Howard H. Stahl - *Pro Hac Vice* Pending
howard.stahl@friedfrank.com
Daniel E. Loeb - *Pro Hac Vice* Pending
daniel.loeb@friedfrank.com
Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW
Washington, DC 20006
Telephone: (202) 639-7000
Facsimile: (202) 639-7003

Terry W. Bird - State Bar No. 49038
twb@birdmarella.com
Paul S. Chan - State Bar No. 183406
psc@birdmarella.com
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
Telephone: (310) 201-2100
Facsimile: (310) 201-2110

Attorneys for Plaintiff
BETHESDA SOFTWORKS LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

BETHESDA SOFTWORKS LLC, Plaintiff, vs. MASTHEAD STUDIOS LTD., Defendant.	CASE NO. LACV11-7534-JFW(Ex) *Honorable John F. Walter* **PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE** Date: TBD Time: TBD Crtrm.: 16

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Docketed Cases

Federal Statutes

Bethesda Softworks LLC ("Bethesda"), by and through its undersigned counsel, respectfully responds to the Court's Order dated September 16, 2011 ("Order"), directing Bethesda to show cause why this action should not be transferred to the United States District Court for the District of Maryland in light of the pending case entitled *Bethesda Softworks LLC v. Interplay Entertainment Corp.*, Case No. 09 CV 2357 (DKC) (D. Md.) (the "Maryland Litigation").

I

INTRODUCTION

Bethesda is not "forum shopping." This is the only court where, with certainty, Bethesda can seek to vindicate and protect its valuable intellectual property rights and obtain relief from the ongoing and continuous irreparable harm caused by the infringing conduct of Defendant Masthead Studios LTD ("Masthead"), a Bulgarian corporation with its principal place of business in Sofia, Bulgaria. Masthead, which has acknowledged receipt of the pleadings in this matter,[1] is subject to personal jurisdiction in California, but Bethesda is unaware of any basis, on the facts as known, upon which Masthead is subject to personal jurisdiction in Maryland. Bethesda's claim against Masthead, which is independent of and not dependent on Bethesda's claim against Interplay Entertainment Corp. ("Interplay") in the Maryland Litigation, should be heard and resolved here.

As set forth in Bethesda's complaint and memorandum in support of its *ex*

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[1] As of the time of filing this response, Masthead has yet to make any appearance or offer a submission in response to Bethesda's complaint or its *ex parte* applications for a temporary restraining order and substituted service. However, Masthead has actual notice of this action -- Atanas Atanasov, the president of Masthead, personally acknowledged receiving copies of Bethesda's complaint and *ex parte* applications the day they were filed with this Court, both by signing for the package that was hand-delivered by Bethesda's Bulgarian counsel (*see* Tucker Decl., Ex. 1) and by confirming receipt by email (*see* Tucker Decl., Ex. 2).

parte application for a temporary restraining order (*see* Compl. ¶¶ 13-26; [Dkt. #7] at 4-12), this case arises out of the ongoing and unauthorized use by Masthead of Bethesda's federally registered and protected copyrights relating to the "Fallout" video game series. Masthead had entered into a Product Development Agreement ("PDA") with an entity named PV13 Online, Inc. ("PV13"),[2] which is a Delaware corporation with its principal place of business in Los Angeles, California, for the development of a Fallout-branded massively multiplayer online game ("MMOG") called "Project V:13."[3] On August 22, 2011, Bethesda learned *for the first time* that Masthead actually was performing significant work under the PDA related to a Fallout-branded MMOG and, consequently, had infringed and is infringing on Bethesda's Fallout copyrights. Specifically, after discovery had closed in the Maryland Litigation, Interplay, the defendant in that action, belatedly informed Bethesda that Masthead has had a team of thirty-five (35) individuals working on the development of the infringing MMOG using Bethesda's copyrighted material. It was only at that time that Bethesda realized that Masthead is actively and significantly involved in continuing violations of Bethesda's Fallout copyright rights.[4]

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[2] Although the PDA purports to be between PV13 and Masthead, it appears -- although Bethesda does not know how or to what extent -- that PV13 may have some relationship with Interplay.

[3] An "MMOG" is a computer video game that is set in a fictional universe and can be played over the Internet by hundreds or thousands of players simultaneously.

[4] Bethesda still does not know the full scope of Masthead's activities and infringing use of Bethesda's valuable and protected copyrighted works. However, as explained in the memorandum filed in support of Bethesda's *ex parte* application for a temporary restraining order ([Dkt #7] at 18-22), Bethesda has shown that it is being -- and *certainly* has shown that it is likely to be -- irreparably harmed by Masthead's infringing activities. Given that Masthead has assembled a 35-member team to work on infringing reproductions and derivatives of Bethesda's copyrighted (footnote continued)

Given that: Masthead is a foreign company located in Bulgaria; the infringement of Bethesda's federally-protected copyrights currently is uncontrolled; and Bethesda has suffered, and will continue to suffer, immediate, substantial, and irreparable harm as a result of Masthead's activities, Bethesda filed this action here because Bethesda was certain it could seek injunctive relief in this Court free from valid jurisdiction or venue challenges. If Bethesda could have brought this litigation in the District of Maryland, it would have done so.

