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NORTHERN DISTRICT OF CALIFORNIA

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14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

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17 SONY COMPUTER ENTERTAINMENT
18 AMERICA LLC, a Delaware limited liability
19 company,

Plaintiff,

v.

20 BRIDGESTONE AMERICAS, INC.; a Nevada
21 corporation; WILDCAT CREEK, INC., a
22 California corporation; and DOES 1 through 10,

Defendants.

Case No. _____

**COMPLAINT FOR INJUNCTIVE RELIEF
AND DAMAGES BASED ON
VIOLATIONS OF THE LANHAM ACT (15
U.S.C. § 1125 (a)); UNFAIR
COMPETITION (BUS. & PROF. CODE §§
17200, et seq.); COMMON LAW UNFAIR
COMPETITION; COMMON LAW
MISAPPROPRIATION; BREACH OF
CONTRACT; AND TORTIOUS
INTERFERENCE WITH CONTRACTUAL
RELATIONS**

DEMAND FOR JURY TRIAL

1 Plaintiff Sony Computer Entertainment America LLC ("SCEA") hereby alleges as
2 follows:

3 **NATURE OF THE ACTION**

4 1. "Kevin Butler" is a fictional character created, owned and used by SCEA to
5 promote SCEA's PlayStation® video game systems and related products. For several years,
6 an actor has portrayed "Kevin Butler" pursuant to an exclusive contract with SCEA in which
7 the actor, along with Defendant Wildcat Creek, Inc. ("Wildcat Creek"), agreed not to promote
8 any competing video game products.

9 2. The same actor has played the distinctive "Kevin Butler" character in over thirty
10 commercial spots and other promotional material for SCEA and made an appearance as
11 "Kevin Butler" at the 2010 Electronic Entertainment Expo ("E3"), the world's premier video
12 game industry conference, to promote the PlayStation brand. "Kevin Butler" is a well-known
13 and popular figure among video game consumers and has achieved widespread recognition
14 as distinguishing SCEA's goods and services from others.

15 3. Intending to capitalize on the consumer goodwill of the "Kevin Butler" character,
16 Defendant Bridgestone Americas, Inc. ("Bridgestone") recently produced a commercial for its
17 "Game On!" tire promotion with Nintendo ("Co-Promotion") and strategically placed the same
18 actor with the Nintendo® Wii.™ The spot, therefore, depicts a Bridgestone employee who
19 consumers reasonably perceive to be "Kevin Butler" promoting the Nintendo Wii, a product
20 that competes directly with SCEA's PlayStation products. Further exacerbating this
21 consumer confusion is that "Kevin Butler" in the Co-Promotion appears to be "testing"
22 Nintendo's *Mario Kart*® game at a time when SCEA is actively promoting the launch of its
23 own carting video game title, *LittleBigPlanet*®*Karting*, in conjunction with the cartoon version
24 of the "Kevin Butler" character. Bridgestone's use of the "Kevin Butler" persona to endorse
25 its tire products and a promotional program featuring a competing video game system
26 violates the Lanham Act, 15 U.S.C. § 1125(a), and constitutes state and common law unfair
27 competition, misappropriation of SCEA's property and tortious interference with contractual
28 relations. Further, by providing services in connection with the promotion of the Nintendo Wii

1 while still under contract with SCEA and portraying the Kevin Butler character, Defendant
2 Wildcat Creek breached the contract with SCEA.

3 4. Defendants' actions have created confusion in the market place and, unless
4 enjoined, will continue to cause substantial harm to SCEA.

5 **PARTIES**

6 5. SCEA is a Delaware company with its headquarters and principal place of
7 business at 919 East Hillsdale Boulevard, Foster City, California, 94404. SCEA is engaged
8 in the business of marketing and distributing computer video game console hardware and
9 peripheral accessories and developing, marketing and distributing video game software.

10 6. On information and belief, Bridgestone is a corporation with its principal place
11 of business in Akron, Ohio and is incorporated in Nevada.

12 7. On information and belief, Wildcat Creek is a corporation with its principal place
13 of business in Sherman Oaks, California and is incorporated in California.

