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**Attorneys for Plaintiff**

**TECHNOLOGY PROPERTIES LIMITED LLC**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

TECHNOLOGY PROPERTIES LIMITED  
LLC, PHOENIX DIGITAL SOLUTIONS  
LLC, and PATRIOT SCIENTIFIC  
CORPORATION,

Plaintiffs,

v.

BARNES & NOBLE INC.,

Defendant.

Case No. 3:12-CV-03863-VC (PSG)

**PLAINTIFFS' MOTION FOR  
ADMINISTRATIVE RELIEF FOR  
LEAVE TO FILE SUR-REPLY BRIEF  
IN SUPPORT OF MOTION FOR DE  
NOVO DETERMINATION OF  
DISPOSITIVE MATTER REFERRED  
TO MAGISTRATE JUDGE**

Docket No: 89

**Hearing:**

Date: July 23, 2015

Time: 10:00 a.m.

Place: Courtroom 4 - 17<sup>th</sup> Floor

Judge: Hon. Vince Chhabria

1 **PRELIMINARY STATEMENT**

2 Pursuant to Civil Local Rule 7-11, Plaintiffs Phoenix Digital Solutions LLC, Technology  
3 Properties Limited LLC, and Patriot Scientific Corporation (“Plaintiffs”) seek leave to file a sur-  
4 reply brief in opposition to Defendant Barnes & Noble, Inc.’s (“B&N”) Motion for De Novo  
5 Determination of Dispositive Matter Referred to Magistrate Judge. A copy of Plaintiffs’ sur-reply  
6 brief is attached hereto as Exhibit A.

7 Plaintiffs sought B&N’s stipulation to the filing of their sur-reply, which was agreed to in  
8 exchange for Plaintiffs’ stipulation to B&N’s filing of its reply. (Bumgardner Decl.,<sup>1</sup> ¶ 2).

9 **ARGUMENT**

10 B&N has argued that two recent opinions necessitate additional briefing on its Motion for  
11 De Novo Determination of Dispositive Matter Referred to Magistrate Judge. (*See* Dkt. No. 101).  
12 At the time of the filing of B&N’s Motion for Administrative Relief for Permission to File Reply  
13 Brief, Phoenix Digital Solutions LLC had notified B&N that it would oppose the motion unless  
14 B&N would agree not to oppose a motion by Plaintiffs for similar administrative relief, i.e., for  
15 permission to file a sur-reply regarding the same new material. While an initial agreement  
16 between the parties could not be reached, a compromise was reached in subsequent discussions.  
17 (*See* Bumgardner Decl., ¶ 2). The parties no longer oppose one another seeking such  
18 administrative relief.

19 **CONCLUSION**

20 Consequently, to the extent that the Court is inclined to grant B&N’s Motion permitting a  
21 reply, Plaintiffs request that the Court also grant Plaintiffs’ Motion for Administrative Relief for  
22 Permission to File a Sur-Reply to address these new issues.

23  
24 Dated: July 8, 2015

Respectfully Submitted,

25 /s/ Brent N. Bumgardner

26 **NELSON BUMGARDNER, P.C.**

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28 <sup>1</sup> References herein to “Bumgardner Decl.” refer to the Declaration of Brent N. Bumgardner.

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**LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that, on July 8, 2015, I caused the foregoing document to be served on counsel of record via the Court's CM/ECF system.

Dated: July 8, 2015

By: /s/ Brent N. Bumgardner  
Brent N. Bumgardner

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

TECHNOLOGY PROPERTIES LIMITED  
LLC, PHOENIX DIGITAL SOLUTIONS  
LLC, and PATRIOT SCIENTIFIC  
CORPORATION,

Plaintiffs,

v.

BARNES & NOBLE INC.,

Defendant.

Case No. 3:12-CV-03863-VC (PSG)

**DECLARATION OF BRENT N.  
BUMGARDNER IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
ADMINISTRATIVE RELIEF FOR  
LEAVE TO FILE SUR-REPLY IN  
OPPOSITION TO DEFENDANT  
BARNES & NOBLE, INC.'s MOTION  
FOR DE NOVO DETERMINATION OF  
DISPOSITIVE MATTER REFERRED  
TO MAGISTRATE JUDGE**

Docket No: 89

**Hearing:**

Date: July 23, 2015

Time: 10:00 a.m.

