment around mid-day on Friday. [*See* Exhibit 3.] The following day, SCEA received a multi-page meet and confer letter from Mr. Hotz. [*See* Exhibit 4.]

Upon review, SCEA determined that although most of Mr. Hotz's meet and confer letter was focused on changing the Court's orders, there were some places where SCEA could agree to the changes proposed by Mr. Hotz. For example, SCEA agreed to include a provision requiring the parties to agree to a protective order, something that the parties are currently negotiating. [*See* Exhibit 1, Paragraph 6.] SCEA also included language setting forth a procedure should the parties be unable to reach agreement on certain terms of the protective order. Additionally, SCEA took out the introductory clause stating the fact that Mr. Hotz had not objected to the Twitter subpoena. SCEA further added language in the PayPal portion of the proposed order to clarify that all third party subpoena recipients, including PayPal, were to be advised of their right to file a motion to quash and informed that any information they produce will be designated as Attorneys' Eyes Only. In response to Mr. Hotz's concerns that the impoundment procedures were not specifically delineated, SCEA agreed to incorporate TIG's February 27, 2011 certification including its Exhibit A – which together lay out the forensically sound manner to perform the impoundment at a high level and the details of how the impoundment will be conducted – by attaching them to the proposed order. In its March 13, 2011 response to Mr. Hotz's meet and confer letter, SCEA outlined these agreements and the basis for its positions on the items in dispute in this joint letter. [*See* Exhibit 5.]

Today, Mr. Hotz sent SCEA yet another letter suggesting a two-day delay for further meet and confer. [*See* Exhibit 6.] From that letter, it is clear that the parties are still in disagreement on important issues. As the parties are at a clear impasse, and SCEA's opposition to Mr. Hotz's motion to dismiss is currently due on Friday, March 18, 2011, SCEA rejected the offer for further meet and confer and asked that the issues be submitted to the Court for consideration. [*See* Exhibit 7.]

C. Notice To The Subpoenaed Parties (Paragraph 1 of SCEA's Proposed Order and Paragraph 1 of Hotz's Proposed Order)

Pursuant to the Court's March 3, 2011 order authorizing the issuance of the third party subpoenas (Docket No. 90), SCEA served subpoenas on Google, Twitter, and Bluehost on March 4, 2011; SoftLayer Technologies on March 7, 2011; and YouTube on March 8, 2011. Upon receipt of the subpoenas, Google (for both Google and YouTube) and Twitter responded that they had provided notice of the subpoena to subject users to allow them an opportunity to object or file a motion to quash. Of the subpoenaed parties, Bluehost produced documents to counsel for SCEA on the afternoon of March 11, 2010. Upon receipt of the documents, counsel

for SCEA left a voice mail message for Bluehost asking them to call back. Subsequently, on March 13, 2011, counsel for SCEA sent an email to Bluehost notifying them of the Court's order regarding third party discovery. [*See* Exhibit 8.]

Mr. Hotz now contends that the subpoenas themselves are to be modified and not returnable. This is incorrect. As reflected in the transcript and the Court's order of March 10, 2011, the Court ordered SCEA's counsel to advise the subpoenaed parties of their right to file a motion to quash and to inform them that any information provided in response to the subpoenas will be treated as "Attorneys' Eyes Only." This ruling in no way alters the information requested in the subpoenas. As such, there is no need for them to be redrafted. Moreover, the Court did not order that the subpoenas "are not to be returned." Furthermore, SCEA has already complied with the order by providing written notice to the parties and sending them a copy of the March 10, 2011 order. [*See* Exhibit 9]

Until this joint submission, Mr. Hotz's proposed that the third parties be allowed 45 days to respond to the subpoenas. The Court did not order this. SCEA has already provided notice to the parties as required by the Court. Mr. Hotz proposes that the parties' response deadline be extended by seven calendar days (i.e., March 23, 2011). However, SCEA's opposition to the motion to dismiss is currently due on March 18, 2011. It is also worth noting that, to the extent counsel for SCEA receives any computer addresses associated with individuals, that information will be used solely to ascertain the location of the computer (and treated as "Attorneys' Eyes Only") and not the identity of the individual.[1]

