

March 16, 2011

Magistrate Judge Joseph C. Spero  
United States District Court  
Northern District of California  
Courtroom A, 15<sup>th</sup> 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:

Defendant George Hotz and Plaintiff Sony Computer Entertainment America LLC (“SCEA”) respectfully submit this joint letter regarding their dispute relating to the jurisdictional search of Mr. Hotz’s impounded hard drives as established in the March 10, 2011 Order § 5(b).

### **Mr. Hotz’s Position**

#### **1. SCEA Made Material Misrepresentations to the Court and Refuses to Provide Mr. Hotz’s Counsel with a Copy of the SDK to be Searched on Mr. Hotz’s drives.**

SCEA made false representations to this court regarding the Software Developer’s Kit (“SDK”) and whether it contains information that SCEA is in California. At the March 10 hearing, counsel for SCEA represented to the Court that the SDK contains information showing that SCEA is located in California. The Court authorized a limited search of Mr. Hotz’s impounded hard drives for the SDK based on SCEA’s statements. Counsel for Mr. Hotz has discovered that SCEA’s statements are false and SCEA refuses to verify their statements or provide Mr. Hotz’s counsel with the SDK to verify the same. A relevant portion of the transcript is as follows:

MS. SMITH: Additionally, we're looking for information, such as any of the Sony Developer Kit tools that might be contained on that computer. That information would only be distributed by Sony Computer Entertainment America, and would establish contacts between SCEA and Mr. Hotz.

THE COURT: Or between Mr. Hotz and somebody who had them, and gave them to him?

MS. SMITH: That's correct; but at the end of the day, he would have something belonging to SCEA that he should have licensed.

THE COURT: Well, but you already say he's got something belonging to you. This is not on the merits, right? This is about general and specific jurisdiction.

MS. SMITH: Right. And one of his contentions is that he's not aware of Sony

Computer Entertainment America being in California. And **we believe that the SDK – the developer's kit -- would contain information showing him that SCEA is in California.**

THE COURT: Okay. Mr. Kellar, both of those things seem relevant.

March 10, 2011 Hearing Transcript [Dkt No. 93] 20:20-21:14 (emphasis added). Despite SCEA's representations, **Counsel for Mr. Hotz has ascertained that the SDK is owned by Sony Computer Entertainment Inc. ("Sony Japan") and the SDK installation procedures reference Sony Japan.** A cursory internet search yielded screen shots of the SDK's installation procedures, and indicates that **the SDK is the property of Sony Japan and no reference is made to SCEA.** A true and correct copy of such image is attached hereto as Exhibit 1. SCEA's own officer has declared that Sony Japan owns the copyright to the SDK as well. A true and correct copy of Declaration of Riley Russell [Dkt No. 3, exh. B] is attached hereto as Exhibit 2.

Moreover, premitting SCEA's misrepresentation, the fact that SCEA refuses to provide Mr. Hotz's counsel with a copy of the SDK is problematic in and of itself. The SDK is one of the items that the third party neutral, The Intelligence Group ("TIG"), will search for on Mr. Hotz's impounded hard drives. If counsel for Mr. Hotz is not permitted to have a copy of the SDK to determine the authenticity of the program, the appropriate search protocol, and to determine if SCEA's statements regarding the SDK are true, Mr. Hotz will be prejudiced and an unwarranted search will be performed. This is even more problematic based on SCEA's false representations regarding the SDK's pertinence to jurisdictional discovery. To date, SCEA refuses to provide the SDK to Mr. Hotz's counsel for such purposes.

SCEA cannot be permitted to make statements to the Court regarding the contents of the SDK while preventing all efforts by Mr. Hotz's counsel to confirm the truth of such statement. Indeed, SCEA has refused all efforts to identify those portions of the SDK containing information showing that SCEA is in California.

Mr. Hotz's counsel must be provided with a copy of the SDK that will be used as the source file to search Mr. Hotz' impounded drives.