However, because Bethesda knows of no facts affording the Court in Maryland jurisdiction over Masthead, bringing this action in Maryland would have been pointless. In sharp contrast, this Court may exercise personal jurisdiction over

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materials in Bulgaria, Bethesda has lost all control over the use of its copyrighted works, which are unique, intangible assets. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1218-19 (C.D. Cal. 2007) (copyright owners "have the exclusive right to decide when and how their material should be reproduced and/or distributed, regardless of whether their decisions make good business sense" and when this right to control is compromised irreparable harm can result from the copyright owner's very inability to enforce its exclusive rights). The copyrighted works are unique, intangible artistic assets. In their written agreement, Bethesda and Interplay -- the only entities that have owned the assets (at different times) -- expressly acknowledged the intangible value of the assets and specifically recognized that misuse of such assets would result in irreparable harm to Bethesda. ([Dkt #12], Ex. 1, APA § 7.6.) Moreover, because Masthead has no known assets in the United States, and because enforcement of any U.S. damages judgment in Bulgaria, at best, would be uncertain, Bethesda likely will not be able to recover any damages (actual or statutory) after judgment. The inability to recover damages after judgment is a well-recognized basis for establishing irreparable harm. *See, e.g., In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1479 (9th Cir. 1994) (money judgment is inadequate and preliminary injunction is warranted where irreparable harm would result from inability to collect a money judgment); *Grokster*, 518 F. Supp. 2d at 1219 ("Damages are no remedy at all if they cannot be collected.") (citation omitted). Because Masthead is effectively judgment proof against a damages claim, the probability of a final judgment of infringement in this case has no deterrent effect on Masthead as it might otherwise have in the ordinary case. (footnote continued)

Masthead because it is actively doing business in California, has engaged in extensive email exchanges with PV13 in California, is delivering infringing product into California, has consented to jurisdiction here in the very contract that gives rise to this action, and has committed intentional acts of infringement expressly aimed at California. Having no other viable alternative, Bethesda sought relief in this Court.

Bethesda is fully cognizant of the Court's concerns about having cases with some apparent common factual elements pending in separate districts, especially where an expedited appeal is pending in a Circuit Court. (*See* [Dkt. #7] at 11.) Absent personal jurisdiction over Masthead in Maryland -- or Masthead's consent to jurisdiction in Maryland -- this Court should not, however, transfer this action to the District of Maryland. Transfer of venue is proper only to a district where the case "might have been brought." 28 U.S.C. § 1404(a). Bethesda is unaware of any basis to assert jurisdiction over Masthead in Maryland -- this case could not have been brought in Maryland. Any attempted transfer would serve only to delay Bethesda's right to obtain the prompt injunctive relief necessary to address ongoing irreparable harm.

II

DISCUSSION

Transfer of venue from one federal district to another is governed by 28 U.S.C. § 1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." An action "might have been brought" only in a district that is a proper venue and in which the exercise of personal jurisdiction over the defendant is appropriate. *See, e.g.*, *Van Dusen v. Barrack*, 376 U.S. 612, 624 (1964) ("[T]he words 'where it might have been brought' must be construed with

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Bethesda's only means of protection is immediate injunctive relief.

reference to the federal laws delimiting the districts in which such an action 'may be brought.'"); *Metz v. U.S. Life Ins. Co.*, 674 F. Supp. 2d 1141, 1145 (C.D. Cal. 2009) ("[T]he defendant must establish that the matter 'might have been brought' in the district to which transfer is sought. 'This includes demonstrating that subject matter jurisdiction, personal jurisdiction, and venue would have been proper if the plaintiff had filed the action in the district to which transfer is sought.'") (internal citations omitted); *Mut. Pharm. Co. v. Watson Pharm., Inc.*, No. CV 09-5700 PA (RCx), 2009 WL 3401117, at *6 (C.D. Cal. Oct. 19, 2009) ("Thus, the 'transferee court' must have subject matter jurisdiction, venue must be proper, and defendant(s) must be subject to personal jurisdiction."); *Catch Curve, Inc. v. Venali, Inc.*, No. CV 05-04820 DDP (AJWx), 2006 WL 4568799, at *1 (C.D. Cal. Feb. 27, 2006) (interpreting the phrase "might have been brought" to mean that "subject matter jurisdiction, personal jurisdiction, and venue would have been proper if the plaintiff had filed the action in the district to which transfer is sought").

