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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

CHESTER A. BROWN, JR. and MARCIE BROWN,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES LIMITED, LLC, a California limited liability corporation, dba TPL GROUP; DANIEL E. LECKRONE, and individual; and DOES 1 through 20, inclusive,

Defendants.

AND RELATED CROSS-ACTION.

CASE NO. **1-09-CV-159452**

CASE NO. **1-10-CV-183613**

DECLARATION OF KENNETH H. PROCHNOW IN SUPPORT OF MOTION FOR CONSOLIDATION

Date: February 24, 2012
Time: 9:00 a.m.
Dept. 21
Hon. Joseph H. Huber

I, Kenneth Prochnow, declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record in the *Moore v. TPL* matter submitted for consolidation with the above-captioned *Brown v. TPL* matter. I make this declaration in support of the motion of Charles Moore, plaintiff in *Moore v. TPL*, for consolidation of that case with *Brown v. TPL*.

2. Based upon the pleadings in both cases, this court's tentative decision in *Brown v. TPL*, the so-called "Green Arrays" cross-complaint now at-issue in *Brown v. TPL* and the substantially similar Green Arrays cross-complaint due to be served and filed by the *Moore v. TPL* defendants

(more on that below), the common questions of law and fact that abound in the two actions, and the very real risk of inconsistent adjudication and impairment of contract rights and remedies that will result if the two matters are tried separately, Moore v. TPL should be consolidated with the earlier-filed *Brown v. TPL* case, with the matters to proceed together through discovery and trial under the *Brown v. TPL* file number.

3. *Brown v. TPL* has been pending since 2009. *Moore v. TPL* was filed in 2010.

4. I have submitted a request for judicial notice of the *Moore v. TPL* complaint (attached to the request for judicial notice). Plaintiff Charles Moore is the co-inventor of the so-called MMP Portfolio of patents (already licensed for several hundred million dollars, with the proceeds divided between Patriot Scientific Corporation (50%) and TPL (with TPL retaining and refusing to turn over or account for the 50% share of licensing proceeds it has received). Plaintiff Moore is also the inventor of the "Array" portfolio of patents, which TPL at one point attempted unsuccessfully attempted to commercialize and monetize through its subsidiary "Intellasys".

5. When I filed *Moore v. TPL* in 2010, I served and filed notices of related cases as to a number of related matters before this Court in which TPL was actively engaged in attempting to disclaim or defeat the interests of inventors whose patents TPL had appropriated through licensing agreements and/or whose patent proceeds were being converted to TPL's own use and coffers. Those related matters included:

(a) *Brown v. TPL* (the above-captioned case, in which plaintiff Brown claims that defendants TPL and Daniel Leckrone breached their contracts to pay over licensing proceeds to plaintiffs Brown);

(b) *Daniel Leckrone v. Phil Marcoux et al.*, (and related cross-action), Santa Clara County Superior Court No. 1-09CV159594, involving Mr. Leckrone's claimed appropriation of the so-called "Chipscale" patent portfolio; and

(c) *Patriot Scientific Corporation v. TPL*, Santa Clara County Superior Court No. 1-10-CV169836, arising from TPL's mis-allocation of a "mixed" MMP license to a major Silicon Valley firm, allowing TPL to appropriate for itself some 95% of the gross license proceeds without accounting to its MMP partners for their rightful share of a multimillion dollar license.

6. The TPL defendants, confronted with the *Moore v. TPL* complaint, removed it to federal court as purportedly arising under federal patent law. The United States District Court, Northern District of California, assigned the removed federal case to the Hon. James Ware. For plaintiff Moore, I filed a federal court motion to remand *Moore v. TPL* back to this Court. Three days before the scheduled oral argument, Judge Ware announced his decision – an order for remand.

7. By January 2010, the complaint in *Moore v. TPL* was back before this Court. On February 4, 2011, the TPL defendants demurred, setting the hearing on demurrer for the next available demurrer hearing date in Department 2 – June 28, 2011.

8. Not wanting to waste the long gap between defendants' filing of their *Moore v. TPL* demurrer and the July 2011 hearing date, I prepared papers in support of injunctive relief for plaintiff Moore (who, despite a contractual entitlement to 55% of TPL's licensing proceeds from his MMP patent portfolio, had been paid nothing since January 2009, with TPL failing to account for its revenues, receipts and supposed expenditures.)

9. Defendants and plaintiff Moore compromised on his claim for pendent lite injunctive relief, with plaintiff Moore and his representative (me) being afforded access to the weekly reports of licensing results and prospects that TPL had earlier been compelled, through injunction, to provide to Patriot.

10. Plaintiff Moore and I attended, in person or through computer-aided conference call, perhaps 10 to 12 of TPL's weekly licensing update sessions, with our participation ending in or about May 2011.

