

JAMES C. OTTESON, State Bar No. 157781
jim@agilityiplaw.com
 THOMAS T. CARMACK, State Bar No. 229324
tom@agilityiplaw.com
 PHILIP W. MARSH, State Bar No. 276383
phil@agilityiplaw.com
 AGILITY IP LAW, LLP
 149 Commonwealth Drive
 Menlo Park, CA 94025
 Telephone: (650) 227-4800
 Facsimile: (650) 318-3483
 Attorneys for Defendants
 TECHNOLOGY PROPERTIES LIMITED and
 ALLIACENSE LIMITED

CHARLES T. HOGE, State Bar No. 110696
choge@knlh.com
 KIRBY NOONAN LANCE & HOGE
 35 Tenth Avenue
 San Diego, CA 92101
 Telephone: (619) 231-8666
 Attorneys for Defendant
 PATRIOT SCIENTIFIC CORPORATION

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

ACER, INC., ACER AMERICA)
 CORPORATION and GATEWAY, INC.,)
 Plaintiffs,)
 v.)
 TECHNOLOGY PROPERTIES LIMITED,)
 PATRIOT SCIENTIFIC CORPORATION,)
 and ALLIACENSE LIMITED,)
 Defendants.)

Case No. 5:08-cv-00877 PSG

**DEFENDANTS' ADMINISTRATIVE
 MOTION TO SEAL CERTAIN
 PORTIONS OF THE EXPERT REPORT
 OF DR. STEPHEN D. PROWSE**

Judge: Hon. Paul S. Grewal

HTC CORPORATION and HTC)
 AMERICA, INC.,)
 Plaintiffs,)
 v.)
 TECHNOLOGY PROPERTIES LIMITED,)
 PATRIOT SCIENTIFIC CORPORATION)
 and ALLIACENSE LIMITED,)
 Defendants.)

Case No. 5:08-cv-00882 PSG

AND ALL RELATED COUNTERCLAIMS)

PLEASE TAKE NOTICE that pursuant to Civil Local Rule 79-5(c) and (d), Defendants Technology Properties Limited, Patriot Scientific Corporation, and Alliacense Limited (collectively, “Defendants”) move the Court for an order to file under seal certain portions of the Expert Report of Dr. Stephen D. Prowse, filed at the request of the Court in connection with multiple motions in the above-captioned actions. TPL has provided the Court with a version of the Report highlighting the portions of the Report the parties wish to file under seal.

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, inter alia, the protection of “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). Further, although “courts have recognized a ‘general right to inspect and copy public records and documents, including judicial records and documents,” the Ninth Circuit has made clear that “access to judicial records is not absolute.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal citation omitted). Thus, a party seeking to seal a document or information filed in connection with a dispositive motion may overcome the presumption of public access by meeting the “compelling reasons” standard articulated by the Ninth Circuit. *Id.*; *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *Medtronic Vascular, Inc. v. Abbott Cardiovascular Sys., Inc.*, 614 F. Supp. 2d 1006, 1035-36 (N.D. Cal. 2009), amended on other grounds, No. C 06-1066 PJH, 2009 WL 1764749 (N.D. Cal. June 22, 2009). Specifically, a party may demonstrate the need for under seal treatment by “articulat[ing] compelling reasons supported by specific factual findings . . . that outweigh the general history of access and the public policies favoring disclosure.” *Kamakana*, 447 F.3d at 1178-79 (internal citations omitted).

Certain portions of the Expert Report of Stephen D. Prowse, as specifically identified in the declarations of David Lansky, Kyle Chen, and Harold H. Davis, filed contemporaneously herewith, contain highly confidential information of Acer, HTC, TPL, and TPL’s licensees. For the reasons contained in those declarations, Defendants’ motion to seal should be granted.