14 8. SCEA is unaware of the true names and capacities of the other Defendants
15 named as Does herein. SCEA is informed and believes and on that basis alleges that each
16 of the Doe Defendants is legally liable and responsible directly or indirectly for the matters
17 alleged herein. SCEA will seek leave to amend this Complaint to show the true names and
18 capacities of the Doe Defendants when, and if, they become known.

19 **JURISDICTION AND VENUE**

20 9. This Court has subject matter jurisdiction over the claims relating to the
21 Lanham Act (15 U.S.C. § 1125 (a)) pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a)
22 (any act of Congress relating to copyrights, patents, and trademarks). This Court also has
23 subject matter jurisdiction over the remaining claims under the doctrines of ancillary and
24 pendent jurisdiction.

25 10. Personal jurisdiction is proper over Defendants because they regularly do
26 business in California and/or this judicial district and/or are residents of California and/or this
27 judicial district and/or directed tortious conduct into California and/or this judicial district.

28 11. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c)

1 because a substantial part of the events or omissions giving rise to the claims occurred here,
2 a substantial part of the subject property is located here, Defendants' conduct has been
3 directed into this district, and harm to SCEA has occurred in this district.

4 INTRADISTRICT ASSIGNMENT

5 12. Intra-district assignment to any division of the Northern District is proper under
6 Local Rule 3-2(c) and the Assignment Plan of this Court as an Intellectual Property Action.

7 GENERAL ALLEGATIONS

8 I. **SCEA and the PlayStation 3 System**

9 13. SCEA is known for its sales of home entertainment products and is highly
10 regarded in the video game industry. Chief among the many products SCEA sells is the
11 PlayStation 3 System ("PS3"), a computer entertainment system featuring hardware and
12 firmware designed for the playing of video games, Blu-ray discs and DVD movies.

13 14. SCEA develops and publishes video game software for the PS3 System, and
14 has made and continues to make a substantial investment of time, effort and expense in the
15 design, development, testing, manufacturing and marketing of its interactive entertainment
16 software video games.

17 15. The PS3 System has enjoyed wide success throughout the United States and
18 the world. Over 50 million PS3 Systems have been sold worldwide since the product release
19 in November 2006. There are hundreds of different video game titles currently available for
20 the PS3 System in the United States.

21 II. **The Subject Agreement**

22 16. On or about August 7, 2009, Wildcat Creek entered into a contract with SCEA
23 (formerly SCEA Inc.) through its advertising agency, Deutsch LA, Inc., for the provision of
24 services in connection with the actor's portrayal of "Kevin Butler" (hereinafter, the
25 "Agreement"). The initial term of the Agreement was twelve months, with options to extend
26 for two additional, consecutive twelve month periods. The Agreement was in full force and
27 effect through August 31, 2012.

28 17. Among other provisions, the Agreement contains an exclusivity clause in which

1 Wildcat Creek agreed not to provide, authorize or permit the actor's services in connection
2 with any promotion of competing video gaming systems for the term of the contract.

3 Specifically, the clause provides in relevant part:

4 "[Actor] will not provide his services, and neither [Wildcat Creek]
5 nor [Actor] will authorize or permit the use or imitation of [Actor's]
6 name, photograph, likeness, endorsement, voice or biography, in
7 any way, in connection with the advertising, promotion or sale of
8 (i) an electronic game or gaming system; or (ii) any product
related to electronic games or gaming systems manufactured or
distributed by any of the software publishers or hardware
manufacturers listed in Exhibit A hereto. . ."

9 (emphasis added). Nintendo is identified as one of the hardware manufacturers in Exhibit A
10 to the Agreement.

11 18. Under the Agreement, Wildcat Creek also agreed that the "Kevin Butler"
12 character "will be and remain the sole and absolute property of [SCEA] forever." Wildcat
13 Creek further acknowledged that "neither [Wildcat Creek nor actor] now has nor in the future
14 will assert any right, title or interest of any kind or nature whatsoever in the materials
15 produced hereunder, or in or to any component part, or tape, dub, copy or element or
16 character or characterization thereof."

