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I

INTRODUCTION

Petitioner provides this reply memorandum to address specific points in Real Party in Interest's¹ Points and Authorities in Opposition² to Petitioner's Petition for Writ of Mandate. Efforts have been made to avoid re-stating facts and arguments already presented in Petitioner's opening papers. Therefore said Petition, Authorities³, and Appendix of Exhibits⁴ are incorporated herein by reference.

¹Hereinafter "Real Party" or "DVD CCA"

²Hereinafter referred to as "OPP."

³Petitioner's Points and Authorities and Petition for Writ of Mandate previously filed in this action will be collectively referred to as "PET"

⁴Petitioner's Appendix of Exhibits previously filed in this action will be referred to as "APP." Specific references to the APP will include the Appendix page number of the document addressed, followed by the description of the document (i.e. APP.p.186; Deposition at 93:1-10).

II

ARGUMENT

Below, Petitioner provides limited argument urging the Court to disregard DVD CCA's new evidence, to carefully scrutinize DVD CCA's evidentiary citations and the corresponding absence of evidence, and to carefully review the "Effects Test" within the confines of traditional Due Process guarantees.

The essence of Petitioner's argument is that Real Party in Interest has provided no competent evidence of actual California contacts that are specific to the single trade secret action pled in this case. The "Effects Test" has never before stood for the proposition that every plaintiff harmed may sue in their forum state.

A The Court should disregard Real Party in Interest's "Exhibit A," which was not put before the lower Court as part of DVD CCA's record in opposing Petitioner's motion.

DVD CCA includes the lower Court's January 21, 2000 Order

Granting a Preliminary Injunction⁵ as Exhibit A to its Opposition (OPP at Exhibit A). Real Party now presents this evidence to support its theory of “Defendants’ knowledge of impropriety” (OPP at p.2). Yet, the order in OPP Exhibit A was entered fully six months prior to Petitioner’s filing of this motion⁶, and the Court’s findings were based exclusively upon evidence presented by DVD CCA and defendant Andrew Bunner. DVD CCA has provided no evidence to support its contrived allegation that Petitioner “acted in concert” with others (OPP at p.4) or that the evidence presented in the January 21 hearing somehow relates to Petitioner. Petitioner PAVLOVICH was not present at the hearing, provided no evidence to the Court, and was not referenced by the Court in its order. Thus, the lower Court’s conclusions regarding another defendant are of no relevance⁷ to the analysis of this Petitioner’s actions or state of mind and should therefore be disregarded.

⁵As noted in Petitioner’s opening papers (PET at pp.2-3), this order is itself the subject of an extensive related appeal.

⁶Petitioner’s motion to quash was filed June 6, 2000 (APP. at p.22).

⁷California Courts have repeatedly noted that it is improper to impute the actions of codefendants to a Petitioner for purposes of assessing personal jurisdiction (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 447-448).

Additionally, DVD CCA was free to request judicial notice of the lower Court's Injunction Order when opposing Petitioner's motion to quash. It declined to do so. As such, the lower Court was never permitted to rule on the relevance or admissibility of Real Party's Exhibit A. It is well settled that reviewing Courts will generally not consider issues not raised in the lower Court (*Citizens Utilities Company v. Superior Court* (1963) 56 Cal.2d 805, 814).

B DVD CCA's allegations and conclusions are not supported by substantial, accurate, citations to evidence

As discussed below, Real Party erroneously misstated certain evidentiary citations and provides other evidence that does not show any California contacts. The competent evidence certainly falls short of the "Minimum Contacts" required to ensure that maintenance of the suit does not offend "traditional notions of fair play and substantial justice" embodied in Due Process guarantees (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316).

1 Real Party misstates evidence regarding the creation and operation of the subject web site.

Real Party in Interest makes the factual statement:

“Petitioner, by his own admission, founded and operated a web site located at the URL: “livid.on.openprojects.net” (fn. citation). A key purpose of this web site was to aid in the development of an unlicensed system for DVD playback and copying.”

OPP at p.5.

Both allegations are inaccurate.