1 Dated: September 11, 2013

Respectfully Submitted,
AGILITY IP LAW, LLP

3 By: /s/ David Lansky
4 James C. Otteson, State Bar No. 157781
jim@agilityiplaw.com
5 Thomas T. Carmack, State Bar No. 229324
tom@agilityiplaw.com
6 Philip W. Marsh, State Bar No. 276383
phil@agilityiplaw.com

7 Attorneys for Defendants
8 TECHNOLOGY PROPERTIES LIMITED
9 and ALLIACENSE LIMITED

10 KIRBY NOONAN LACE & HOGE

12 By: /s/ Charles T. Hoge
13 Charles T. Hoge, State Bar No. 110696
choge@knlh.com

14 Attorneys for Defendant
15 PATRIOT SCIENTIFIC CORPORATION

JAMES C. OTTESON, State Bar No. 157781
jim@agilityiplaw.com
THOMAS T. CARMACK, State Bar No. 229324
tom@agilityiplaw.com
PHILIP W. MARSH, State Bar No. 276383
phil@agilityiplaw.com
DAVID LANSKY, State Bar No. 199952
dlansky@agilityiplaw.com
AGILITY IP LAW, LLP
149 Commonwealth Drive
Menlo Park, CA 94025
Telephone: (650) 227-4800
Facsimile: (650) 318-3483

Attorneys for Defendants
TECHNOLOGY PROPERTIES LIMITED and
ALLIACENSE LIMITED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ACER, INC., ACER AMERICA
CORPORATION and GATEWAY, INC.,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES
LIMITED, PATRIOT SCIENTIFIC
CORPORATION, and ALLIACENSE
LIMITED,

Defendants.

Case No. 5:08-cv-00877 PSG

**DECLARATION OF DAVID LANSKY IN
SUPPORT OF MOTION TO SEAL
CERTAIN PORTIONS OF THE EXPERT
REPORT OF DR. STEPHEN D. PROWSE**

Judge: Hon. Paul S. Grewal

HTC CORPORATION, HTC AMERICA,
INC.,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES
LIMITED, PATRIOT SCIENTIFIC
CORPORATION, and ALLIACENSE
LIMITED,

Defendants.

Case No. 5:08-cv-00882 PSG

1 I, David L. Lansky, declare the following:

2 1. I am an attorney licensed to practice in the State of California with the firm Agility
3 IP Law, LLP, counsel for Defendants Technology Properties Limited and Alliacense Limited in
4 this action (collectively, "TPL"). I have personal knowledge of the facts set forth below and, if
5 called upon to do so, could and would testify competently thereto.

6 2. TPL requests that certain portions of the Expert Report of Dr. Stephen D. Prowse,
7 referenced in the Administrative Motion to Seal Certain Portions of the Expert Report of Dr.
8 Stephen D. Prowse (the "Motion to Seal") filed contemporaneously herewith, be filed under seal.
9 Pursuant to Civil Local Rule 79-5(d), I submit this Declaration in support of the Motion to Seal.

10 3. Page 17 (§ 44), p. 18 (§ 46, n.68), pp. 32-33 (§§ 91, 92), and Exhibits 19 through
11 26 have been designated as confidential and contain the confidential business information of TPL
12 and its licensees.

13 4. The confidentiality interests of TPL and its licensees overcome the right of public
14 access to the record, as a substantial probability exists that TPL's and its licensees' overriding
15 confidentiality interest will be prejudiced if the record is not sealed. Further, the proposed sealing
16 is narrowly tailored, and no less restrictive means exist to achieve this overriding interest.

17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing is true and correct. Executed this 10th day of September 2013, at Menlo Park,
19 California.

