Court of Appeal No. H021961

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

MATTHEW PAVLOVICH, Petitioner v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, Respondent.	Supreme Court No. S100809 Trial Judge: Hon. William J. Elfving Santa Clara County Superior Court Trial Court Case No. CV 786804
DVD COPY CONTROL ASSOCIATION, INC., Real Party in Interest	

REAL PARTY IN INTEREST DVD COPY CONTROL ASSOCIATION'S BRIEF ON THE MERITS

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By and through its undersigned counsel, Real Party in Interest DVD Copy Control Association, Inc. ("DVD CCA") hereby responds to Petitioner Matthew Pavlovich's (the "Petitioner" or "Pavlovich") Brief on the Merits ("Pet.Br.").

PRELIMINARY STATEMENT

The decision of the Court of Appeal sustaining the jurisdiction of the California courts over Petitioner Matthew Pavlovich follows and applies well settled principles laid down by the Supreme Court of the United States and the courts of this state. In particular, the Court of Appeal properly applied the "effects test" articulated by the United States Supreme Court seventeen years ago in *Calder v. Jones* As the Court of Appeal correctly noted

> [T]he fact that Pavlovich used the new medium of the Internet to inflict harm on a California plaintiff, instead of the print media that was used in *Calder,* is irrelevant. It should not matter whether the delivery system used to inflict the injury is the traditional delivery system of air, land, or sea transportation, or the cutting-edge technological system of cyberspace, satellites, cable, and electro-magnetic waves. California's long- arm statute looks at the effects, not at the system that delivered and produced those effects.

Pavlovich v. Superior Court (hereinafter, the "Appellate Opinion"), 109 Cal.Rptr.2d 909, 914 (2001).

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465 U.S. 783 (1984).

In his attempt to convince this Court to depart from these long established principles, Petitioner

1 Misreads and mischaracterizes the decision in *Calder*;

2 Selectively quotes and fundamentally misinterprets the decisions of this Court, lower California courts and Federal Courts; and

3. Asserts, for the first time and without any record support, that "Matt Pavlovich himself did not post the code on the LiVid site or anywhere else," Pet.Br., p. 10, and suggests, also for the first time and without record support, that his involvement in the misappropriation of DVD/CCA's trade secrets was minimal

In fact, Pavlovich's role in the misappropriation of DVD/CCA's trade secrets by posting of DeCSS on the Internet[2] was neither minimal, innocent nor inadvertent. Pavlovich is a leader in the "open source" movement, which generally seeks to make material available over the Internet for free. In particular, Pavlovich founded and operated a group called the "LiVid Video Project," a key purpose of which, in Pavlovich's

[2] This action was commenced in order to stop the theft of DVD CCA's trade secrets that are utilized in an encryption-based copy protection system known as the Content Scramble System ("CSS"). CSS is employed to encrypt and thereby protect the copyrighted motion pictures contained on Digital Versable Discs ("DVDs"). Pavlovich and the other defendants in the underlying action developed and/or disseminated computer programs on the Internet, including a program called DeCSS, that misappropriate DVD CCA's trade secrets and are designed to defeat the CSS encryption technology. Such actions facilitate the wholesale infringement of copyrighted motion pictures by individuals worldwide.

own words "was to aid in the development of an unlicensed system for DVD playback and copying."[3]

As stated by the Court of Appeal,

> Pavlovich cannot claim innocent intent. As a computer engineering student, a technician in the computer and telecommunications industry, a founder and president of a technology start-up company, and a leader in the "open source" movement, Pavlovich knew, or should have known, that by posting the misappropriated information on the Internet, he was making the information available to a wide range of Internet users and consumers throughout the Internet world, including users and consumers in California.

Appellate Opinion at 916.

In disseminating DeCSS on the Internet, Pavlovich engaged in purposeful, unlawful conduct directed at three substantial industries in the State of California – the motion picture industry, the computer industry and the consumer electronics industry. He did so knowing that his actions would adversely affect these business enterprises and that his actions had the effect of circumventing trade secret protections established by and for the benefit of those business enterprises. Without denying any of these facts, Pavlovich seeks to escape the jurisdiction of this court by arguing that

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[3] Appellate Opinion at 912. In a message posted on October 1, 1999, Pavlovich stated: "I have been limiting my work in other projects and really changing gears for LiVid." And, on November 10, 1999 Pavlovich posted a message entitled: "[LiVid-dev] More legal trouble" in which he stated: "It seems to me that at least two things need to happen ASAP: #1 Move the mailing list and CVS site to a friendly country, where lawyers like these have limited (and perhaps no) ability to harass mailing list hosts,

he did not know the precise identity of the plaintiff, and that his acts targeted general industries rather than a specific person or entity. This argument is untenable under the California long arm statute and related case law.

Pavlovich identifies three issues for review by this Court: (i) whether jurisdiction in California is proper under the *Calder* effects test

"a defendant knew or should have known that his acts would have an effect on industries generally reputed to exist in California" (Pet.Br., p. 1); (ii) whether the 'express aiming' requirement of the *Calder* effects test may be satisfied by "general, untargeted acts" (*Id.*); and (iii) whether jurisdiction in California is proper under the *Calder* effects test where a defendant "is responsible for a passive, non-commercial website that enables an unknown third party to post information subsequently claimed to have caused harm in California, without 'something more.'" (*Id.*)

Pavlovich suggests that the answer to each of these questions is no and that the Court of Appeal's decision should therefore be overturned. In fact, however, the Court of Appeal's decision should be affirmed regardless of the answers to the questions posed by Pavlovich.

With regard to the first question, Pavlovich aimed his conduct at particular, known, California parties, not just at "industries generally

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CVS contributors and the like. ." Attached to the Shapiro Decl. as Exhibit C.

reputed to exist in California." He acted with the knowledge that his conduct would harm the sole entity licensing CSS (DVD CCA, a California domiciliary), its California licensees – computer hardware and software companies -- and the California-based motion picture companies that depend on CSS to protect their copyrights. Appellate Opinion at 912-916 Thus, whether jurisdiction would be proper over a defendant who knew or should have known only that his conduct would have an effect on "industries generally reputed to exist in California" is of no relevance here.