To support its statement that PAVLOVICH “founded and operated” the site, DVD CCA cites to Petitioner’s deposition pages 15-16 and page 40 (APP. at p.96, 101). The relevant portions of Real Party’s citations are as follows:

- A. . . . there are two other items that aren’t correct, but it would lead me to believe they are referring to me.
- Q. Which items are you referring to?
- A. Citizen of the state of Indiana and operating the web site. . .

APP. at p.96

It is clear from the deposition transcript citation that PAVLOVICH is stating that the complaint is incorrect, in that he is not a citizen of the state of Indiana and does not operate the LiVID web site (see also APP. at pp.231-232). Similarly unavailing is DVD CCA’s citation to page 40 of the

deposition (APP at p.101). That citation simply shows that PAVLOVICH was the founder and project lead for the LiVID project group – not the LiVID web site. As indicated in Petitioner’s opening papers, the LiVID project was a loose group of volunteer Linux programmers who were involved in all manner of Linux video playback issues (PET at p.15). Indeed, the LiVID group was in existence long before DeCSS and was focusing on Personal Computer video cards for much of its existence. The LiVID web site on the other hand, was apparently operated by an individual not known to Petitioner (APP. P.97; Deposition at pp.20-21).

Real Party offers no evidentiary citation for its allegation that the web site was created to develop “DVD playback and copying” (OPP at p.5; and similar allegations regarding piracy at OPP p.12). There is no evidence demonstrating the reason for creation of the web site. There is evidence that the LiVID group’s goal was to create better support for all types of video⁸ playback for Linux machines (APP. at pp.175-176;

⁸It is worth noting that in the context of computer programming, the concept of “video” includes any graphical representations on a computer screen. Thus, video output usually includes presentation of text and graphics on a video screen connected to a computer and video playback includes the storage and retrieval of such data. In this context, “video” has nothing to do with video cassettes, motion pictures, or film.

Deposition at pp.22-23). DVD CCA has never provided a shred of evidence suggesting Petitioner or the LiVID project was involved in piracy of DVDs or piracy of any other media.

2 The evidentiary citations put forth by DVD CCA do not demonstrate contact with California and are not substantially related to the trade secret cause of action

DVD CCA did not bring this action under copyright law, nor under contract law, nor under the new Digital Millennium Copyright Act (17 U.S.C. 1201), instead, it filed a simple misappropriation of trade secrets action. The entirety of evidence presented by DVD CCA at pages 11-12 of its opposition is reprinted below. Inaccuracies in the evidentiary citations presented by Real Party are identified by footnote.

a Petitioner's general knowledge unrelated to the plaintiff or the cause of action cannot support jurisdiction

This category of evidence can be categorized as generic knowledge about the motion picture industry and computer industry's reputations. It provides no specific information as to PAVLOVICH's purposeful availment nor is it substantially related to the cause of action:

- At the time he misappropriated DVD CCA's trade secrets⁹, he knew the motion picture industry was centered¹⁰ in California (citation).
- At the time he misappropriated DVD CCA's trade secrets¹¹,

⁹DVD CCA's citation provides no evidentiary support for the allegation that PAVLOVICH "misappropriated DVD CCA's trade secrets" (APP at p.99; Deposition at pp.29-30).

¹⁰DVD CCA specifically asked PAVLOVICH if the motion picture industry was "centered" in Hollywood, California, to which Petitioner responded "I wouldn't know" (APP. At p.99; Deposition at 30:2-7). Petitioner only stated that movies and movie stars are known to exist in Hollywood.

¹¹As is the case above, DVD CCA's citation provides no support for the allegation that PAVLOVICH "misappropriated DVD CCA's trade secrets" (APP at p.102; Deposition at

he knew the computer technology industry was centered¹² in California (citation).

- DVD discs are instruments of the motion picture industry in that their purpose¹³ is to deliver motion picture content to

pp.41-44).

¹²Again, DVD CCA's citation does not accurately track its allegation. PAVLOVICH actually stated that he was aware many such companies were in California, with many others in Texas and around the world (APP. at p.102; Deposition at pp.41-44).