17 19. The Agreement further provides for injunctive relief in the event of a breach.
18 Wildcat Creek acknowledges that any breach will cause SCEA "irreparable damage." The
19 Agreement states: "It is therefore agreed that [Deutsch LA, Inc.] and [SCEA] shall be entitled
20 as a matter of right, and without notice, to the enforcement of this Agreement and any or all
21 of its terms by way of an injunction or other relief in a court of equity, in addition to such and
22 further relief as they shall be entitled to at law."

23 III. The "Kevin Butler" Character

24 SCEA developed the "Kevin Butler" character in 2009 to promote SCEA's goods and
25 services. SCEA's PlayStation marketing campaigns featuring "Kevin Butler" have been very
26 successful. The humorous ads typically feature "Kevin Butler" at SCEA's headquarters
27 dressed conservatively in a shirt and tie, responding to "Dear PlayStation" inquiries. The
28 "TheKevinButler" Twitter page describes "Kevin Butler" as a holder of many VP Titles at

1 PlayStation. Sandwich inventor, occasional time traveler, leader of the charge to bring back
2 the glory of Play to gaming.” The character usually boasts a different job title in each
3 commercial such as, for example, “VP of Big Action Moments” or “VP of the Cold Hard
4 Truth.” One commercial features “Kevin Butler, VP of Inspiration and Perspiration” as a
5 hard-hitting coach. In another spot, “Kevin Butler, VP of Epic Footage” transforms into a rock
6 star. Despite the character’s entertaining role playing, the “Kevin Butler” character remains
7 identifiable by his quiriness and enthusiasm for video games, and he is frequently depicted
8 playing SCEA’s video games and other games available on PlayStation consoles.

9 20. “Kevin Butler” is well known and popular among video game consumers and is
10 closely identified by the consuming public with SCEA’s products and services. Indeed,
11 SCEA has invested substantial resources in the development and promotion of the
12 character. Portrayed by the same actor for several years, “Kevin Butler” has appeared in
13 over thirty television commercials and other promotional materials for SCEA. The actor as
14 “Kevin Butler” spoke to an excited audience at the E3 in 2010 as part of his promotion of the
15 PlayStation brand. The “Kevin Butler” character is also featured in various online social
16 media and on SCEA’s website. The character’s Twitter account at “TheKevinButler” has
17 approximately 130,000 followers. A Facebook page containing photographs of “Kevin Butler”
18 has been created under the header “Kevin Butler from Sony’s Ad Campaign” and boasts
19 over 11,000 “likes.” A Wikipedia page is devoted to “Kevin Butler” and includes a
20 photograph of “Kevin Butler” in a PlayStation ad. “Kevin Butler” also hosts a YouTube
21 channel entitled “The World o’ KB” with over 50,000 subscribers and over 11 million video
22 views. Through these and other uses by SCEA, the “Kevin Butler” character has acquired
23 secondary meaning and come to serve as a source identifier for PlayStation products and
24 services.

25 21. In addition, a cartoon version of the “Kevin Butler” character is currently being
26 used to promote the launch of SCEA’s new video game title, *LittleBigPlanet Karting*,
27 scheduled for release in November 2012. The pre-order bonus of the title includes a “Kevin
28 Butler Pack,” which features the “Kevin Butler”-themed character in the game itself.

1 IV. Defendants' Unlawful Conduct

2 22. On September 3, 2012 – a mere three days after the expiration of the
3 Agreement – Bridgestone began airing its “Game On!” co-promotion with Nintendo, featuring
4 the same actor as a Bridgestone employee and lead video game tester, participating in a
5 “test” of Nintendo’s *Mario Kart*® game. In the ad, the “Kevin Butler” character speaks
6 excitedly about the Nintendo Wii and shouts gleefully when his colleague wins “first place!” in
7 the game.

8 23. On information and belief, the Co-Promotion has and is continuing to air on
9 various cable channels, including, for example, Spike, ESPN, FX, the Discovery Channel,
10 TNT and the Weather Channel.