20
21 /s/ David Lansky
22 David Lansky
23
24
25
26
27

MICHAEL BETTINGER (SBN 122196)
mike.bettinger@klgates.com
TIMOTHY P. WALKER (SBN 105001)
timothy.walker@klgates.com
HAROLD H. DAVIS, JR. (SBN 235552)
harold.davis@klgates.com

K&L GATES LLP

Four Embarcadero Center, Suite 1200
San Francisco, California 94111
Tel: (415)882-8200
Fax: (415)882-8220

Attorneys for Plaintiffs, Counter-Defendants
ACER, INC., ACER AMERICA
CORPORATION
and GATEWAY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ACER, INC., ACER AMERICA
CORPORATION and GATEWAY, INC.,

Plaintiffs, Counter-Defendants,

vs.

TECHNOLOGY PROPERTIES LIMITED,
PATRIOT SCIENTIFIC CORPORATION, and
ALLIACENSE LIMITED,

Defendants, Counter-Claimants.

AND RELATED COUNTERCLAIMS.

Case No. 5:08-cv-00877 PSG

**DECLARATION OF HAROLD H. DAVIS
IN SUPPORT OF MOTION TO SEAL
CERTAIN PORTIONS OF THE EXPERT
REPORT OF STEPHEN D. PROWSE**

1 I, Harold H. Davis, declare:

2 1. I am a partner at the law firm K&L Gates LLP, and counsel for Plaintiffs Acer Inc.,
3 Acer America Corporation, and Gateway Inc. I have personal knowledge of the facts stated herein.

4 2. I submit this declaration in support of the Motion to Seal Certain Portions of the
5 Expert Report of Stephen D. Prowse ("Report").

6 3. Page 19 of the Report at paragraph 49 of the Report contains identification of Acer's
7 confidential patent license agreements. Acer is under a contractual obligation to keep the terms and
8 identification of these agreements confidential.

9 4. Page 24 of the Report at paragraphs 63, 64 and footnotes 95 and 96 contains revenue
10 and gross profit information for the accused Acer products. I have been informed that this
11 information is highly confidential to Acer and would cause Acer competitive harm if it were widely
12 known to Acer competitors.

13 5. Page 33 of the Report at paragraph 93 of the Report contains confidential information
14 concerning Acer's manufacturing costs and markups.

15 6. Page 36 of the Report at paragraphs 101, 102, and 103 contains confidential
16 information concerning Acer's unit sales and revenue from those sales. This information has not
17 been publicly disclosed and is confidential to Acer.

18 7. Exhibits 4, 5, 6, 6a, 6b, 7, 8, 9, 10, 11, 12, and 13 of the Report contain revenue, profit
19 and units sold information for the accused Acer products on a yearly basis by product and in
20 aggregate for the accused products. I have been informed that this information is highly confidential
21 to Acer and would cause Acer competitive harm if it were widely known to Acer's competitors.

22 8. I have been informed that the information described above is not available in the
23 public domain and is not shared without a non-disclosure agreement or an agreement including
24 confidentiality provisions restricting access and distribution of this information. I have been
25 informed that Acer has taken substantial steps, including without limitation placing this information
26 in only secure environments, etc., to prevent and protect this information from entering into the
27 public domain. I have also been informed that dissemination of this information without restriction
28

1 to the public could harm Acer's business and/or other interests, particularly because Acer is in a
2 highly competitive market.

3 9. The Court should seal the above portions of Dr. Prowse's report pursuant to Local
4 Rule 79-5. With respect to dispositive pleadings, a party seeking to seal a judicial record bears the
5 burden of overcoming the presumption in favor of public access to that record by meeting the
6 "compelling reasons" standard. *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th
7 Cir. 2003). That is, the party must "articulate[] compelling reasons supported by specific factual
8 findings," *Id.* However, with respect to documents attached to a non-dispositive motion, a party must
9 only demonstrate "good cause." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, Slip Op., Ap. No. 2012-600
10 (Fed. Cir. Aug. 23, 2013).