¹³Once again, a close reading of the evidence cited demonstrates a different meaning than that found in the Opposition. The transcript shows that Petitioner informed his examiner that

their purchasers (citation).

See OPP at p.11

b Evidence pertaining to contractual or licensing issues unrelated to the plaintiff or the cause of action will not support jurisdiction

As with the first category, this evidence does not substantially support the Court's holding since it does not pertain to the trade secret Cause of action and because it does not evidence contact with California.

DVDs were used for "large back-ups and stuff" but accepted DVD CCA's attorney's request that they only address DVDs used to deliver motion picture content (APP. at p.98; Deposition 28:10-19). In fact, Petitioner corrected his examiner that motion pictures were probably not the primary use of DVDs, just the most well known use (APP. at p.98; Deposition 28:20-25).

- Prior to the Internet publication of DeCSS, Petitioner knew that “there was an organization which you had to file for or apply for a license” to use certain DVD technology¹⁴ (citations)
- The LiVID project, which Petitioner founded and led, never applied for or attained (sic) a license to use DVD technology, but nevertheless utilized DVD CCA’s trade secrets including those contained in DeCSS¹⁵ (citations).

¹⁴Petitioner’s statements make it clear that he believed a license was needed, but stated “I didn’t know the full details . . .” and “I never knew for certain” (APP. at p.98; Deposition 25:1-20). Irrespective of any such knowledge, except in a patent action, neither reverse engineering, nor independent innovation of unlicensed products are considered illegal or intentionally harmful.

¹⁵DVD CCA again misstates Petitioner’s testimony. Petitioner was specifically asked if DeCSS is utilized, or was ever utilized in the LiVID project. To which he unequivocally answered “No.” (See APP. at p.104; Deposition at 57:8-15, emphasis added).

- Petitioner’s goal – through the LiVID project – was to develop an unlicensed DVD player¹⁶ that would use DeCSS¹⁷ to decrypt DVD data (citations).

OPP at p.11.

c The evidentiary citations do not show intentional action aimed at California and related to the trade secret cause of action

The following evidence presumably purports to show intentional acts. However, a careful review of the evidence cited shows that it is irrelevant to the analysis or, in some instances, plainly inaccurate:

- Petitioner knew DeCSS was developed by reverse engineering (citations) and that such reverse engineering is illegal¹⁸ (LiVID posting October 1, 1999, citations);

¹⁶As noted previously and in opening papers, the goals of the LiVID group involved all aspects of video playback. It is accurate that a DVD player was one such goal. Since this is not a patent infringement action, the concept of developing a competing, unlicensed player, is neither illegal nor purposefully harmful.

¹⁷As indicated above, LiVID did not utilize DeCSS (See APP. at p.104; Deposition at 57:8-15). None of DVD CCA’s actual, competent, evidence indicates otherwise.

¹⁸Petitioner did believe that DeCSS was reverse engineered (APP. at p.99-100; Deposition at pp.32-33), however, he did not know that the reverse engineering of DeCSS was illegal. The citation offered by Real Party to show such “knowledge” predates the existence of DeCSS by a substantial amount of time (see PET p.16, fn.9) such that it cannot possibly relate to DeCSS. The evidence itself (see APP. at p.112; Declaration of Shapiro at Exhibit C) quotes previous messages by others and relates to “media drivers” (programs that interact between hardware and operating systems) not the CSS technology.

In a trade secret action, the only way in which reverse engineering can be “illegal” is if it is

done in violation of a contract (See Cal.Civ.Code §3426.1(a)) – DVD CCA provides no evidence to support such a conclusion.

Additionally, Petitioner contends the evidence itself is incompetent and inadmissible as discussed in opening papers (PET at p.16, fn.9).