Moreover, even if that question were relevant, the answer would be yes. The *Calder* effects test is satisfied, and jurisdiction is therefore appropriate, so long as the defendant engaged in intentional conduct aimed at the forum state, knowing that such conduct is likely to cause harm to forum residents. Those residents may be specific individuals or entities, or general industries. To rule otherwise would permit out of state defendants to target broad-based California industries – like the citrus industry, the software industry, or the movie industry without fear of being haled into court here simply because they did not have a specific citrus, software or movie company in mind when they acted.

With regard to the second question posed by Pavlovich, it is clear from the record, and from the findings of the Superior Court and Court of Appeal, that, far from "general, untargeted acts," Petitioner's conduct was directed at entities in California – the motion picture

companies, the computer companies and Real Party in Interest DVD CCA. Thus, whether general untargeted acts satisfy the *Calder* effects test, has no bearing on an evaluation of Pavlovich's conduct.

Even if that question were relevant to the circumstances here, it is clear that a defendant's acts need not be targeted at specific California individuals or organizations in order to trigger California jurisdiction. 'Express aiming' under the *Calder* effects test means express aiming at the forum state, not necessarily at a specific, known party.[4] The case law is well-established that if California is the place where the brunt of the injury is felt, then California jurisdiction is proper.[5]

As to the third question identified by Pavlovich, again, the record and the findings of the courts below are clear that Petitioner did engage in 'something more' than participation in a passive, non-commercial Internet site. In its opinion, the Court of Appeal notes that Pavlovich: 1) "developed and/or posted computer programs on the Internet . that misappropriate DVD CCA's trade secrets;" 2) knew that a license was required to use such trade secrets; 3) failed to apply for or obtain a license; and 4) "sought to and actually disseminated [DVD CCA's] trade secrets" anyway. Appellate Opinion at 912. Moreover, 'express aiming' at

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[4] Appellate Opinion at 918; *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000).

[5] *Core-Vent Corp. v. Nobel Indus.*, F.3d 1482, 1486 (9th Cir. 1993).

the forum state has been held to constitute the 'something more' required by *Calder*. That is exactly what Pavlovich did here. Thus, whether Pavlovich could be subject to California jurisdiction without this 'something more' is of no relevance here and cannot warrant a reversal of the Court of Appeal's decision.

Finally, it is irrelevant, under the effects test, whether a web site is passive and non-commercial as opposed to interactive and commercial. Those factors are relevant only to inquiries -- outside of the effects test framework -- into whether the defendant's commercial contacts with a forum subject that defendant to jurisdiction there.[6]

As the Superior Court and Court of Appeal correctly recognized, defendants who misappropriate valuable trade secrets and inflict injury on major interests in California cannot be immunized simply by conducting their illegal activities from afar over the Internet and can be required to answer for their actions in this State. In this regard, it should not matter whether the defendant's actions target a person, an entity or a group of entities. The idea that an individual, out-of-state cyber-terrorist, for example, could set loose a computer virus with the intent of paralyzing energy delivery, or business communication, or water flow in the State of California, yet somehow avoid the jurisdiction of the California courts

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[6] *Panavision Inter'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998).

because that individual was not targeting a particular individual or entity makes no sense. The actions of that defendant are aimed at the forum state and are, thus, under *Calder*, sufficient to subject him to the jurisdiction of the courts of that forum state. Accordingly, as further detailed below, the Court of Appeal's decision should be affirmed.

STATEMENT OF FACTS

Real Party in Interest DVD CCA is the sole authorized licensor of the encryption technology known as CSS.[7] DVD CCA licensees CSS and the associated proprietary technology for use in an array of computer operating systems, including Microsoft's *Windows*, Macintosh's *MacO/S* and the *Linux* operating system.[8]

Pavlovich himself has admitted in sworn testimony that he is the president of a technology start-up company (Pavlovich Aug. Depo., p 8), a former computer engineering student, and a technician in the computer

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[7] Contrary to Petitioner's assertion, DVD CCA is not maintaining this action as an assignee. DVD CCA came into existence prior to the time DeCSS was posted on the Internet and, after an interim period during which it administered licenses on behalf of its predecessor in interest, took over all licensing responsibilities in December of 1999. Petitioner's actions prior to and since December 1999 have harmed DVD CCA's business interests. Further, whether or not DVD CCA were pursuing this action as an assignee has no bearing on the jurisdictional issues before this Court.

[8] There is no record support for Petitioner's claims that "the entities who license CSS had not permitted CSS-equipped DVD players to be built for the Linux operating system or for other open-source operating systems." Op Br. p.3. In fact, CSS technology has been licensed to those seeking to develop a player for the Linux environment. Hoy Decl ¶¶ 5-20.

and telecommunications industry.[9] At the time he posted DeCSS on the Internet, he was a leader in the "open source" movement, which is dedicated to making material available over the Internet. At that time, Pavlovich had founded and was operating a group called the LiVid video project, which operated through a host website located at the URL: "livid.on.openprojects.net."[10]

Although Pavlovich's Brief on the Merits states that he did not have "sole control" over the website, he testified under oath that he was the "founder" and "project leader" of the LiVid video project and that the website in question was the host site for that project.[11] Pavlovich also testified that the members of the LiVid video project communicated primarily through the website and admitted that a key purpose of this project "was to aid in the development of an unlicensed system for DVD playback and copying."[12] To that end, as explicitly recognized by the Court

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[9] *See* July 7, 2000 Deposition of Matthew Pavlovich ("Pavlovich July Depo.") p. 18, cited pages attached to the Shapiro Decl. as Exhibit B.

[10] Appellate Opinion at 912; *See also* Deposition of Matthrew Pavlovich, August 4, 2000 ("Pavlovich Aug. Depo") pp. 15-16, 40, cited portions attached as Exhibit A to the Declaration of Jonathan Shapiro ("Shapiro Decl."), filed with DVD CCA's original appellate papers; *see also* Declaration of Matthew Pavlovich in Support of his Motion to Quash ("Pavlovich Decl."), ¶ 9, contained in Exhibit B to the Petitioner's original appellate papers.

[11] Pavlovich August Depo. pp. 15-17, 40.