11 10. It appears that the Prowse report excerpts were filed with respect to Docket No. 508,
12 which is a non-dispositive motion. Thus, the above-identified portions of Dr. Prowse's report meet
13 the standard set in *Apple*. Even if the Court considers the *Foltz* standard appropriate, Acer believes
14 that each portion identified above contain information that pertains to Acer's confidential financial
15 data, and because disclosing this information to the general public, including Acer's competitors,
16 could materially harm Acer's businesses. For these reasons, the parties' confidentiality interest is a
17 "compelling reason" that overcomes the right of public access to these records, as a substantial
18 probability exists that Acer's overriding confidentiality interest will be prejudiced if the record is not
19 sealed. Furthermore, the proposed sealing is narrowly tailored and no reasonably less restrictive
20 means exist to achieve this overriding interest, because it seeks sealing of only the specific portions
21 of Dr. Prowse's report.

1 I declare under penalty of perjury, under the laws of the United States of America that the
2 foregoing is true and correct, and that this declaration was executed in San Francisco, California.
3

4 Dated: September 10, 2013

By: /s/ Harold H. Davis
Harold H. Davis

COOLEY LLP
HEIDI L. KEEFE (178960) (hkeefe@cooley.com)
MARK R. WEINSTEIN (193043) (mweinstein@cooley.com)
KYLE D. CHEN (239501) (kyle.chen@cooley.com)
Five Palo Alto Square, 4th Floor
3000 El Camino Real
Palo Alto, California 94306-2155
Telephone: (650) 843-5000
Facsimile: (650) 857-0663

Attorneys for Plaintiffs
HTC CORPORATION and
HTC AMERICA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HTC CORPORATION, HTC AMERICA,
INC.,

Plaintiffs,

v.

TECHNOLOGY PROPERTIES
LIMITED, PATRIOT SCIENTIFIC
CORPORATION, and ALLIACENSE
LIMITED,

Defendants.

Case No. 5:08-cv-00882 PSG

(Related to Case Nos. 5:08-cv-00877 PSG)

**DECLARATION OF KYLE D. CHEN IN
SUPPORT OF MOTION TO SEAL
CERTAIN PORTIONS OF THE EXPERT
REPORT OF STEPHEN D. PROWSE**

Complaint Filed: February 8, 2008
Trial Date: September 23, 2013

I, Kyle D. Chen, declare:

1. I am an attorney at the law firm of Cooley LLP, counsel in this action for Plaintiffs HTC Corporation and HTC America, Inc. (collectively "HTC"). I make this declaration in support of the Motion to Seal Certain Portions of the Expert Report of Stephen D. Prowse ("Motion"). I have personal knowledge based on information provided to me of the facts

1 contained within this declaration, and if called as a witness, could testify competently to the
2 matters contained herein.

3 2. Page 24 of Dr. Prowse's expert report at paragraph 65 contains gross profit
4 information for the accused HTC products. I have been informed that this information is highly
5 confidential to HTC and would cause HTC competitive harm if it were widely known to
6 HTC's competitors.

7 3. Exhibits 4, 5, 14a, 15, 16, and 17 to Dr. Prowse's report contain revenue, profit
8 and units sold information for the accused HTC products on a yearly basis by product and in
9 aggregate for the accused products. I have been informed that this information is highly
10 confidential to HTC and would cause HTC competitive harm if it were widely known to HTC's
11 competitors.

12 4. I have been informed that the information described above is not available in the
13 public domain and is not shared without a non-disclosure agreement or an agreement including
14 confidentiality provisions restricting access and distribution of this information ("NDA"). I have
15 been informed that HTC has taken substantial steps, including without limitation entering into
16 NDAs with parties that are to have access to this information and/or placing this information in
17 only secure environments, etc., to prevent and protect this information from entering into the
18 public domain. I have also been informed that dissemination of this information without
19 restriction to the public could harm HTC's business and/or other interests, particularly because
20 HTC is in a highly competitive market

21 5. The Court should seal the above portions of Dr. Prowse's report pursuant to Local
22 Rule 79-5. With respect to dispositive pleadings, a party seeking to seal a judicial record bears
23 the burden of overcoming the presumption in favor of public access to that record by meeting the
24 "compelling reasons" standard. *Foltz v. State Farm Mutual Auto. Insurance Company*, 331 F.3d
25 1122, 1135 (9th Cir. 2003). That is, the party must "articulate[] compelling reasons supported by
26 specific factual findings," *id.* (citing *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d
27 1096, 1102-03 (9th Cir. 1999)), that outweigh the general history of access and the public policies
28

Hagestad, 49 F.3d at 1434 (quoting *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990)).