D. Redrafted Subpoena to PayPal, Inc. (Paragraph 1 of SCEA's Proposed Order; Paragraph 1(b) of Hotz's Proposed Order)

In its proposed order, SCEA used the Court's language for how the PayPal subpoena should be redrafted. Transcript 4:16-23; 6:25-5. Mr. Hotz, however, seeks to modify this language to identify funds of payers having an address of record in California. SCEA's concern with Mr. Hotz's proposed language is that PayPal may not have an address of record on file for all of the payers and may only be able to identify whether the funds came from California through other records in its system. Accordingly, SCEA has retained the language as ordered by the Court.

E. Mr. Hotz's Deposition (Paragraph 3 of SCEA's Proposed Order; Paragraph 3 of Hotz's Proposed Order)

The Court has ordered Mr. Hotz to appear in California for a deposition relating solely to the question of personal jurisdiction. Mr. Hotz now contends that there should be no deposition, arguing that it is unnecessary for jurisdictional discovery. Indeed, SCEA is entitled to cross-examine Mr. Hotz on his declarations (which include statements by Mr. Hotz regarding relevant activities before the suit was filed) and uncover his contacts with California. Counsel for Mr. Hotz did not raise any burdensome objections during the hearing and instead focused on getting assurances from SCEA that neither it nor its related entities would serve Mr. Hotz while he is in

[1] Moreover, the Google, Twitter and Softlayer subpoenas only seek copies of posts and comments associated with those sites.

California for a deposition and SCEA so stipulated. Counsel for SCEA will of course meet and confer with Mr. Hotz's counsel to set an appropriate date for the deposition.

F. Impoundment Protocol (Paragraph 4 of SCEA's Proposed Order; Paragraph 4 of Hotz's Proposed Order)

The Court has ordered that TIG be allowed to proceed as set forth in its February 27, 2011 Certification Letter. Transcript 16:20-17:3; 17:22-24. The February 27, 2011 Certification Letter incorporates the February 26, 2011 certification that is attached as Exhibit A. The February 27, 2011 certification discusses how the impoundment is to be performed in a forensically sound manner at a high level, while Exhibit A includes additional details on how the impoundment will be conducted. *See, e.g.,* paragraphs 7-10 of Exhibit A. Accordingly, SCEA has attached a copy of the February 27 Certification and Exhibit A as Exhibit 1 to the proposed order and references that exhibit as the protocol that TIG is to use to conduct the impoundment of the circumvention devices.

With respect to the isolation, segregation and removal of "information relating to Mr. Hotz's circumvention of the technological protection measures in the PS3 System" ordered by Judge Illston (Docket No. 87), the Court has ordered the parties to meet and confer on what information is related to Mr. Hotz's circumvention of the technological protection measures in the PS3 System, as well as a procedure on how the search is to be performed. However, with respect to establishing this procedure, SCEA is at an unfair disadvantage because we do not currently know the types of documents on the impounded devices. SCEA has therefore proposed that the parties, along with TIG, meet and confer on these issues with a deadline of March 28, 2011 for submission of a protocol to the Court. This will allow TIG sufficient time to begin its review of the impounded devices, gain a better understanding of what they contain, and develop a proposed protocol for searching for information related to the circumvention. It also gives the parties time to define what "related to" means. As the Court noted during the hearing, TIG is best suited for determining the most forensically sound manner to perform this task. Transcript 18: 6-12.

G. Jurisdictional Discovery (Paragraph 5 of SCEA's Proposed Order; Paragraph 5 of Hotz's Proposed Order)

The Court has ordered that the impounded devices be searched for SCEA's development tools and access to the PSN. This material is relevant to jurisdiction and the impounded devices are not immune from discovery just because they are in the possession of a third party neutral. Transcript 22:17-23:5; 23:19-22.