[12] Appellate Opinion at 912.

of Appeal's decision, Petitioner and the other defendants developed and/or posted on the Internet a computer program called DeCSS,[13] which misappropriates DVD CCA's proprietary trade secrets and is designed to defeat the CSS encryption technology.[14]

At the time DeCSS was posted on the LiVid project website, Pavlovich knew that "there was an organization which you had to file for or apply for a license" to use certain DVD technology (Pavlovich Aug. Depo., pp. 24-25, 86-87) (Pavlovich July Depo., pp. 86-89). Despite this knowledge, the LiVid project, which Pavlovich founded, never sought or

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[13] For the first time, in his Brief on the Merits, Pavlovich states that "Matt Pavlovich himself did not post the code on the LiVid site or anywhere else." This claim has no factual support in the record. In fact, the record shows that Pavlovich refused to answer direct questions about his role in posting DeCSS on the Internet as part of his agreement to be deposed on jurisdictional issues. See Pavlovich Aug. Depo. pp. 36-37, 94-95, see also pp. 9, 18. Further, Pavlovich's new and cleverly worded denial allows Pavlovich to appear to deny involvement in the posting of DeCSS even if he (i) instructed, aided or encouraged someone else to post DeCSS on the website; and/or (ii) simply posted a "button" or text line which, when clicked, deposited the code on users' hard drives. Even Pavlovich himself, later in his Brief, characterizes his involvement in this case as "input to a website run by his not-for-profit volunteer group." Pet.Br., p. 36. Whether "Pavlovich himself" actually posted DeCSS on the Internet or whether he allowed or encouraged someone else to do so on his website is irrelevant. Either way, he knowingly participated in the dissemination of wrongfully acquired trade secrets.

[14] Appellate Opinion at 911-912. Contrary to Petitioner's claim that he innocently republished DVD CCA's trade secrets on the Internet, the Superior Court ruled that "circumstantial evidence, available mostly due to the various defendants' inclination to boast about their disrespect for the law, is quite compelling on ... Defendants' knowledge of impropriety." See Order Granting Preliminary Injunction, p. 4.

obtained a license to use DVD technology. It nevertheless utilized DVD CCA's trade secrets, including those contained in DeCSS. (Pavlovich Aug. Depo., pp. 51, 57-58).

When Pavlovich misappropriated DVD CCA's trade secrets, he also knew that such actions would adversely impact three significant industries located in California – the motion picture industry, the consumer electronics industry and the computer industry. Appellate Opinion at 912.

Pavlovich knew the motion picture industry was centered in California (Pavlovich Aug. Depo., pp. 29-30); that DVDs were key instruments of the motion picture industry in that they serve to deliver motion picture content to their purchasers (Pavlovich Aug. Depo., pp. 28); that DeCSS facilitates the pirating of DVDs (Pavlovich Aug. Depo., pp. 59-60); and that pirating DVDs is wrongful conduct (Pavlovich Aug. Depo, p. 71). His conduct has in fact injured the motion picture industry by making available software that allows the illegal copying of its copyrighted motion pictures.

Further, at the time he misappropriated DVD CCA's trade secrets, Pavlovich knew that the computer technology industry has a substantial presence in California (Pavlovich Aug. Depo., pp. 41-44). Indeed, of the more than 400 CSS licensees companies that make the computer hardware and software which allow consumers to view digital images on DVDs – 73 are located in California, 42 are located in Santa

Clara County and an additional 17 are in other Bay Area locations. See Complaint, ¶ 53.

Thus, the Court of Appeal properly found that Petitioner misappropriated DVD CCA's trade secrets knowing that such actions "were injuriously affecting the motion picture and computer industries in California"[15] and that such conduct threatens the economic welfare of the more than 400 CSS licensees – companies that make the hardware and software enabling consumers to view digital images on DVDs, 73 of which are located in California.[16]

Finally, Pavlovich's familiarity with CSS, DeCSS and the consequences of his actions is demonstrated by the fact that he was designated as a potential expert witness by the defendant, and was deposed, in *Universal Studios, Inc. v. Reimerdes*, 11 F.Supp.2d 294 (S.D.N.Y 2000), a case decided in the United States District Court, Southern District of New York which involved the same conduct as that at issue here. That decision, which enjoined the defendants there from posting DeCSS to the Internet, was affirmed just three months ago by the United States Court of Appeals for the Second Circuit. *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2nd. Cir. 2001).

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[15] *Id.* at 915-16.

[16] *See* Complaint, ¶ 53, attached as Exhibit D to the Shapiro Decl.; Appellate Opinion at 912, 915-916.

PROCEDURAL HISTORY

On January 21, 2000, Judge J. William Elfving of the Respondent Superior Court granted in part DVD CCA's request for preliminary injunctive relief to prevent dissemination of its proprietary information. The Preliminary Injunction prevents the defendants, including Pavlovich, from

> Posting or otherwise disclosing or distributing, on their websites or elsewhere, the DeCSS program ... or any other information derived from this proprietary information.

See Order Granting Preliminary Injunction, p. 2.[17]

Six months later, on June 6, 2000, Pavlovich moved the trial court for an order quashing service of process. After full briefing and oral argument, on August 30, 2000, Judge Elfving denied Pavlovich's motion. On September 11, 2000, Pavlovich petitioned the Court of Appeal for the Sixth Appellate District for a Writ of Mandate compelling the trial court to quash service of process. The court denied that petition on October 11 2000.

Pavlovich then petitioned this Court to review that decision. Upon instructions by this Court, the Court of Appeal, on January 16, 2001, ordered that the Superior Court show cause why the relief requested by

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[17] That Order remains in effect. On review, the Court of Appeal for the Sixth Appellate District ruled that the order violates the First Amendment. DVD CCA has petitioned this Court to review that decision. The injunction remains in effect pending disposition.

Petitioner should not be granted and directed that Petitioner and Real Party In Interest DVD CCA file additional briefs on the matter. On August 7, 2001, the Court of Appeal filed an unanimous opinion, again ruling that Pavlovich is subject to California court jurisdiction in this matter.

Pavlovich again petitioned this Court for review of that decision. On December 12, 2001, this court granted review.