11 24. On information and belief, the actor started working for Bridgestone in or
12 around February 2012 and provided services to Bridgestone in connection with the
13 competing Nintendo Wii product while he was still under contract with SCEA. Commercials
14 like the Bridgestone promotion typically take weeks or months to script, shoot and produce.
15 On information and belief, given the production value of the commercial, Bridgestone and its
16 agency arranged for the actor’s participation and shot the spot during the Agreement’s term.

17 25. On information and belief, Bridgestone was aware of the existence of the
18 Agreement, including the exclusivity provision in which Wildcat Creek agreed not to provide
19 services for any products in competition with PlayStation products. On information and
20 belief, Bridgestone knew that interference with the Agreement would occur when the actor
21 provided services to promote the Nintendo Wii in the Co-Promotion.

22 26. Indeed, Bridgestone is trading in on the popularity of the “Kevin Butler”
23 character in an effort to boost its own sale of products and entice consumers to participate in
24 its Nintendo Wii product giveaway. The Co-Promotion and PlayStation ads are also similar
25 in that both are shot in corporate headquarter environments. Like “Kevin Butler,” the
26 Bridgestone character is a conservatively dressed executive who is enthusiastic about video
27 games. The same actor plays the “Kevin Butler” character in the Co-Promotion, and
28 Bridgestone intends for that connection to be made so that it can reap the benefit.

1 27. As evidenced by numerous articles on the Internet and various online posts
2 and commentary, consumers clearly recognize the actor as “Kevin Butler” in the Bridgestone
3 commercial and are confused as to why “Kevin Butler” is now endorsing Nintendo products.
4 Many commented that “Kevin Butler’s” “testing” of the Nintendo Wii at Bridgestone means
5 that “Kevin Butler” is “going under cover,” and others expression confusion about “Kevin
6 Butler” promoting a competing video game product.

7 28. Further increasing consumer confusion is the fact that “Kevin Butler” in the Co-
8 Promotion appears to be “testing” Nintendo’s *Mario Kart®* game, while SCEA is actively
9 promoting the launch of its own carting video title, *LittleBigPlanet®Karting*, in conjunction
10 with the cartoon version of the “Kevin Butler” character.

11 29. Defendants’ actions were knowing, deliberate, willful and in complete disregard
12 for SCEA’s rights in the “Kevin Butler” character.

13 **FIRST CLAIM FOR RELIEF**

14 (Violation of the Lanham Act, 15 U.S.C. § 1125 (a), *et seq.*)

15 (*Against Bridgestone*)

16 30. SCEA incorporates by reference and realleges each and every allegation set
17 forth in the foregoing paragraphs as though fully set forth herein.

18 31. The distinctive “Kevin Butler” character is owned by SCEA and has been
19 continuously used by SCEA for several years as a trademark in commercials advertising
20 SCEA’s PlayStation products.

21 32. Through widespread and continuous use and promotion, the “Kevin Butler”
22 character has obtained secondary meaning and achieved widespread recognition as
23 distinguishing SCEA’s goods and services.

24 33. With the intent of unfairly capitalizing on the consumer goodwill generated by
25 “Kevin Butler,” Bridgestone has used and is using the same or confusingly similar character,
26 also played by the same actor, to advertise its products or services in the commercial.

27 34. Bridgestone’s use of the “Kevin Butler” character constitutes a false
28 designation or origin and false or misleading description of fact that is likely to cause
confusion, or to cause mistake, or to deceive as to SCEA’s and/or its brand’s affiliation,

1 connection, or association with the goods or services promoted by Bridgestone in the Co-
2 Promotion or as to the origin, sponsorship, or approval of the goods or services in the Co-
3 Promotion.

4 35. The conduct complained of has been without authorization or consent of
5 SCEA.

6 36. As a direct and proximate result of Bridgestone's conduct set forth above,
7 SCEA has been injured and damaged in an amount to be proven at trial.

8 37. The above actions of Bridgestone constitute a violation of SCEA's rights under
9 the Lanham Act, 15 U.S.C. §1125(a) and has caused and is causing irreparable harm and
10 damage to SCEA for which no adequate remedy at law exists.