- Petitioner sought to distribute DVD CCA's trade secrets while knowing that such action was illegal¹⁹ (citation);

¹⁹The evidence cited for this allegation has almost nothing to do with DVD CCA's assertion (see APP. at p.113; Declaration of Shapiro at Exhibit C). The evidence is an e-mail which re-prints someone else's comments (the ">" symbol in e-mail indicates that the message is being re-printed from another author) about moving a mailing list (which is not the web site) and something called a CVS site to a "friendly country, where lawyers like these have limited . . . ability to harass mailing list hosts, CVS contributors, and the like" (APP. at p.113). It is clear that whomever is being quoted is simply angry about the DVD CCA lawsuit. Nothing in the post suggests that Petitioner "sought to distribute DVD CCA's trade secrets" much less seeking to do so "knowing that such action was illegal" (OPP at p.12).

Additionally, Petitioner contends the evidence itself is incompetent and inadmissible as discussed in opening papers (PET at p.16, fn.9).

- At the time Petitioner posted²⁰ DeCSS on the Internet, he knew that DeCSS facilitates the pirating of DVDs²¹

²⁰As indicated previously, there is no evidence demonstrating Petitioner himself posted DeCSS (APP. at p.104; Deposition at pp.59-60; see also PET generally and at p.14).

²¹In the transcript cited, Petitioner did not state that DeCSS facilitates piracy. Rather, when counsel for DVD CCA asked “once a motion picture is on a hard drive” can it be pirated? (APP at p.104; Deposition at 60:19-25). Petitioner answered: “It can. I mean, it’s not like you can go from using DeCSS as part of your hard drive to pirating. There is a lot more that one would have to do to do that” (APP. at p.183; Deposition at 61:1-3). PAVLOVICH went on to explain that there are many other ways to pirate motion pictures (APP. at p.183; Deposition 61:5-25). Furthermore, PAVLOVICH testified that according to his knowledge, copying a purchased DVD onto a hard drive either as a back-up or to “space-shift” viewing to a different machine constituted legal “fair use” (APP. at p. 184; Deposition at p.70:17-25) and not piracy (see also 17 U.S.C 107 and annotations). As indicated previously, the goal of LiVID was to improve Linux support for video playback, as well as to produce the first Linux compatible DVD player – There is no evidence suggesting they were involved in illegal copying of any sort.

It is noteworthy that in a recent trial relating to DeCSS, the major motion picture studios dropped their claim for damages since they were unable to prove any instance of piracy

(citations);

attributable to DeCSS (see generally APP at pp150-151; Reply Memorandum of Points and Authorities at pp. 6-7), DVD CCA has provided no evidence that such piracy exists.

- At the time Petitioner posted²² DeCSS on the Internet, he knew that pirating²³ DVDs is wrongful conduct²⁴ (citations).

OPP at pp.11-12.

The sole cause of action put forth by Real Party alleges misappropriation of trade secrets²⁵. It has nothing to do with unproven allegations of piracy, the exclusive rights of patent holders, the violation of any licenses or the rights of non-party copyright holders. The above referenced evidence (that which is stated correctly) provides no California contacts and is not substantially related to the trade secret cause of action. Since a Court may only properly consider forum-related activities that relate to the specific cause of action at hand when considering specific jurisdiction (*Jewish Defense Organization, Inc. v. Superior Court*

²²As indicated previously, neither this citation nor any other, shows that Petitioner posted DeCSS.

²³PAVLOVICH further stated that he does not understand how placing a movie onto a hard drive will harm the motion picture industry (Deposition at p.61:7-15).

²⁴That Petitioner feels piracy is morally wrong is of no moment in this trade secret action. Additionally, DVD CCA has provided no evidence that Petitioner was involved in piracy, or that DeCSS itself is used for piracy.

²⁵PAVLOVICH did not know if motion picture companies were involved in the creation of the DVD technology standard (APP at p.186; Deposition at 93:21-24).

(1999) 72 Cal.App.4th 1045, at 1058, citing *Gordy v. Daily News* (9th Cir. 1996) 95 F.3d 829, 835), the Court should disregard the above referenced evidence.