ARGUMENT

I. The Court Of Appeal Properly Ruled That Pavlovich Is Subject To The Jurisdiction Of The California Courts

The Court of Appeal's ruling correctly applied traditional, well-settled rules governing personal jurisdiction to the modern world of the Internet. As the court noted in its opinion:

> The Internet, as a mode of communication and a system of information delivery is new, but the rules governing protection of property rights [on the Internet] need not be. There is, for instance, sufficient guidance provided by the United States Supreme Court in *Calder v. Jones*.

Appellate Opinion at 912-13 (citation omitted).

Contrary to Petitioner's doomsday rhetoric, the Court of Appeal's ruling does not "completely eviscerate" the Supreme Court's ruling in *Calder v. Jones* (Pet.Br., p.30), nor does it base jurisdiction on "random" or "fortuitous" acts (*Id.*). Rather, the exercise of jurisdiction over Petitioner follows the established precedent of the U.S. Supreme Court, this Court and the Court of Appeals for the Ninth Circuit. As the U.S. Supreme

Court stated in *Calder v. Jones*, where a defendant "knew the brunt of the injury would be felt" in the forum state, he or she "must reasonably anticipate being haled into court there to answer for" his or her conduct. 465 U.S. 783, 788-89 (1984).

Petitioner provides no legitimate reason why this Court should disturb the Court of Appeal's ruling. It is well-settled that California courts may exercise specific jurisdiction over nonresident defendants when "the state has 'a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'" *Vons Companies, Inc. v. Seabest Foods, Inc.*, (1996) 14 Cal.4th 434, 447 *cert. denied* 522 U.S. 808, citing *Burger King v. Rudzewicz*, 471 U.S. 462, 473-74 (1985).[18] "The defendant need not ever have been physically present in the forum state for specific jurisdiction to apply." *Panavision L.P. v. Toeppen*, 938 F.Supp 616, 620 (C.D. Cal 1996), *aff'd*, 141 F.3d 1316, 1321 (9th Cir. 1998).

Courts apply a three-part test to determine whether specific jurisdiction exists in a particular instance. First, the defendant must have purposefully availed himself or herself of the forum. Second, the controversy must arise from the defendant's contacts with the forum. Third, the exercise of jurisdiction must comport with notions of "fair play

[18] The limits of the California long-arm statute are co-extensive with the limits of due process. Cal. Code Civ. Proc. § 410.10.

and substantial justice." *See, e.g., Panavision Inter'l, L.P.* v. *Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). In its decision, the Court of Appeal followed this framework. Appellate Opinion at 913-15 As detailed further below, Pavlovich's conduct clearly satisfies all three prongs of this test and, thus, his request that this Court reverse the Court of Appeal's decision should be rejected.

A. Pavlovich Purposely Availed Himself Of The Privileges Of This State

California Courts have long held that the "purposeful availment" requirement is satisfied where a defendant's intentional conduct causes harmful effects within the state. *See, e.g., Panavision,* 4 F.3d at 1321, citing *Calder*, 465 U.S. 783; *Quattrone v. Superior Court*, 44 Cal.App.3d 296 (1975); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

Under the "effects test," a defendant's actions constitute 'purposeful availment' if those actions are (1) intentional actions (2) expressly aimed at the forum state (3) causing harm which is suffered – and which the defendant knows or reasonably should have known is likely to be suffered – in the forum state. *Panavision*, 141 F.3d at 1321

When evaluating a petition for writ of mandate (which is what Pavlovich seeks), an appellate court is confined "to an inquiry as to whether the findings and judgment of the trial court are supported by

substantial, credible and competent evidence." *Rodriguez v. Solis*, (5th Dist. 1992) Cal.App.4th 495. And, under California law, where neither party requests factual findings from the lower court, "an appellate court must presume that the facts would support the trial court's judgement." *In re Marriage of Flaherty*, (1992) 31 Cal.3d 637, 645.[19] Pavlovich offers nothing to rebut this presumption.

Further, on motions to dismiss for lack of personal jurisdiction, the allegations of the complaint are taken as true, with disputes being resolved in favor of the plaintiff. *See, e.g., Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154, 1158 (C.D. Cal. 2000), *aff'd*, 246 F.3d 675 (9th Cir. Dec. 26, 2000). In its Complaint, DVD CCA alleged that Pavlovich and the other defendants intentionally developed and distributed computer programs utilizing DVD CCA's trade secrets without authorization, and with the knowledge that such actions would adversely affect three of California's most prominent and internationally-known industries – the computer industry, the consumer electronics industry and the motion picture industry (*see* Complaint, ¶¶ 45-74). Thus the Complaint

[19] By citing both *Calder* and *Panavision* in support of his ruling, Judge Elfving clearly ruled that Pavlovich's conduct meets the effects test standards contained in those cases. Factual findings that can be inferred from a lower court opinion are entitled to the same deference on appellate review as factual findings that are expressly stated. *See City and County of San Francisco v. Sainez*, (Ct. App. 1st Dist. 2000) 77 Cal.App. 4th 1302, 1313.

alleges that Pavlovich expressly aimed his intentional conduct at this State with the knowledge that such conduct would cause substantial harm here. This alone is enough to establish jurisdiction over Pavlovich in California.

In addition, as detailed below, substantial and credible evidence on the record supports jurisdiction over Pavlovich in California.

1. Pavlovich's Actions Meet The Intent Prong Of The Effects Test

It is beyond debate that Pavlovich's conduct was intentional. If a defendant had accidentally posted DeCSS to the Internet, or accidentally created a program which, without a license to do so, decrypted the copyrighted content of DVDs, such conduct, without more, might not be considered intentional conduct. By contrast, however, Pavlovich, has admitted that (i) he was the founder and project leader of the LiVid project, which was created to help create an unlicensed DVD player; (ii) the livid.on.openprojects.net website on which DeCSS was posted was the host site for his LiVid video project; Pet.Br., p. 36; Pavlovich Aug. Depo., pp. 15-17, 40; Appellate Opinion, p. 12; (iii) Petitioner knew DeCSS was developed by reverse engineering (Appellate Opinion at 912; Pavlovich Aug. Depo., pp. 32-33) and that such reverse engineering is illegal (Appellate Opinion at 912; LiVid posting, October 1, 1999, attached as Exhibit C to Shapiro Decl.); and (iv) Petitioner sought to distribute DVD CCA's trade secrets while knowing that such action was illegal (Appellate

Opinion at 912; LiVid postings, November 10, 1999, attached as Exhibit C to Shapiro Decl.). Moreover, Pavlovich was limiting his role on other projects and "really changing gears for LiVid." *Id.* Even Pavlovich himself characterizes his involvement in this case as "input to a website run by his not-for-profit volunteer group." Pet.Br., p. 36. Nowhere does Pavlovich claim – nor could he – that his role in the unlawful dissemination of DVD CCA's trade secrets was accidental.