In copyright infringement actions, venue is governed by 28 U.S.C. § 1400(a): "Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found." Courts in both this circuit and in the Fourth Circuit interpret this provision to mean that venue is proper for copyright infringement actions only where the defendant is subject to personal jurisdiction. *See, e.g.*, *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1126 (9th Cir. 2010) ("This circuit interprets this provision to allow venue in any judicial district where, if treated as a separate state, the defendant would be subject to personal jurisdiction."); *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir.1997), *overruled on other grounds by Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998) (same); *CoStar Realty Info., Inc. v. Meissner*, 604 F.Supp.2d 757, 772 (D. Md. 2009) ("The term 'may be found' in 1400(a) is interpreted to mean any district

which may assert personal jurisdiction over a defendant."); *Cole-Tuve, Inc. v. Am. Mach. Tools Corp.*, 342 F. Supp. 2d 362, 369 (D. Md. 2004) ("[W]here a defendant 'may be found' [for purposes of 28 U.S.C. § 1400(a)] is wherever a court may exercise personal jurisdiction over him.").

Accordingly, the only issue relevant to determining whether it is appropriate to transfer venue in this case is whether the District Court in Maryland properly may exercise personal jurisdiction over Masthead. This analysis, in turn, is dependent on the extent of Masthead's contacts with Maryland. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Such contacts are necessary in the Fourth Circuit even when applying the so-called "effects test" described in *Calder v. Jones*, 465 U.S. 783 (1984).[5] *See, e.g., Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 280 (4th Cir. 2009) ("The effects test does not supplant the minimum contacts analysis, but rather informs it."); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 401 (4th Cir. 2003) ("[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the [jurisdictional] inquiry, it must ultimately be accompanied by the defendant's own [sufficient minimum] contacts with the state if jurisdiction ... is to be upheld") (citation omitted, alterations in original). Bethesda is unaware of any Masthead contacts in Maryland and, absent Masthead's

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[5] Although this Court is located in the Ninth Circuit, the Fourth Circuit's law is controlling on the personal jurisdiction analysis here as that is the caselaw the District of Maryland would have to apply in determining whether it can exercise personal jurisdiction over Masthead. The fact that the Ninth Circuit's application of the "effects test" may be broader is not relevant. *See, e.g., Brayton Purcell*, 606 F.3d at 1128 ("There is no requirement [under the 'effects test'] that the defendant have any physical contacts with the forum."); *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (holding that the "express aiming" at the forum state under the effects test "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").

consent to jurisdiction in Maryland, there are no known facts upon which a District Court properly could base the exercise of personal jurisdiction over Masthead in Maryland.[6]

In contrast, this Court properly may exercise personal jurisdiction over Masthead. Among other reasons, Masthead: (1) entered into the PDA with PV13, a Delaware corporation, with its principal place of business in Los Angeles, California; (2) agreed under the PDA to deliver, and in fact has delivered, infringing product into California (*see* PDA §§ 2.1, 13.2);[7] (3) engaged in repeated email communications with PV13 (in Los Angeles, California) directly related to Masthead's work under the PDA (*see* LoBue Decl. [Dkt. #12] ¶ 14, Ex. 14); and (4) consented to the personal jurisdiction and venue of this Court for all actions or proceedings arising directly or indirectly from its work under the PDA (*see* PDA § 3.19.). *See Brayton Purcell*, 606 F.3d at 1131 (finding personal jurisdiction proper under the "effects test" where the defendant was alleged to have purposefully directed its copyright infringement activities into and causing harm in California).

Bethesda is unaware of any facts which would subject Masthead to personal jurisdiction in Maryland. Absent such facts, this action could not "have been brought" in the District of Maryland. This jurisdictional impediment in Maryland, combined with the existence of personal jurisdiction over Masthead in California,

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[6] Jurisdiction and venue exists in the Maryland Litigation because Interplay expressly consented to jurisdiction in Maryland in the Trademark License Agreement. (*See* Compl., Ex. B § 13.0.) But Masthead is not a party to that agreement.

[7] The PDA was filed in fully-redacted form with the Declaration of Joseph J. LoBue [Dkt. #12], which was submitted in support of Bethesda's *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction. Bethesda filed on September 14, 2011 an application to file the PDA under seal.

were the exclusive reasons Bethesda sought relief in this Court. Given the lack of personal jurisdiction over Masthead in Maryland, this litigation cannot be transferred to the District of Maryland under 28 U.S.C. § 1404(a).

III

CONCLUSION

For the foregoing reasons, the Court should not transfer this case to the United States District Court for the District of Maryland.

Howard H. Stahl
Daniel E. Loeb
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

Terry W. Bird
Paul S. Chan
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS & LINCENBERG, P.C.

By: /s/ Terry W. Bird
Terry W. Bird
Attorneys for Plaintiff
BETHESDA SOFTWORKS LLC