Mr. Hotz now contends that the impounded calculator should be exempt from discovery. However, the Court has authorized discovery from "copies of the devices." Transcript 24:18-24. This necessarily includes the impounded calculator. Indeed, the calculator already contains the circumvention devices. If the calculator does not contain the material ordered discoverable by the Court, TIG will be able to quickly determine and inform the parties of that fact after the agreed upon search is performed.

Mr. Hotz also attempts to improperly limit the scope of the Court's order regarding search for the SCEA's development tools. The Court did not limit the search to only those portions that "explicitly state that SCEA owns the SDK and that SCEA is located in California" as Mr. Hotz suggests. Indeed, the fact that Mr. Hotz possessed material distributed by SCEA is relevant. The Court ordered the parties to meet and confer on the procedure for conducting a search for SCEA's development tools. Transcript 24:7-24. SCEA's proposed order reflects this ruling. The Court contemplated that the parties would meet and confer and later submit a search protocol for its approval. SCEA believes that TIG needs to be involved in determining that protocol. Additionally, Mr. Hotz, a known hacker, now requires that SCEA provide its highly valuable and proprietary software development kit to him for purposes of this review. This is unacceptable and unnecessary. SCEA can provide TIG with search terms to identify this information. This is why SCEA needs to meet and confer with counsel for Mr. Hotz and TIG.

Finally, during the hearing, counsel for SCEA offered to confirm with SCEA that a normal computer can be used to connect to the PSN. The Court did not require counsel to do so. Nonetheless, counsel has since confirmed with SCEA that this is true and informed Mr. Hotz's counsel. With respect to the actual protocol regarding the PSN discovery, SCEA will provide guidance to TIG on the procedures for connecting to the PSN to assist TIG in their search. Once the parties agree on a protocol with TIG, counsel will then submit to the Court for approval. Accordingly, in the proposed order, SCEA has included a statement that the parties will meet and confer on the proper procedure for searching the items for the jurisdictional discovery authorized by the Court.

For the above stated reasons, SCEA respectfully requests that the Court issue the proposed order attached hereto as Exhibit 1.

Mr. George Hotz's Position

SCEA has not been acting in god faith and essentially refuses to amicably resolve or collaborate on a joint order. Mr. Hotz's received an initial proposed order from SCEA on Friday afternoon, and Mr. Hotz's counsel worked diligently to provide thoughtful and constructive responses in order to facilitate the instructions by the Court.

Notwithstanding, SCEA has refused to meet with SCEA's counsel, has refused to accept or otherwise confer to amicably resolve the discovery disputes, and simply wishes to present their drafted proposed order without modification. Indeed, as of the time of this filing, SCEA still refuses to meet with Hotz to amicably resolve this matter, opting instead to file competing "all or nothing" proposed orders and burden this Court with items that may be worked-out jointly.

As a cursory matter, prior to addressing such points of contention, Mr. Hotz must add that SCEA willfully ignored the Court's order to inform the subpoenaed parties of their rights, dragging their feet until today, Monday afternoon, to inform via email, each party of their rights and requirements under the subpoena. For parties left uninformed until today, those notices are too little too late. This was confirmed via a telephone call this afternoon to subpoenaed party Bluehost Inc., who stated they didn't know they could object to the subpoenas and have already

responded to the subpoena and informed us that they were not notified by SCEA about their rights to object, an option in which they are still quite interested.

The time frame on this joint letter was incredibly short. Mr. Hotz attempted to make all of the arguments made in the meet and confer letters which are attached hereto as Exhibits 4 and 6. However, he reserves those arguments and any other arguments to be made at a hearing on these joint letters.

Mr. Hotz's is respectfully requesting the Court to require the parties to amicably resolve the situation and issue a joint-order together. In the event the court does not order such, Mr. Hotz respectfully requests a hearing with this Court.