In arguing that the Court of Appeal misconstrued *Calder*'s intent requirement, Pavlovich confusingly scrambles *Calder*'s "intent" requirement with its "express aiming" requirement and contends that the Court of Appeal "lowered the intent element of the express aiming requirement." Pet.Br., p.19. Under the intent requirement of the effects test, it is a defendant's actions which must be intentional, as Pavlovich's were. It was the defendants' "intentional, and allegedly tortious, actions" that the *Calder* court cited in ruling that California jurisdiction was proper in that case. *Calder* at 789 (emphasis added). As set forth above, Pavlovich's actions clearly satisfy this intent standard, and he does not claim otherwise. The Court of Appeal properly applied this standard and did not, as Pavlovich confusingly asserts, create a negligence standard or "lower the intent standard of the express aiming requirement." Pet.Br., p.19

2. Pavlovich's Actions Meet The "Expressly Aiming" Prong Of The Effects Test

The "express aiming" requirement of the effects test requires that the defendant aimed his conduct at the forum state. As stated by the

Calder court itself, "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation'" (*Id.* at 788), not the defendant and the plaintiff. Indeed, knowledge that "the brunt of the harm would be suffered in California" has been deemed the "[m]ost significant" factor favoring jurisdiction under the effects test. *Core-Vent Corp. v. Nobel Indus.*, 11 F.3d 1482, 1486 (9th Cir. 1993).

In *Panavision*, for example, the court found that the express aiming requirement was satisfied where, *inter alia*, the defendant registered the plaintiff's motion picture camera trademarks as "domain names" on the Internet knowing that plaintiff did substantial business with the motion picture industry and that "the heart of the theatrical motion picture and television industry is located [in California]." *Id*; *see also Nissan*, 89 F.Supp.2d 1154 (C.D. Ca. 2000)(holding that a North Carolina defendant was subject to California jurisdiction for trademark infringement over the Internet).

In *3DO Co. v. Poptop Software, Inc.*, 49 U.S.P.Q.2d 1469 (N.D. Cal. 1998), a California plaintiff sued for misappropriation of trade secrets associated with computer games. In upholding jurisdiction over the nonresident defendant, the court held that:

> The computer game industry is primarily located in California. Therefore, defendant's conduct is likely to have an effect in the forum state. As Defendants should know their

> actions are likely to cause harm in California, under the 'effects test,' the purposeful availment requirement necessary for specific jurisdiction is satisfied.

49 U.S.P.Q.2d at 1473 (emphasis supplied); *see also Cable News Network v. GoSMS.Com*, 56 U.S.P.Q.2d 1959 (S.D.N.Y. 2000) (holding that a California defendant was subject to New York jurisdiction where defendant "should have reasonably expected the transmittal of copyright infringing content...to have consequences in New York.").

The record provides substantial, credible and competent evidence, much of it from his own sworn statements, that Pavlovich expressly aimed his intentional conduct at the State of California, knowing that significant injury would be felt by three of California's largest and most important industries, and, specifically, by DVD CCA. As DVD CCA demonstrated, and as the Court of Appeal found, Petitioner has admitted that:

- Petitioner's goal -- through the LiVid project -- was to develop an unlicensed DVD player that would use DeCSS to decrypt DVD data – copyrighted motion pictures (Appellate Opinion at 912; Pavlovich Aug. Depo., pp. 28, 30-33);
- At the time Petitioner posted DeCSS on the Internet, he knew that DeCSS facilitates the pirating of motion pictures on DVDs (Appellate Opinion at 912; Pavlovich Aug. Depo., pp. 59-60) and that pirating DVDs is wrongful conduct (Appellate Opinion at 912; Pavlovich Aug. Depo., p. 71);

Indeed, as the Court of Appeal opinion notes, "Pavlovich admitted in his deposition that 'there was an organization that you had to apply for a license or whatever' to use certain DVD technology." Appellate

Opinion at 912. Nonetheless, "Pavlovich never sought or obtained a license," "admitted that his LiVid project utilized DVD CCA's trade secrets," and "sought to and actually disseminated those trade secrets. Appellate Opinion at 912.[20] Pavlovich did all this knowing that the motion picture industry, the consumer electronic industry and the computer industry was centered in California. *Id.*

Thus, Petitioner targeted his conduct at the motion picture, consumer electronic and computer industries in California and did not simply engage in "general," "untargeted" acts, as he claims.[21]

Petitioner's contention that the effects test requires a defendant to intentionally target a specific, known plaintiff rather than an "industry" before jurisdiction can be exercised (Pet.Br., pp. 24-30) is

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[20] Pavlovich's claim that he did not know DVD CCA's actual name or precise location until commencement of this lawsuit (Petition, p. 25) is similarly irrelevant. The salient facts are that Pavlovich (I) knew "there was an organization which you had to file for or apply for a license" to use certain DVD technology (Pavlovich Aug./ Depo., p. 24-25, 86-87; Pavlovich July Depo., pp. 86-89; and (ii) knew or should have known that his conduct would affect this licensing entity's California interests because he knew the motion picture, consumer electronics and computer industries are located in California. *See, e.g. Core-Vent v. Nobel Indus.*, 11 F.3d at 1486.

[21] It is for this reason that Pavlovich's reliance on *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F.Supp.2d 1194 (C.D.Cal. 2000), is unfounded. Whereas the defendant there "merely" knew that "a corporate defendant might be located in California," (*Id.* at 1206) (emphasis supplied), Pavlovich knew that DVD CCA and others "would feel the brunt of the effects of [his] actions in California." *Id.* (emphasis supplied).

completely unfounded. As the California Court of Appeal for the Fourth District recently stated:

> [T]he defendant's forum related activities need not be directed at the plaintiff in order to give rise to specific jurisdiction.... [T]he nexus required to establish specific jurisdiction is between the defendant, the forum, and the litigation – not between the plaintiff and the defendant.