C Real Party in Interest Misreads the legal standard for the *Calder* “Effects Test”

Real Party avers that jurisdiction exists because Petitioner “knew or should have known that his conduct would effect (sic) this (DVD CCA) licensing entity’s California interests²⁶” since California has a reputation for movies and computers (OPP at 12-13). This averment misreads the legal standard for the “Effects Test” (*Calder v. Jones* (1984) 465 U.S. 783).

In interpreting and applying the *Calder* Effects Test, this state’s Court of Appeal recently noted:

It does not follow, however, that the fact that a defendant’s actions in some way set into motion events which ultimately injured a California resident, will be enough to confer

²⁶The fact that DVD CCA has not provided competent evidence to support these allegations is outlined in the opening papers as well as in the sections above.

jurisdiction over that defendant on the California courts.

Edmunds v. Superior Court (1994) 24 Cal.App.4th 221, 236, citing *Wolf v. City of Alexandria* (1990) 217 Cal.App.3d 541, and relying on *Kulko v. Superior Court* (1978) 436 U.S. 84, 94-95.

Jurisdiction may be invoked only where the actor committed an out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result (citations). . .

[and]. . . the plaintiff must present facts demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute constitutionally cognizable “minimum contacts” (*Edmunds v. Superior Court, supra*, 24 Cal.App.4th at p.228, emphasis added).

Goehring v. Superior Court (1998) 62 Cal.App.4th 894, 909)²⁷.

The *Calder* Effects Test is merely an application of the age-old “minimum contacts” test (*International Shoe, supra*). It does not dispose of the need for actual contacts or for the need of purposeful availment and the need for the cause of action to arise out of actual forum related contacts. Thus, DVD CCA’s loose interpretations of both tiers are

²⁷In *Goehring*, the Petitioner knew the identity of the California business and directed some correspondence and agreements to the California entity. However, the *Goehring* Court still found that the Petitioner had not purposefully directed their acts with an intention or expectation that the documents would have an effect in California. Similarly, assuming arguendo, PAVLOVICH did publish DeCSS information, there is no evidence that his general knowledge about the movie and computer industry translates into an intention or expectation that publication of DeCSS would cause an effect in California.

impermissible. Certainly, Real Party's "knew or should have known" standard along with the general knowledge of a State's particular reputation (OPP at pp.12-13) is far lower than the constitutionally mandated "purposeful availment"²⁸ and "claim arising from forum contacts" standards.

Similarly evidence that Petitioner was not aware of DVD CCA's existence, or its location is far from being "irrelevant" to the analysis as urged by Real Party (OPP at p.12). As indicated in opening papers, all of the Effects cases upholding jurisdiction cited by DVD CCA involved purposeful acts targeted at the plaintiff who was known to be in California (PET at pp.30-35). In the recent case of *Bancroft & Masters Inc. v.*

²⁸ A "purposeful" contact is one in which a particular defendant has deliberately directed his/her activities at the residents of the forum state or has deliberately availed himself/herself of the benefits and protections of the laws of the forum state (*Hanson v. Denckla*, (1958) 357 U.S. 235, 253-254; See Also *Sibley v. Superior Court*, (1976) 16 Cal.3d 442, 447-448).

Augusta National Inc. (9th Cir.2000) __ f.3d __, 2000 U.S. App. LEXIS 20917, 2000 C.D.O.S 6941, 2000 D.A.R. 9197, the Court addressed the importance of a defendant's knowledge of the Plaintiff's existence and location in the *Calder* Effects analysis:

Subsequent cases have struggled somewhat with *Calder's* import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be (citation).

We now conclude that "something more" is what the Supreme Court described as "express aiming" at the forum state. See *Calder*, 465 U.S. at 789. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is 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 & Masters Inc., *supra* __ f.3d __, 2000 U.S. App. LEXIS 20917 at *10-14 (a courtesy copy of the decision has previously been provided to opposing counsel and is attached hereto as exhibit "A" for the court's convenience).

The *Bancroft* Court carefully analyzed the existing case law and properly deduced the importance of a defendant's express targeting of the plaintiff.

Here, no such express targeting of the sole plaintiff (DVD CCA) exists.