Nevertheless, Mr. Hotz's proposed order is attached hereto as Exhibit A. Mr. Hotz's position as to each point of contention, in as much as he could make them in the short period of time SCEA allowed for this joint letter is as follows.

1. **Third Party Subpoenas**

SCEA served subpoenas in this matter on March 4, 2011 prior to the hearing on March 11. The return date on all of these subpoenas is March 16, 2011, two days after this letter date and 12 days after the issuance of those subpoenas. SCEA dragged its feet until just this afternoon, Monday, March 14, 2011 to inform subpoenaed parties of their rights. Indeed, Bluehost, the web provider for www.geohot.com has already responded to the subpoena without being informed of their right to move to quash. SCEA left a voicemail for Bluehost on Friday (time of call unknown) but didn't inform Blouehost of its rights in the message: their ability to move to quash the subpoena. SCEA also never effectively informed them of their obligation to produce documents marked as highly confidential attorneys eyes only. Third parties need to be immediately appraised of their rights and obligations pursuant to this court's order. Mr. Hotz suggests that SCEA be required by order to inform subpoenaed third parties of their right to move to quash and their obligation to produce documents marked attorneys eyes only. Further, Mr. Hotz believes that SCEA should be obligated to return any documents that have already been produced by any third party and allow that third party seven days to determine whether it desires to move to quash. These third parties have obligations to protect the privacy of, quite possibly, millions of consumers.

2. **The Manner and Burden of Taking Mr. Hotz's Deposition**

Hailing Mr. Hotz to California for purposes of jurisdictional discovery is unduly burdensome and disruptive. Regardless of SCEA's willingness to pay to fly Mr. Hotz to California, a cross-country flight and removal of Mr. Hotz from his area of residence for several days is burdensome and disruptive.

Accordingly, Mr. Hotz asked SCEA to reconsider its position that deposing Mr. Hotz is necessary for jurisdictional discovery, and to take a less-invasive approach to discovery, such as by conducting a written deposition. Mr. Hotz has been very accommodating as it pertains to allowing SCEA to conduct jurisdictional discovery, despite the fact that it appears that SCEA is

merely conducting a fishing expedition. We believe that SCEA's subpoenas to numerous third parties, its numerous document requests and interrogatories have reached the limit of the scope of jurisdictional discovery. See Bell Atlantic Co. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

3. Sufficiency of Instructions to TIG

Mr. Hotz asked SCEA to state explicitly in the proposed order what tasks TIG shall perform without abstractly referring to Mr. Grennier's Certification letter. SCEA's proposed language is simply incomplete. The Court said that TIG was to only do what the Court instructed it to do. But SCEA has not specifically identified what it wants TIG to do. While the terms "relating to" may be useful to describe activities and actions in legal terms, they are broad and ambiguous when it comes to the nuts and bolts of the limited search of a hard drive. If SCEA is allowed to instruct TIG to search generally in that matter, then SCEA's instructions amount to a fishing expedition.

With respect to the method of all discovery and impoundment protocol and procedures, Mr. Hotz proposes to follow all the method of procedures and steps as outlined by TIG in the Second Certification by Michael Grennier (SCEA's Exhibit A).

4. Limiting Previously-Waived Inspection to Jurisdictional Discovery

SCEA has previously waived inspection of Mr. Hotz's drives in Docket No. 85 Pg.9 but now seeks it here without showing any reason to believe the SDK or access to the PSN are on the impounded devices.

I. Impounded Calculator

As a preliminary matter, the Proposed Order refers to the "impounded devices." The Court clearly ordered that the jurisdictional discovery would relate to the impounded hard drives, not the impounded calculator. SCEA did not suggest that the impounded calculator could (1) contain the SDK or (2) have possibly connected to the Playstation Network ("PSN"). Mr. Hotz believes the order must be clarified to limit the jurisdictional search to only the impounded hard drives and not the calculator.