6. The above-identified portions of Dr. Prowse’s report meet the standard set in *Foltz* for sealing information within dispositive motions because they each contain information that pertains to HTC's confidential financial data, and because disclosing this information to the general public, including HTC's competitors, could materially harm HTC's businesses. For these reasons, the parties’ confidentiality interest is a “compelling reason” that overcomes the right of public access to these records, as a substantial probability exists that HTC's overriding confidentiality interest will be prejudiced if the record is not sealed. Furthermore, the proposed sealing is narrowly tailored and no reasonably less restrictive means exist to achieve this overriding interest, because it seeks sealing of only the specific portions of Dr. Prowse’s report.

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Executed on September 6, 2013 in Palo Alto, California.

/s/ Kyle D. Chen
 Kyle D. Chen

JAMES C. OTTESON, State Bar No. 157781
jim@agilityiplaw.com
 THOMAS T. CARMACK, State Bar No. 229324
tom@agilityiplaw.com
 PHILIP W. MARSH, State Bar No. 276383
phil@agilityiplaw.com
 AGILITY IP LAW, LLP
 149 Commonwealth Drive
 Menlo Park, CA 94025
 Telephone: (650) 227-4800
 Facsimile: (650) 318-3483

Attorneys for Defendants
 TECHNOLOGY PROPERTIES LIMITED and
 ALLIACENSE LIMITED

CHARLES T. HOGE, State Bar No. 110696
choge@knlh.com
 KIRBY NOONAN LANCE & HOGE
 35 Tenth Avenue
 San Diego, CA 92101
 Telephone: (619) 231-8666
 Attorneys for Defendant
PATRIOT SCIENTIFIC CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ACER, INC., ACER AMERICA) Case No. 5:08-cv-00877 PSG
CORPORATION and GATEWAY, INC.,)
Plaintiffs,) **[PROPOSED] ORDER GRANTING**
v.) **DEFENDANTS' MOTION TO SEAL**
) **CERTAIN PORTIONS OF THE EXPERT**
) **REPORT OF DR. STEPHEN D. PROWSE**

Judge: Hon. Paul S. Grewal

HTC CORPORATION and HTC
AMERICA, INC.,

}
}
} Case No. 5:08-cv-00882 PSG

Plaintiffs,

v.

TECHNOLOGY PROPERTIES LIMITED,
PATRIOT SCIENTIFIC CORPORATION
and ALLIACENSE LIMITED,

Defendants.

AND ALL RELATED COUNTERCLAIMS

1 Having reviewed Defendants' Administrative Motion to Seal Certain Portions of the
2 Expert Report of Stephen D. Prowse, and all related facts and circumstances, and good cause
3 appearing therefor, IT IS HEREBY ORDERED THAT the designated portions of the Expert
4 Report of Stephen D. Prowse should be filed under seal.

5 IT IS HEREBY ORDERED THAT Defendants' Administrative Motion to Seal Certain
6 Portions of the Expert Report of Stephen D. Prowse is GRANTED and that the designated
7 portions of the Expert Report of Stephen D. Prowse be filed under seal by the Clerk of the Court
8 in conformity with Local Rule 79-5(f).

9 IT IS SO ORDERED.

10
11 Dated: _____, 2013

12 _____
13 Hon. Paul S. Grewal
14 United States Magistrate Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28