Cassier Mining Corp. v. Superior Court (1998) 66 Cal.App.4th 550, 557, *citing Vons Companies, Inc. v. Seabest Foods, Inc.* 1996) 14 Cal.4th 434, 455 (emphasis supplied). The Ninth Circuit has made it equally clear that "express aiming" means express aiming at the forum state, not necessarily at a specific party. *See Bancroft & Masters, Inc. v. Augusta National, Inc.* 223 F.3d 1082 (9th Cir. 2000).

In the instant case, the Court of Appeal similarly states that

> Neither does *Calder 's* language suggest that the defendant must have known of the plaintiff's identity and location.... As the court keenly observed in *Cassiar Mining Corp. v. Superior Court* (1998) 66 Cal.App.4th 550, 557, 78: "[T]he defendant's forum [related] activities need not be directed at the plaintiff in order to give rise to specific jurisdiction.... [T]he *nexus required to establish specific jurisdiction* is *between the defendant, the forum, and the litigation--not between the plaintiff and the defendant.*

Appellate Opinion at 918. (Italics in Appellate Opinion, citations omitted).[22]

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[22] Similarly, in *Gutierrez* v. *Givens*, 1 F.Supp.2d 1077 (S.D.Ca. 1998), the defendants, non-residents of California, attempted to hide assets from potential creditors. These potential creditors were more than 29,000 class plaintiffs in a class action law suit. Despite the fact that the defendants did

Pavlovich cites *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000), for the proposition that a defendant's out-of-state conduct must be aimed at an individual or particular entity in order to meet the express aiming standard. This contention is belied by the very wording of the effects test itself, as stated by the *Calder* court and reiterated by very the *Bancroft* court cited by Pavlovich. The relevant jurisdictional test is express aiming "at the forum state," not at a particular entity in the state, much less at the particular plaintiff in the suit. Thus, in *Calder*, the Supreme Court stated that the defendants "intentional, and allegedly tortious, actions were expressly aimed at California," (465 U.S. at 783) not "at the plaintiff in California". And, in *Bancroft*, the court stated that: "the letter was expressly aimed at California, because it individually targeted B &M, a California corporation...." *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (emphasis supplied).

As the Court of Appeals pointed out below:

> Pavlovich misreads *Bancroft*. *Bancroft* did not interpret the "express aiming" requirement of *Calder* to mean that the defendant must know the identity and location of the plaintiff when it undertakes the wrongful acts. *Bancroft* stated merely that it understood the express aiming requirement of *Calder*

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not aim their conduct at any particular, known, California party, the court ruled that they "knew or should have known that their actions would later injure judgement creditors in California." Id. at 1082. Thus, the court found, jurisdiction was proper. *Id.*

> to be "satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." (*Bancroft, supra,* 223 F.3d at p. 1087.) *Bancroft* did not say that targeting the wrongful conduct "at a plaintiff whom the defendant knows to be a resident of the forum state" is the *only* way to satisfy *Calder* 's "express aiming" requirement.

Appellate Opinion at 918 (emphasis supplied).

The *Edmunds* case, also cited by Pavlovich, is not an "effects test" case and therefore does not even address the issue of express aiming. Rather, in *Edmunds*, as Pavlovich himself states, jurisdiction was found to be improper because the defendant's action merely "set into motion events which ultimately injured a California resident." Pet.Br., p. 23, citing *Edmunds v. Superior Court*, (1994) 24 Cal.App.4th 221.[23] By contrast, Pavlovich engaged in intentional conduct knowing and intending that the conduct would affect parties in this State.

Similarly, *Cybersell,*[24] *Calloway*[25] and *Gordy*[26] (cited by Petitioner) are inapplicable to the questions presented here. Those cases involved only injury to individual plaintiffs, not to any industry. Thus, those courts did not need to reach the "industry" question. Each of those

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[23] The defendant was an Hawaii attorney representing a California company in a Hawaii lawsuit. *Edmunds* at 224.

[24] *Cybersell Inc.* v. *Cybersell, Inc.,* (9th Cir. 1997)130 F.3d 415.

[25] *Calloway Golf Corp. v. Royal Canadian Golf Ass'n,* (C.D. Cal. 2000) 2000 U.S. Dist. LEXIS 19032.

[26] *Gordy v. Daily News, L.P.* (9th Cir. 1996) 95 F.3d 819.

cases, however, does specify that the relevant question under the effects test is the targeting of the forum state.

According to Pavlovich's contrary view, a person who fired a bullet into California could be sued in California only if he fired with the intent to hurt a particular, known, California party. A person who simply stood at the Nevada border and fired randomly into this State could not, under Pavlovich's framework, be brought to answer for his conduct here. Similarly, under Pavlovich's formulation, a party could come to the Nevada border and, without fear of California court jurisdiction, release fruit flies into this State in order to generally sabotage the citrus industry. According to Pavlovich, only if the saboteur had a particular company in mind as a target – rather than a general industry could he be called to answer for his conduct here. The law cannot turn on such distinctions, as the State of California clearly is entitled to protect its citizens, its businesses and its industries from out-of-state tortfeasors.

3. Pavlovich's Conduct Caused Harm That He Knew Or Reasonably Should Have Known Was Likely To Cause Harm In California

As a leader in the "open source" movement, a computer engineering student, the president of a technology start-up company, and a technician in the computer and telecommunications industry, Pavlovich was certainly aware that posting information on the Internet would make that information available to a large and geographically scattered

population of individuals and organizations. Indeed, that was his intention as the founder and project leader of the LiVid group, which seeks to create unlicensed DVD decryption applications. Pavlovich Aug. Depo., pp. 22-25. Pavlovich cannot now claim to have been naïve or unsophisticated in his understanding of the impact his actions would have.