Place: Courtroom 4 - 17<sup>th</sup> Floor

Judge: Hon. Vince Chhabria



1 I, Brent N. Bumgardner, declare:

2 1. I am a member of the State Bar of Texas, admitted to practice, *pro hac vice*, before  
3 this Court, and a partner at the law firm of Nelson Bumgardner, P.C. (“Nelson Bumgardner”),  
4 attorneys for Plaintiff Phoenix Digital Solutions LLC. I make this declaration on personal, first-  
5 hand knowledge, and if called and sworn as a witness, I could and would testify as set forth below.

6 2. On Tuesday, July 7, 2015, Nelson Bumgardner asked counsel for Barnes & Noble,  
7 Inc. whether it would consent to Plaintiffs’ Motion for Administrative Relief to file a sur-reply  
8 regarding the motion for de novo determination of dispositive matter referred to the magistrate  
9 judge. Barnes & Noble, Inc.’s counsel informed Nelson Bumgardner that they would not oppose  
10 the motion if Plaintiffs would limit the sur-reply to three pages or less and not oppose Barnes &  
11 Noble Inc.’s motion for administrative leave to file a reply. Consequently, the parties no longer  
12 oppose one another seeking such administrative relief.

13 3. Attached as Exhibit A is a true and correct copy of Plaintiffs’ sur-reply brief in  
14 opposition to Defendant Barnes & Noble Inc.’s Motion for De Novo Determination of Dispositive  
15 Matter Referred to Magistrate Judge.

16 I declare, under penalty of perjury that the foregoing is true and correct.

17 Executed on July 8, 2015

18 By /s/ Brent N. Bumgardner  
19 Brent N. Bumgardner  
20 Attorney for Phoenix Digital Solutions LLC  
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# **Exhibit “A”**

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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

TECHNOLOGY PROPERTIES LIMITED  
LLC, PHOENIX DIGITAL SOLUTIONS  
LLC, and PATRIOT SCIENTIFIC  
CORPORATION,

Plaintiffs,

v.

BARNES & NOBLE INC.,

Defendant.

Case No. 3:12-CV-03863-VC (PSG)

**PLAINTIFFS' SUR-REPLY IN  
OPPOSITION TO DEFENDANT  
BARNES & NOBLE, INC.'s MOTION  
FOR DE NOVO DETERMINATION OF  
DISPOSITIVE MATTER REFERRED  
TO MAGISTRATE JUDGE**

Docket No: 89

**Hearing:**

Date: July 23, 2015

Time: 10:00 a.m.

Place: Courtroom 4 - 17<sup>th</sup> Floor

Judge: Hon. Vince Chhabria

**PRELIMINARY STATEMENT**

1  
2 Plaintiffs Phoenix Digital Solutions LLC, Technology Properties Limited LLC and Patriot  
3 Scientific Corporation (“Plaintiffs”) submit this sur-reply to address the second point raised in  
4 Barnes & Noble, Inc.’s (“B&N”) reply brief. *See* Dkt. No. 102. This second point concerns a  
5 Federal Circuit opinion that issued after Plaintiffs filed their response brief, *SpeedTrack, Inc. v.*  
6 *Office Depot, Inc.*, --- F.3d ----, No. 2014-1475, 2015 U.S. App. LEXIS 11169.

**ARGUMENT**

7  
8 Citing to *SpeedTrack*, B&N claims that “the Federal Circuit just decided a case that makes  
9 clear that *Kessler* cannot properly be restricted to its specific facts.” B&N’s Reply at 3. This  
10 assertion is simply incorrect and B&N greatly overstates the applicability of *SpeedTrack* to this  
11 case.

12 The portion of *SpeedTrack* cited by B&N concerns the Federal Circuit’s analysis of  
13 whether the *Kessler* doctrine may be invoked by a customer. *See* 2015 U.S. App. LEXIS 11169,  
14 at \*21-26. As explained by the Federal Circuit, “[t]he question of whether a customer can invoke  
15 the *Kessler* doctrine has divided the circuits, and we have not specifically addressed it.” *Id.* at  
16 \*21. After evaluating conflicting authority, the Federal Circuit concluded that “the rational  
17 underlying the *Kessler* doctrine supports permitting customers to assert it as a defense to  
18 infringement claims.” *Id.* at \*24. Unlike this case, *SpeedTrack* concerned whether a *district*  
19 *court judgment* of non-infringement barred *SpeedTrack*’s subsequent claims under the *Kessler*  
20 doctrine. *Id.* at \*2. *SpeedTrack* has nothing to do with whether an *ITC decision* precludes a  
21 district court’s consideration of patent issues. *See id.* Nothing in *SpeedTrack* can be fairly read as  
22 an invitation for this Court to create new law by extending the *Kessler* doctrine to ITC decisions.  
23 *See id.*