11. Plaintiff Moore and I took advantage of our attendance at the TPL weekly licensing update sessions to gain substantial insights into the problems of and prospects for licensing Plaintiff Moore's MMP patent portfolio.

12. Through the efforts of Plaintiff Moore and his associate Dave Sciarrino, we have made any number of settlement proposals to TPL (19 separate proposals, at last count). In view of the settlement privilege that surrounds the parties' efforts to resolve litigations such as these, I cannot

reveal the content and substance of those negotiations. I can say that the settlement proposals that I have seen that have been made on Plaintiff Moore's behalf have each **made substantial provision for continuing payments to Chet Brown**, the plaintiff in *Brown v. TPL*, with the hope and expectation that a settlement of *Moore v. TPL* would settle plaintiff Brown's claims in *Brown v. TPL* as well.

13. A strong, and unusual, factor mitigating in favor of consolidation of *Moore v. TPL* and *Brown v. TPL* is the prospect for a joint, mutually beneficial resolution of both matters that is clearly not possible with the two cases proceeding on separate, parallel tracks.

14. In or about June 2011, to move the *Moore v. TPL* case forward, I reviewed the TPL defendants' still-pending demurrer, and determined that there were additional substantive allegations that I could add to the original *Moore v TPL* complaint that would, in my view, speak to the issues raised by the defendants on demurrer and permit answer.

15. On June 24, 2011, I submitted a First Amended Complaint in the *Moore v. TPL* matter, thus eliminating the need for the June 28, 2011 hearing on the TPL demurrer to the initial complaint.

16. The TPL defendants demurred to my June 24, 2011 First Amended Complaint in *Moore v. TPL*. Their first available date for hearing on the demurrer was December 6, 2011, in Department 2.

17. I resisted the TPL defendants' demurrer to the *Moore v. TPL* First Amended Complaint.

18. On December 5, 2011, Judge Lucas issued a tentative ruling on the TPL defendants' demurrer to the *Moore v TPL* First Amended Complaint. Judge Lucas' tentative overruled defendants' demurrer in all respects.

19. TPL counsel challenged the tentative; when the matter was called, however, counsel chose not to challenge the tentative, but asked only that with the demurrer overruled, defendants be granted to and through January 13, 2012, to answer, with the explanation that TPL would be filing a detailed and substantive cross-complaint against plaintiff Moore and possibly others, based

upon plaintiff Moore's continuing efforts to commercialize and monetize the Array portfolio of patents through the company "GreenArrays Inc."

20. There is already a cross-complaint in *Brown v. TPL*, dated June 10, 2011 and entitled the "First Amended Cross-Complaint" of TPL in that case. Counsel in Moore v. TPL advises that the forthcoming cross-complaint in *Moore v. TPL* will be substantially similar to the *Brown v. TPL* First Amended Cross-Complaint.

21. I have now reviewed the *Brown v. TPL* First Amended Cross-Complaint. The cross-complaint is rife with reference to "Mr. [Chester] Brown and his management team" [Examples at Cross-Complaint Par. 12.c., at 4:23-25; Par. 13 at 5:12; etc.] Under the facts of the *Brown v. TPL* First Amended Cross-Complaint, Charles Moore (the plaintiff in *Moore v. TPL*) is plainly a member of the Brown-related "management team" about which TPL complains through cross-complaint in *Brown v. TPL*; moreover, I am informed and believe – and TPL's *Moore v. TPL* cross-complaint available to Court and counsel by January 12, 2012 will make clear – that plaintiff Brown, plaintiff Moore and presumably others face threats of liability by reason of what will be two, virtually identical TPL "GreenArrays" cross-complaints, each seeking to impose liability for supposed theft or misappropriation of TPL intellectual property.

22. Consolidation should be ordered to prevent the obvious risk of inconsistent result, and the inevitable waste, of preparing two identical TPL cross-complaints for trial, and trying those cross-complaints, against some cross-defendants in *Brown v. TPL* and against other cross-defendants in *Moore v. TPL*, where the supposed liability arises out of the same "Intellasys" business arrangement and that company's use and abandonment of the Array technology.

23. Moreover, I am informed and believe that the alleged investment by TPL of "approximately $79 million" [*Brown v. TPL* First Amended Cross-Complaint at 4:2] in the company headed by plaintiff Brown consists, in its entirely, of licensing proceeds of plaintiff Moore's MMP patent portfolio, for which plaintiff Moore was unpaid and remains unpaid despite his 55% share of the non-Patriot proceeds.

24. To avoid duplication, waste and inconsistent adjudication of TPL's two, parallel,

GreenArrays cross-complaints, *Moore v. TPL* should be consolidated with *Brown v. TPL*.

25. Within the past six weeks, I became aware that *Brown v. TPL* cross-complainant TPL, without any notice to or consultation with me (as Charles Moore's attorney), had caused a "commission" action to be filed in Nevada through which Nevada-source subpoenas were issued to Charles Moore, to other GreenArrays officers and employees, and to GreenArrays itself. I am not admitted to practice in Nevada. I am informed and believe that Nevada counsel retained by the subpoena deponents served objections to the Nevada process that TPL's Nevada counsel had issued out of courts in that State. I am unaware whether any Nevada discovery has been compelled.