2. Protocol for Search for the SDK

TIG's protocol for locating the circumvention device on the impounded hard drives involves using "portions of data from the Circumvention Device . . . to search for these devices and/or additional references of circumvention devices across the entire hard drive space." In English, TIG uses portions of the Circumvention Devices as a source file to compare to other files on the impounded hard drives as a the manner for searching for copies of the Circumvention Devices on the impounded hard drives. Certification of February 26, 2011, ¶ 10(g).

Those same steps must apply to searching for the SDK. Further, those steps must be specifically laid out in the Proposed Order as required by paragraph 4(a) of the Proposed Order.

SCEA must specifically identify the portions of source files to be used by TIG. Those portions of source files identified by SCEA must contain jurisdictionally relevant content. In other words, the portions of source files selected from the SDK by SCEA must state that SCEA is located in California. March 10, 2011 Transcript, 22:19-23. Anything else is beyond the scope of the Court's order and contrary to the manner in which TIG has stated that it searches hard drives.

Moreover, once SCEA identifies the specific files, which are contained in its SDK and which state that SCEA owns the SDK that SCEA proposes to send to TIG as source files, SCEA must provide those specific files to Mr. Hotz. Further, SCEA must provide us a copy of the SDK that the source files are alleged to have been extracted from. SCEA must provide a declaration that SCEA has provided true and correct copies of the SDK as distributed by SCEA for verification by Mr. Hotz's counsel that those files (1) are contained in the SDK and (2) explicitly state that SCEA is located in California and that SCEA owns the SDK. We believe we will be able to perform this verification within 4 business days. Not allowing Mr. Hotz's counsel the ability to do this makes the process unfair.

3. Evidence the Hard Drives Connected to PSN

SCEA represented to the Court that the impounded hard drives could have been connected to the PSN. March 10, 2011 Transcript, 23:8-17. Further SCEA represented that it would "confirm" the accuracy of its representation to the Court. Id. We have received no declaration from SCEA stating that standalone hard drives can connect to the PSN, or that if a hard drive were to connect to the PSN that the user would have to "click through" the PSN agreement. Without a declaration from SCEA on this issue, this item of jurisdictional discovery is improper and potentially a fraud on the Court.

Further, SCEA's proposed order fails to specifically describe what TIG is instructed to look for. The Court made clear that TIG can only do what the Court orders it to do. Therefore, SCEA must specifically describe (1) how a hard drive not part of or connected to a PS3 console can connect to the PSN; and (2) what evidence TIG is instructed to look for relating to whether the impounded hard drives connected to the PSN. If SCEA cannot provide this information with reasonable certainty and clarity, then SCEA's instructions to TIG amount to a baseless fishing expedition concocted by counsel, and not based on the fact of how the PSN and hard drives allegedly interact. Clearly, such a request is beyond the narrow and tailored discovery authorized by the Court.

Assuming for now, that a standalone hard drive can connect to the PSN, we will move to the procedures for search. The same procedures that apply to searching for/verifying the accuracy of the representations relating to files searched for as described above for the SDK, shall also apply to searching for evidence relating to the impounded hard drives' stand alone connection to the PSN.

Again, before we can even begin to discuss how TIG is to search for evidence of connection to the PSN, SCEA must first identify what, if any evidence would be created in the event of any such connection.

As a final note, SCEA's description of how a hard drive connects to the PSN cannot encompass the issue of whether the impounded hard drives were ever connected to a PS3. Connecting impounded hard drives to a PS3 is completely different than, and has no bearing on, whether the impounded hard drives ever connected to the PSN.

For the above stated reasons, Mr. Hotz respectfully requests that the Court issue the proposed order attached hereto as Exhibit A.

Thank you very much for your time and consideration.

Respectfully submitted,

Kilpatrick Townsend & Stockton

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Enclosures

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