11 **SECOND CLAIM FOR RELIEF**

12 (Unfair Competition, Cal. Bus. & Prof. Code § 17200, *et seq.*)
(*Against Bridgestone*)

13 38. SCEA incorporates by reference and realleges each and every allegation set
14 forth in the foregoing paragraphs as though fully set forth herein.

15 39. Bridgestone's acts alleged herein constitute unlawful and unfair business acts
16 and practices that have injured and will continue to injure SCEA in its business and property
17 in violation of California Business and Professions Code § 17200, *et seq.*

18 40. Bridgestone's unlawful and unfair business acts and practices are a direct and
19 proximate cause of injury to SCEA.

20 41. Bridgestone's wrongful acts have proximately caused and will continue to
21 cause SCEA substantial and irreparable injury.

22 42. SCEA is entitled to injunctive relief preventing any further unfair competition.

23 **THIRD CLAIM FOR RELIEF**

24 (Common Law Unfair Competition)
(*Against Bridgestone*)

25 43. SCEA incorporates by reference and realleges each and every allegation set
26 forth in the foregoing paragraphs as though fully set forth herein.

27 44. Bridgestone has engaged in and continues to engage in unfair competition by
28 using the "Kevin Butler" character in its commercial with the intention of interfering with or

1 trading on the business reputation and goodwill created by SCEA.

2 45. Bridgestone's unfair competition is a direct and proximate cause of injury to
3 SCEA.

4 46. Bridgestone's wrongful acts have proximately caused and will continue to
5 cause SCEA substantial and irreparable injury.

6 47. SCEA is entitled to injunctive relief preventing any further unfair competition.

7 **FOURTH CLAIM FOR RELIEF**
8 (Common Law Misappropriation)
9 (*Against Bridgestone*)

10 48. SCEA incorporates by reference and realleges each and every allegation set
11 forth in the foregoing paragraphs as though fully set forth herein.

12 49. SCEA has invested substantial time and money in the development of its
13 property, the "Kevin Butler" character.

14 50. Bridgestone has misappropriated SCEA's property at little or no cost to it.

15 51. Bridgestone's appropriation and use of SCEA's property was without the
16 authorization or consent of SCEA.

17 52. As a direct and proximate result of this misappropriation, SCEA has been
18 injured and damaged in an amount to be determined at trial.

19 53. SCEA is entitled to injunctive relief preventing any further misappropriation of
20 its property.

21 **FIFTH CLAIM FOR RELIEF**
22 (Breach of Contract)
23 (*Against Wildcat Creek*)

24 54. SCEA incorporates by reference and realleges each and every allegation set
25 forth in the foregoing paragraphs as though fully set forth herein.

26 55. Wildcat Creek entered into the Agreement with SCEA and Deutsch, LA, and,
27 among other things: (1) agreed to not authorize or permit the use of the actor's name,
28 photograph, likeness, endorsement, voice or biography in any way, in connection with the
advertising, promotion or sale of (i) an electronic game or gaming system; or (ii) any product
related to electronic games or gaming systems manufactured or distributed by other software

1 publishers or hardware manufacturers, namely Nintendo; and (2) agreed that the “Kevin
2 Butler” character “will be and remain the sole and absolute property of [SCEA] forever.”

3 56. In the Agreement, Wildcat Creek also acknowledges that any breach by the
4 actor would cause SCEA irreparable damage and that SCEA is be entitled as a matter of
5 right, and without notice, to the enforcement of the Agreement and any or all of its terms by
6 way of an injunction or other relief in a court of equity, in addition to such and further relief as
7 they shall be entitled to at law.

8 57. At all times relevant, SCEA has performed all, or substantially all of the terms
9 that the Agreement required of it.

10 58. All conditions for Wildcat Creek's performance have occurred.