24 Judge Grewal analyzed far more applicable Federal Circuit authority<sup>1</sup> and correctly  
25 concluded that “ITC findings have no preclusive effect on district courts.” *See* Report and

26  
27 <sup>1</sup> Report and Recommendation Denying Motion for Judgment on the Pleadings, Dkt. No. 87 at 4  
28 (addressing *Bio-Technology Gen. Corp. v. Genentech, Inc.* 80 F.3d 1553 (Fed. Cir. 1996) and  
*Texas Instruments v. Cypress Semiconductor Corp.*, 90 F.3d 1558 (Fed. Cir. 1996)). Also, by way

1 Recommendation Denying Motion for Judgment on the Pleadings, Dkt. No. 87 at 7. Judge  
 2 Wilken analyzed the same Federal Circuit cases and reached the same conclusion. *See* Order  
 3 Denying Motion for Judgment on the Pleadings, Dkt. 100-3 at 12 (“[L]egal precedents regarding  
 4 the preclusionary effect of an ITC decision were established long before the parties’ dispute  
 5 began. ... [T]he Court is not bound by the ITC decision and will not employ the Kessler  
 6 doctrine.”). Absolutely nothing in *SpeedTrack* calls into question the far more relevant Federal  
 7 Circuit precedent, much less Judge Grewal’s and Judge Wilken’s conclusion that ITC decisions  
 8 do not bind district courts on patent issues.

### CONCLUSION

10 For the foregoing reasons and the reasons set forth in their Response, Plaintiffs respectfully  
 11 ask the Court to deny B&N’s Motion for De Novo Determination and adopt Judge Grewal’s  
 12 Report and Recommendation.

14 Dated: July 8, 2015

Respectfully Submitted,  
 /s/ *Brent N. Bumgardner*  
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26 of clarification, B&N correctly notes at that an editing error resulted in the erroneous attribution of  
 27 a quotation from *Texas Instruments* to 28 U.S.C. § 1659(b). B&N’s Reply at 4, n. 4. Counsel  
 28 apologizes for the error.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on July 8, 2015, I caused the foregoing document to be served on counsel of record via the Court's CM/ECF system.

Dated: July 8, 2015

By: /s/ Brent N. Bumgardner  
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LLC, PHOENIX DIGITAL SOLUTIONS  
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v.

BARNES & NOBLE INC.,

Defendant.

Case No. 3:12-CV-03863-VC (PSG)

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
ADMINISTRATIVE RELIEF FOR  
LEAVE TO FILE SUR-REPLY IN  
OPPOSITION TO DEFENDANT  
BARNES & NOBLE, INC.'S MOTION  
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DISPOSITIVE MATTER REFERRED  
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Docket No: 89

**Hearing:**

Date: July 23, 2015

Time: 10:00 a.m.

Place: Courtroom 4 - 17<sup>th</sup> Floor

Judge: Hon. Vince Chhabria

1 Plaintiffs Phoenix Digital Solutions LLC, Technology Properties Limited LLC and Patriot  
2 Scientific Corporation (“Plaintiffs”) have filed a Motion for Administrative Relief for Leave to  
3 File a Sur-Reply in Opposition to Defendant Barnes & Noble, Inc.’s Motion for De Novo  
4 Determination of Dispositive Matter Referred to Magistrate Judge.

5 Having considered the arguments of the parties and the papers submitted, and good cause  
6 having been shown, the Court hereby GRANTS Plaintiffs’ Motion for Administrative Relief for  
7 Leave to File a Sur-Reply in Opposition to Defendant Barnes & Noble, Inc.’s Motion for De Novo  
8 Determination of Dispositive Matter Referred to Magistrate Judge.

9

10 **IT IS SO ORDERED.**

11

12 DATED: July \_\_\_\_, 2015

13

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\_\_\_\_\_  
HONORABLE VINCE CHHABRIA  
United States District Judge

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