The record, indeed, demonstrates that Pavlovich's intentional actions did, in fact, cause harm in California, as he knew they would. Specifically, by intentionally posting or participating in the dissemination of DVD CCA's proprietary technology on the Internet, Petitioner threatened the very existence of DVD CCA, a California trade association, which is the sole licensor of the intellectual property misappropriated by Petitioner. Petitioner's conduct also jeopardized the economic viability of the dozens of CSS licensees in the computer and consumer electronics industries in California. See Complaint, ¶ 52-53; Appellate Opinion at 912 Finally, Petitioner's conduct put at risk one of the principle assets of the motion picture companies their copyrights in their motion pictures. Petitioner knew these companies were in fact (not simply "reputed to be") in California.[27]

[27] Appellate Decision at 912, *citing* Deposition Admissions.

B. The Court Of Appeal's Decision Is Consistent With The Dictates Of *Calder*

Pavlovich identifies eight points which he claims meaningfully distinguish this case from *Calder*. He is wrong.

The First point raised by Pavlovich is the allegedly "non-commercial" nature of his activities. No case law cited by Pavlovich and no case law in existence, to DVD CCA's knowledge – makes jurisdictional determinations based on whether a tort was committed "for profit" as opposed to for other motives. Pavlovich offers no rationale why such considerations should matter, and indeed they should not. Thus, this is a distinction without a difference.

Second, Pavlovich claims that because DVD CCA "does business world-wide" it is less likely to suffer harm in one geographic location. As *Panavision*, *3DO* and other cases demonstrate, however, where a defendant knew or should have known that the brunt of his conduct would be felt in a particular forum -- because, for example, the movie industry is centered there – he should expect to be called into court in that forum to answer for his conduct.

Third, Pavlovich alleges that his conduct harmed only the Japanese entities who originally licensed CSS. This is incorrect because his conduct has harmed and continues to harm DVD CCA, its licensees, and the movie, computer and consumer electronics industries.

Fourth, Pavlovich alleges that he had no interaction with California residents. This is of no relevance under the effects test. Further, Pavlovich admits that some members of his LiVid video project, including some who contributed to the host website, may have been located in California. *See* Pavlovich Aug. Depo., p. 19.

Fifth, Pavlovich alleges that the website at issue was not under his "sole control." On the one hand, Pavlovich alleges that the website was "passive" (*see* Pavlovich's Sixth point, *infra*) and could not therefore receive input from California users. On the other hand, he now claims that the website was not under his sole control and received input from an "unconstructed group of contributors," some of which may have been in California. Legally, however, all that matters here is that Pavlovich founded a group, for which this website served as a host, that was dedicated to the development of an unlicensed DVD player utilizing wrongfully obtained intellectual property. Whether Pavlovich misappropriated those trade secrets alone or in concert with an "unconstructed group of contributors," jurisdiction is proper in California.

Sixth, Pavlovich claims that the LiVid website was passive and did not solicit information from California. This is inconsistent with Pavlovich's other statements (*see* his Fifth point, *supra*) and with his sworn statement that certain contributors to his LiVid site may have been in

California. Pavlovich Aug. Depo., p. 19. Further, the passivity and commercial nature of a website are irrelevant under the effects test.

Seventh and Eighth, Pavlovich reiterates the "intent" and "targeting" points that were addressed, *supra*, in point I.A

The Court of Appeal decision is fully consistent with *Calder* and correctly determined that Pavlovich purposefully availed himself of a California forum.

II. The Claims Arise From Pavlovich's Forum-Related Activity

There is similarly no merit to Pavlovich's assertion that DVD CCA's claims do not arise directly from Pavlovich's forum-related conduct. In California, courts use a "but-for" test to determine whether a particular claim arises out of forum-related activities. *See, e.g., Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). Thus, the question is: but for Pavlovich's forum-related conduct, would DVD CCA's claims against Pavlovich have arisen? The answer is clearly no. If Pavlovich had not misappropriated

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[28] Petitioner claims that the Court of Appeal's decision is in conflict with *Jewish Defense Organization, Inc.* v. *Superior Court*, 72 Cal.App.4th 1045 (1999) and *Cybersell Inc.* v. *Cybersell, Inc.* 130 F.3d 415 (9th Cir. 1997). He is incorrect. Pavlovich relies on these cases for the proposition that the degree of interactivity and the commercial nature of a web site are relevant under the effects test. This argument ignores the initial holdings in *Jewish Defense Organization* and *Cybersell* that the effects test had not been met because the defendant's actions did not create a "foreseeable risk of injury" in California. Only after making this threshold decision does the court look to the interactivity and commercial nature of the web site in question as an alternative means of determining 'purposeful availment' for jurisdictional purposes. That is not the case here, nor does Petitioner argue otherwise.

DVD CCA's trade secrets, then DVD CCA's claims for misappropriation against Pavlovich would not have arisen.

Pavlovich claims that the Court of Appeal erred in evaluating this issue when it considered the effect misappropriation of DVD CCA's trade secrets had on the unlawful "distribution of copyrighted material of California Companies or the pirating of DVDs." Pet.Br., p. 37 (citations omitted). Pavlovich claims these effects are irrelevant here because "there is no allegation that Petitioner was involved in either activity." *Id.* To the extent this argument is relevant at all, it is incorrect. DVD CCA does allege that Pavlovich and the other defendants facilitated the unlawful distribution of copyrighted motion pictures and the pirating of DVDs by disseminating DVD CCA's trade secrets in the form of computer decryption devices including DeCSS. Complaint ¶¶ 45-74.

III. Jurisdiction Here Comports With Notions of Fair Play and Substantial Justice

Finally, not only is it fair and just for the Superior Court to exercise jurisdiction over Pavlovich, any other result would run contrary to accepted due process analysis. "An otherwise valid exercise of personal jurisdiction is presumed to be reasonable. Accordingly, once a court finds purposeful availment, it is the defendant's burden to present a compelling case that the exercise of jurisdiction would be unreasonable." *Nissan*

Motor Co., Ltd., 89 F.Supp.2d at 160. Here, Pavlovich comes nowhere near meeting this burden.

In determining whether jurisdiction over a nonresident comports with notions of fair play and substantial justice under the due process clause, courts weigh seven factors:

(1) the extent of the defendant's purposeful interjection into the forum state's affairs;

(2) the burden on the defendant of defending a suit in the forum;

(3) the extent of conflict with the sovereignty of the defendant's state;

(4) the forum state's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the controversy;

the importance of the forum to the plaintiff's interest in convenient and effective relief; and

the existence of an alternative forum.