3 The only potential California contacts related to this cause of action would necessarily stem from the LiVID site and would not provide a basis for jurisdiction.

Ignoring, for the sake of argument, the failure of proof on the issues of ownership, control, and posting of the DeCSS code, DVD CCA's sole allegation is that its trade secrets were improperly re-published on the LiVID web site. "Creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide – but, without more, it is not an act purposefully directed toward the forum state." (*Cybersell v. Cybersell* (9th Cir. 1997) 130 F.3d 414, 418; in accord *Panavision Inter'l, L.P. v. Toebben*, (9th Cir. 1998) 141 F.3d 1316, 1322). Similarly, this Court has held that a foreign resident publishing information on a passive web site, which gives rise to an action, has not undertaken sufficient minimum contacts to warrant California Jurisdiction (*Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045).

Because the trade secret action filed against PAVLOVICH is limited to the alleged re-publishing²⁹ of information on a passive web site,

²⁹ As indicated in opening papers, Petitioner is only alleged to have republished the information. Third parties in various other parts of the world are alleged by DVD CCA to be the

Petitioner has repeatedly urged that the precedent of *Jewish Defense*,
supra, is indistinguishable. To date, DVD CCA has never identified any
distinguishing facts.

**4 Real Party's reading of the law contravenes
traditional Due Process rights and would lead to
absurd results.**

It is uncontested that Petitioner had no idea that DVD CCA existed
or that it did business in California prior to the filing of the instant
complaint (OPP at p.12). The only evidence of any connection between
anything remotely involving Petitioner and the state of California is
PAVLOVICH's generic knowledge that the computer industry and the
movie industry³⁰ are reputed to do business in California (OPP at p.11-12).
Permitting jurisdiction based upon such evidence would not only run
counter to hundreds of years of established precedent, but it would run
counter to the Due Process protections afforded by the U.S. Constitution.

original publishers of the DeCSS code onto the Internet.

³⁰Notably, DVD CCA is neither a movie producer, nor a computer company. It is a
small non-profit licensing entity.

Adopting DVD CCA's interpretation of the Effects Test would lead to a complete removal of jurisdictional boundaries, since nearly every person in the world associates movies with California; computers with California; cheese with Wisconsin; cars with Michigan; oranges with Florida; Farming with Nebraska; oil with Texas; and potatoes with Idaho. Under DVD CCA's theory, any resident with a dispute that remotely touches on one of the aforementioned "state related" industries would have automatic world-wide jurisdiction over their disputes in that state.

By way of example, under DVD CCA's theory, California motion picture studios would always be able to litigate their cases in California, irrespective of the facts surrounding the defendant, since California is famous for its movies. The same would hold true for Wisconsin plaintiffs who have disputes alleged to involve cheese, or Michigan plaintiffs with disputes alleged to affect any car manufacturer. Such a result is absurd as well as unconstitutional.

In order to comply with traditional Due Process guarantees, Courts must insist on the presence of minimum contacts with the forum state, fair

play, and substantial justice. This Court should zealously protect the precedent created through years of jurisdictional analysis by this country's courts and reject DVD CCA's *new age* analysis in favor of established jurisdictional jurisprudence. Petitioner urges this Court to continue on the established path of establishing specific jurisdiction through actual, purposeful contacts rather than through conjecture and hyperbole.

III

CONCLUSION

This Court should resist Real Party in Interest's invitation to hyper extend this state's long arm statute, creating new precedent, and destroying the Constitutional protections and tradition of fairness afforded to non-resident defendants. Adopting DVD CCA's expansive reading of the *Calder* Effects test would create new law that transforms the Internet into a liability minefield, with California jurisdiction over virtually any user.

For all of the above reasons, and for those outlined in Petitioner's opening papers and exhibits (PET), California cannot be permitted to exercise personal jurisdiction over Petitioner PAVLOVICH in contravention of his constitutionally protected right to due process of law. It is therefore respectfully requested that this court intervene, grant the relief requested in the petition, and compel the lower court to quash service for lack of jurisdiction.

DATED: September 21, 2000

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