## **2. SCEA Refuses to Demonstrate Whether the SDK contains Information Showing SCEA is in California.**

This Court astutely recognized why searching for presence of the SDK would not be relevant to jurisdictional discovery, yet SCEA represented that it was relevant and necessary because the SDK contains information that SCEA is in California. The Court permitted such inspection based on SCEA's representations. Mr. Hotz's counsel, while disagreeing, also relied on SCEA's representations. Now it appears that SCEA continues to deliberately misrepresent its position in order to gain the ability to perform a search on Mr. Hotz's drives that otherwise would not have been authorized. SCEA refuses to confirm its representation to the Court regarding the SDK. If the SDK contains information that SCEA is in California, SCEA would have provided such information without hesitation. SCEA's refusal to provide such information is telling, in that it effectively shows that SCEA knows such information does not exist.

Although Mr. Hotz's counsel has attempted to work amicably with SCEA and has offered reasonable suggestions to reach a harmonious conclusion, SCEA is unwilling to compromise with Mr. Hotz. Mr. Hotz's counsel requested that, in addition to permitting searches for all or portions of the SDK, SCEA identify those specific portions of the SDK that show SCEA is in California. SCEA refuses to permit Mr. Hotz's counsel, or even the neutral ("TIG"), to perform a reasonable search to determine if the SDK truly does contain information showing that SCEA is in California. SCEA has refused to do so.

SCEA has likewise refused to provide a declaration affirming the statement made to the Court that the SDK contains information showing that SCEA is in California. Further, SCEA has not identified which portions, if any, of the SDK contain such information. SCEA's refusal to provide or confirm this clearly relevant information tends to demonstrate that the statements made by SCEA at the March 10, 2011 hearing were false and that the SDK does not contain information that SCEA is in California.

SCEA must be ordered to provide a written declaration that the SDK does, or does not, contain information showing that SCEA is in California and identifying the portions containing such information, if any.

As one final matter, contrary to the steps SCEA argues it attempted to employ to resolve this SDK matter, SCEA begrudgingly put forth artificial remedies (citing, among other concerns, inexplicable privacy considerations that could be ameliorated through simple stipulations), despite Mr. Hotz's repeated requests, only after Mr. Hotz's counsel informed them of the findings pertaining to the SDK referencing Sony Japan and informed SCEA that Mr. Hotz's counsel was going to inform the Court of these misrepresentations. SCEA's proposed order places limitations on Mr. Hotz's counsel's ability to access the SDK designed to cripple defense counsel's ability to conduct a meaningful search. The neutral has not been so required to conduct searches at SCEA's counsel's offices and to Hotz's counsel's knowledge has not been required to enter an NDA. Thus, SCEA is seeking only to prevent the Defendant from any meaningful search.

### **3. TIG's Protocols Discussed on March 16, 2011 Conference Call Need not be Modified**

Mr. Hotz's proposed Order virtually mirrors Mr. Grennier's neutral letter, a copy of which is attached as exhibit 3. With the exception of SCEA's requirements regarding the SDK, Mr. Hotz's order proposes no substantive changes to Mr. Grennier's letter.

Conversely, in its proposed order, SCEA seeks to significantly modify Mr. Grennier's letter regarding search protocols discussed and agreed to by all parties on March 16, 2011. TIG's protocol is agreed to by Mr. Hotz and need not be modified. The issues of SCEA's misrepresentations and refusal to provide opposing counsel with the SDK does not require modification of any searches or protocols discussed in Mr. Grennier's March 16 letter.

For the above stated reasons, Mr. Hotz respectfully requests that the Court issue the proposed order attached hereto as Exhibit 4.

### **4. This Joint Letter was Filed Late Because of Prejudicial, Undue Delay by SCEA Counsel**

As a result of SCEA's failure to comply with their own time limitations as established in Judge Spero's Order, Mr. Hotz was unable to address and rebut SCEA's arguments in this joint letter. SCEA's counsel did not provide Mr. Hotz's counsel with their portion of the letter until 11:53pm on March 16, 2011 and did not send the included exhibits until 12:12am. SCEA's delay was undue and was in bad faith.