Core-Vent Corp., F.3d at 1487-88. No single factor is dispositive. *Id.*

In the Court of Appeal below and in his Petition to this Court, Pavlovich lists just five of these seven factors (numbers one, two, four, five, and seven)[29] and discusses only four of them (numbers one, two, four and

[29] The 1959 case cited by Pavlovich (*Fisher Governor Co. v. Superior Court*, 53 Cal.2d 222), fails to list factor three: the importance of the forum to the plaintiff's interest in convenient and effective relief; and factor six: the extent of conflict with the sovereignty of the defendant's state. *See* Pavlovich PA, p. 9. As demonstrated below, both of these factors operate in of favor exercising jurisdiction here.

seven). In his Brief on the Merits to this Court, he lists and discusses all seven factors for the first time.

All seven factors favor the exercise of jurisdiction over Pavlovich. Factors four through seven, in particular, strongly militate in favor of upholding jurisdiction over Pavlovich here.[30]

With regard to factor four, California has an immeasurably large interest in adjudicating this dispute. Even Pavlovich recognizes this interest. Pet.Br., p. 41. DVD CCA is a trade association formed by three industries with a tremendous presence in the California economy – the motion picture industry, the computer industry and the consumer electronics industry. Complaint, ¶ 40-44. Pavlovich's actions strike at the core of these industries and affect their ability to operate effectively in the

[30] With regard to the first three factors: The extent of Pavlovich's intrusion into California -- factor one -- has been established above. *See* Section I.A., *supra*. The burden on Pavlovich in defending this suit in the forum – factor two -- is minimal. Pavlovich is represented by the same counsel representing the California defendant who has appeared in this action. If this suit were filed in another jurisdiction, Pavlovich would have to incur the additional expense of hiring counsel in that state. At most, Pavlovich would have to come to California for the trial itself. This would be true in the case of any nonresident defendant and therefore cannot operate as a reason to deny jurisdiction. Further, Pavlovich willingly traveled from Texas to New York to participate in *Universal Studios, Inc. v. Reimerdes*. Thus, Pavlovich's complaints about having to travel to California for this trial ring hollow. Moreover, the burden on the defendant is no longer heavily weighed by courts in determining jurisdiction. *See Panavision* at 1323. And, Pavlovich has traveled to California to attend oral argument on this jurisdictional issue in the Court of Appeal. As for factor three, there is no conflict with the defendant's state, nor does Pavlovich claim so. In fact,

emerging Internet economy. Thus, California maintains a strong interest in providing an effective means of redress for its residents injured by commercial misappropriation.

With regard to factor five, the efficient resolution of this controversy clearly requires that all defendants be tried in one jurisdiction. In fact, the one case cited by Pavlovich on this point highlights "the avoidance of a multiplicity of suits and conflicting adjudications" as a major factor to be considered when deciding whether to exercise jurisdiction. *Fisher Governor Co.*, 53 Cal.2d at 225-26. Yet, if jurisdiction over Pavlovich is not upheld, DVD CCA will be forced to sue the defendants in this case in the dozens of jurisdictions in which they reside. Nothing could be less efficient. The underlying facts and legal issues surrounding each defendant are virtually identical – they all posted the trade secrets on their web sites. Arguing and re-arguing these facts and legal issues in many different jurisdictions ensures the waste of valuable judicial resources and risks the promulgation of conflicting verdicts and court rulings. California, as DVD CCA's primary place of business and as the site of the greatest injury, is undeniably the jurisdiction in which this case should be tried. Pavlovich claims that many witnesses with relevant information to this case may exist in Norway, England, New York and

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even Pavlovich contends that this factor is of only slight relevance here Pet.Br., pp. 40-41.

Connecticut. This point is irrelevant here because Pavlovich would surely contest jurisdiction in those forums as well. Further, as Pavlovich admits, at least two key witnesses, as well as plaintiff DVD CCA, are located in California. Pet.Br., p. 4

For these same reasons, factor six the plaintiff's interest in convenient and effective relief demands that this case be heard in a single jurisdiction: California. The expense and inconvenience of pursuing identical cases in a multiplicity of jurisdictions would be an extraordinary burden for DVD CCA. Further, the possibility of conflicting adjudications risks rendering any relief DVD CCA does obtain ineffective.

With regard to factor seven, there is no alternative forum in which DVD CCA's claims can be as effectively pursued. It is California which has the greatest interest in the outcome of the litigation and California where the brunt injury has occurred. California is uniquely appropriate as a site to pursue claims against all the defendants.

CONCLUSION

Contrary to Pavlovich's contention, the Superior Court's order and the Court of Appeal's affirmation of that order, do not undermine the established rules of personal jurisdiction. Rather, they recognize the well-established principle that when a defendant's intentional conduct causes harmful effects within this State, he can be called to answer for that

conduct here. Defendants who misappropriate valuable trade secrets and inflict injury on major interests in California cannot be immunized simply by conducting their illegal activities from afar over the Internet. If the courts of this State cannot redress injuries directed at this State through web site activity, then the power of the Internet will become a dangerous resource for intellectual property thieves. It is fair and it is the law that defendants who deliberately chose to injure interests in California be required to answer for their actions in California.

WHEREFORE DVD CCA respectfully requests that this Court affirm the decision of the Court of Appeal and reject Pavlovich's Petition for a Writ of Mandate.

Dated: February 13, 2002

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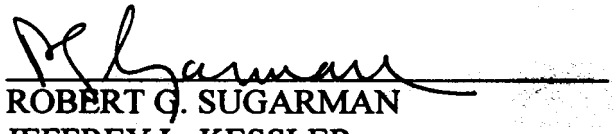
By: 
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CERTIFICATE OF SERVICE

I, Jean Wirdzek, hereby certify that on February 14, 2002, I caused a copy of **Real Party in Interest DVD Copy Control Association's Brief on the Merits** to be sent via U.S. Mail to:

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I caused a copy of the foregoing to be hand delivered to:

Trial Court:
Clerk of the Santa Clara County Superior Court
to be delivered to **Hon. William J. Elfving**
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Redwood Shores, California on February 14, 2002.

Jean Wirdzek