11 59. Wildcat Creek breached the Agreement by authorizing, facilitating, and/or
12 providing the actor's services to Bridgestone in connection with the Co-Promotion during the
13 term of the Agreement, in violation of Section 7 of the Agreement, and other provisions.
14 Wildcat Creek has further breached the Agreement, and continues to be in breach the
15 Agreement, by authorizing and/or facilitating the use and misappropriation by Bridgestone of
16 the “Kevin Butler” character in violation of Section 8 of the Agreement and other provisions.

17 60. As a direct and proximate result of these breaches, SCEA has been injured
18 and damaged in an amount to be proven at trial.

19 61. SCEA has also suffered irreparable harm as a result of Wildcat Creek's
20 breaches and will continue to suffer irreparable injury that cannot be adequately remedied at
21 law unless Wildcat Creek is enjoined from engaging in any further acts of breach of contract.

22 **SIXTH CLAIM FOR RELIEF**
23 (Tortious Interference With Contractual Relations)
(Against Bridgestone)

24 62. SCEA incorporates by reference and realleges each and every allegation set
25 forth in the foregoing paragraphs as though fully set forth herein.

26 63. During all relevant times, SCEA had a contractual relationship with the actor
27 and Wildcat Creek in which they (1) agreed not to provide services in connection with the
28 advertising, promotion or sale of (i) an electronic game or gaming system; or (ii) any product

1 related to electronic games or gaming systems manufactured or distributed by other software
2 publishers or hardware manufacturers, including Nintendo; and (2) agreed that the “Kevin
3 Butler” character “will be and remain the sole and absolute property of [SCEA] forever.”

4 64. Bridgestone had knowledge of this contractual relationship and the exclusive
5 nature of it.

6 65. Bridgestone intentionally interfered with SCEA’s contractual relationship
7 through the unlawful conduct alleged herein.

8 66. The contractual relationship between SCEA and Wildcat Creek has been
9 breached or disrupted by Bridgestone.

10 67. As a direct and proximate result of this interference with its contractual
11 relationships, SCEA has been injured and damaged in an amount to be determined at trial.

12 68. SCEA is entitled to injunctive relief preventing any further tortious interference
13 of its contractual relationship.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, SCEA prays as follows:

- 16 1. That the Court enter judgment in favor of SCEA and against Defendants on all
17 counts;
- 18 2. That the Court issue a preliminary and permanent injunction order enjoining and
19 restraining Defendants and their agents, servants, employees, successors and assigns, and
20 all other persons acting in concert with or in conspiracy with or affiliated with Defendants,
21 from:
- 22 a. violating SCEA’s rights under the Lanham Act, 15 U.S.C. § 1125 (a);
 - 23 b. engaging in any unfair competition;
 - 24 c. engaging in any misappropriation of SCEA’s property;
 - 25 d. engaging in any breach of contract; and
 - 26 e. engaging in any tortious interference with SCEA’s contractual relations
- 27 3. That judgment be entered in favor of SCEA and against Bridgestone for all
28 damages suffered by SCEA as a result of violation of the Lanham Act, 15 U.S.C. § 1125 (a);

1 4. That Bridgestone be required to account for and to pay over to SCEA the
2 Defendant's profits and damages sustained by SCEA by reason of Bridgestone's unlawful
3 acts alleged herein;

4 5. That the Court award SCEA its reasonable attorneys' fees and costs of suit
5 incurred herein;

6 6. That SCEA be awarded prejudgment and post-judgment interest on the above
7 damages awards; and

8 7. That SCEA be awarded such other and further relief as the Court deems just and
9 proper.

10 DATED: September 11, 2012 Respectfully submitted,

11 KILPATRICK TOWNSEND & STOCKTON LLP

12
13
14 By: 

JAMES G. GILLILAND, JR.

15 Attorneys for Plaintiff
16 SONY COMPUTER ENTERTAINMENT AMERICA LLC
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1 Plaintiff demands a trial by jury on all claims on which a jury trial right exists.

2
3 DATED: September 11, 2012 Respectfully submitted,

4 KILPATRICK-TOWNSEND & STOCKTON LLP

5
6 By: 

7 JAMES G. GILLILAND, JR.

8 Attorneys for Plaintiff
9 SONY COMPUTER ENTERTAINMENT AMERICA LLC

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