## **SCEA's Position**

### **A. The SDK**

Plaintiff SCEA's counsel has not made any misrepresentations to the Court regarding the SDK. This is yet another manufactured dispute by Mr. Hotz's counsel.

SCEA is the exclusive distributor of the PS3 System SDK in the United States. This is exactly what counsel for SCEA has represented to the Court.<sup>1</sup> The SDK includes software, hardware, electronic manuals and other materials. As SCEA represented to counsel in meet and confer discussions today, the SDK does contain material that references Sony Computer Entertainment America. SCEA's counsel even confirmed in an email to Mr. Kellar, attached hereto as Exhibit 5. Specifically, the SDK contains an electronic Reference Tool Instruction Manual that references SCEA and lists the company as Developer Support for the tool. The electronic manual is distributed as part of the SDK within the United States. A true and correct copy of the first and last page of the Instruction Manual is attached hereto as Exhibit 6.

Moreover, Mr. Hotz's representation that SCEA has refused allow counsel for Mr. Hotz access to the SDK is simply false. Attached as Exhibit 7 is an email from SCEA's counsel to Mr. Hotz's counsel stating that SCEA will allow Mr. Hotz's counsel to inspect an exact duplicate of the SDK materials being provided to the third party neutral, TIG. Because the SDK includes proprietary source code, SCEA required that the review be done under the usual protocols associated with the review of source code. In meet and confer, Mr. Hotz's counsel did not take issue with this process except that he wanted to ensure the ability to install the software on the stand-alone computer himself. SCEA's counsel confirmed that this would be permitted so long as he did not use his own special installation software. See Exhibit 8. SCEA's proposed order, attached hereto as Exhibit 9, even allows for such a review. See Paragraph 4 (a)-(f).

## **B. TIG Summary**

In its proposed order, SCEA simply makes a few modifications to the TIG summary of the parties' teleconference.

First, TIG proposed that Mr. Hotz make himself available next week to provide TIG access to his computer and passwords to create unencrypted images of the devices. SCEA simply proposes a hard deadline of Tuesday, March 22 in order to stay on schedule for the April 8, 2011 hearing on Mr. Hotz's motion to dismiss. Likewise, SCEA also proposes a deadline of March 22, 2011 for the parties to agree upon search terms involving the PSN and SDK.

SCEA removed TIG's reference to the "circumvention devices" since the parties have already agreed, and the Court ordered, that an impoundment protocol would be agreed upon by March 28, 2011.

After the teleconference with TIG, counsel for SCEA agreed to a few requests made by counsel for Mr. Hotz. First, SCEA agreed to allow TIG to run additional searches on any SDK material found on the impounded devices, and included that provision in its proposed order. As set forth above, SCEA also offered to allow counsel for Mr. Hotz to review the SDK at SCEA

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<sup>1</sup> SCEA has never represented that SCEI has no relationship to the SDK. Moreover, the installation material that Mr. Hotz's counsel refers to herein is not actually part of the SDK itself.

counsel's office in San Francisco. Mr. Hotz, however, refused. These accommodations are not reflected in TIG's summary, but SCEA nonetheless included them in its proposed order.

Lastly, SCEA modified TIG's suggestion on how to segregate privileged and non-relevant material search results involving access to the PSN. Under TIG's suggestion, counsel for Mr. Hotz would decide what material was relevant or not after the search was performed. SCEA believes that TIG, as the third party neutral, should make such a determination. Accordingly, SCEA included language in its Proposed Order that would allow Mr. Hotz's counsel to first identify any purported non-relevant search results. If TIG disagrees with this determination, the items in dispute would be submitted, *in camera*, to the Court for its determination on relevance. With regard to the privilege log, SCEA's counsel simply that the log be produced to it. SCEA's counsel proposed these revision in a telephone conference with counsel for Mr. Hotz. SCEA' proposal was rejected.

Thank you very much for your time and consideration.

Respectfully submitted,

Kilpatrick Townsend & Stockton

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Enclosures