26. Regardless, it is consummately unfair to Charles Moore and to those who now work with him at GreenArrays Inc. in Nevada, to be subpoenaed as mere third party witnesses in a matter of consequence and threat to their ownership of GreenArrays intellectual property and to their livelihoods – all in the context of a coming, January 12, 2012 cross-complaint in the *Moore v. TPL* litigation that will raise precisely the same issues and seek inquiry into the same facts and documents, as that now sought through Nevada third-party discovery in *Brown v. TPL*.

27. Mark Thacker, Esq., is now counsel for TPL in *Brown v. TPL* and counsel for the TPL defendants in my *Moore v TPL* case.

28. Attorney Thacker caused a subpoena to be served on California resident Dave Sciarrino – in *Brown v. TPL*, concerning GreenArrays. Mr. Sciarrino is of course known to me, since he is the same Dave Sciarrino with whom I have closely worked to try to settle the Moore v. TPL litigation (with settlement of *Brown v. TPL* a [considerable] side benefit).

29. I have been retained by Mr. Sciarrino in *Brown v. TPL*. Attorney Thacker seeks to take Mr. Sciarrino's deposition as a third party witness in *Brown v. TPL*. Upon information and belief, much of what Mr. Sciarrino might properly be asked as a *Brown v. TPL* witness is on subjects and will relate to documents directly relevant to the issues in *Moore v. TPL* – especially those issues that will now arise when the *Moore v. TPL* cross-complaint is filed on or about January 12, 2012.

30. I have objected to Mr. Sciarrino's deposition subpoena in *Brown v. TPL*. If Mr.

Sciarrino is to be deposed by TPL counsel Thacker, it should be in *Brown v. TPL* **and** in *Moore v. TPL*, with his answers and evidence bearing upon the many common MMP, Array and GreenArrays issues shared and to be shared (post-Moore v. TPL cross-complaint) by the two cases.

31. If the cases are consolidated, I will produce Charles Moore for deposition in both -- on his MMP issues (clearly relevant and bearing upon plaintiff Brown's rights and interests under the *Brown* complaint as well as the issues raised by plaintiff Moore's own *Moore v. TPL* complaint);

- on his "Array" rights and ownership (again, relevant under the *Brown* First Amended Cross-Complaint as well as raised in the 2007 First Amendment To ComAg Amendment that is a core document in *Moore v. TPL*);

- on the GreenArrays intellectual property (with a complete identity of evidence and interests arising from the identical TPL cross-complaints in both cases); and

- on Mr. Moore's understanding of payment priorities arising from TPL revenues and Dan Leckrone's so-called "carve-outs," subjects on which, on information and belief, plaintiff Moore and plaintiff Brown were told substantially conflicting stories by Mr. Leckrone.

32. Finally, I have read this Court's March 29, 2011 Tentative Decision. I am informed and believe that the Tentative Decision is uninformed by Charles Moore's testimony and evidence concerning Mr. Moore's understanding of his rights and liabilities under Mr. Moore's 2005 Commercialization Agreement with TPL and the 2007 First Amendment to the Moore – TPL Commercialization Agreement.

33. Upon information and belief, the evidence in both *Moore v. TPL* and *Brown v. TPL* will reveal that by 2007 (and the time of the 2007 First Amendment to the Moore-TPL Commercialization Agreement), defendant Dan Leckrone had embarked upon a plan and scheme whereby he – a defendant in both cases – established substantial layers of "carveouts" between the TPL revenue stream and those to whom TPL committed a share of its revenues (plaintiffs Moore and Brown included). The details of the scheme varied from time to time, but the essence was that

when revenues were realized by TPL, they were paid over to defendant Leckrone, his relatives or his cronies, each the supposed beneficiary of a carveout entitling them to payment before whoever it was that Mr. Leckrone was speaking to.

34. The 2007 First Amendment to the Moore-TPL Commercialization Agreement contains such a carveout, in plaintiff Moore's favor. Mr. Moore has never been paid his promised "off the top" percentage.

35. I am informed and believe that defendant Leckrone testified in *Brown v. TPL* that Charles Moore was to be paid before Chester Brown was. I am informed and believe that plaintiff Moore has not been paid, and that when defendant Leckrone is asked the same question in *Moore v. TPL* – outside the presence of *Brown v. TPL* counsel – Mr. Leckrone will testify that it is Mr. Brown who was to be paid before plaintiff Moore.

36. I am informed that trial of the two cases will require a reconciliation of conflicting representations by Mr. Leckrone. That reconciliation should occur in one action, to prevent inconsistent and unfair results.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 20, 2011

Kenneth H. Prochnow