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10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14
 15 HTC CORPORATION and HTC
 AMERICA, INC.,

16 Plaintiffs,

17 v.

18 TECHNOLOGY PROPERTIES
 19 LIMITED, PATRIOT SCIENTIFIC
 CORPORATION and ALLIACENSE
 20 LIMITED,

21 Defendants.

Case No. 5:08-cv-00882 PSG

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
 "EMERGENCY MOION"**

Judge: Hon. Paul. Grewal

Trial Date: September 23, 2013

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1 TPL does not want this Court to review Judge Gildea's exhaustive assessment – and harsh
2 repudiation – of TPL's infringement theories. TPL's desire to deprive this Court of access to the Initial
3 Determination ("ID"), however, does not justify its ill-conceived "emergency" motion, which makes
4 frivolous accusations of protective order violations and other supposed improprieties. TPL's motion
5 should be denied in its entirety.¹

6 TPL argues that HTC violated the ITC Protective Order by providing, only to the district court, a
7 redacted version of the ID. The purpose of the ITC Protective Order is simply to protect a party's
8 Confidential Business Information from *unauthorized* dissemination to third parties, not to prevent access
9 by a district court that is presiding over *the same issues in a parallel action*. In fact, the ITC's own rules
10 expressly authorize the district court to access the record from ITC proceeding, even if it includes
11 Confidential Business Information designated by a party pursuant to an ITC Protective Order. *See*, 19
12 C.F.R. § 210.5(c) ("Transmission of certain records to district court. Notwithstanding paragraph (b) of this
13 section, confidential business information may be transmitted to a district court and be admissible in a civil
14 action, subject to such protective order as the district court determines necessary, pursuant to 28 U.S.C.
15 1659.") (attached as Keefe Decl. Ex. A.)

16 HTC could have lodged a complete and unredacted copy of the ID, but out of an abundance of
17 caution and in deference to the other ITC respondents, HTC redacted anything that might conceivably
18 constitute Confidential Business Information of parties other than HTC, Qualcomm and TI, all of whom
19 gave HTC their express consent to provide the ID to this Court. (See Smith Decl., ¶¶ 2-3; Damstedt Decl.,
20 ¶¶ 2-3) TPL similarly has no standing to complain about any of its own allegedly Confidential Business
21 Information considering that it agreed to a Cross-Use Agreement with HTC in which TPL information
22 adduced in the ITC proceeding is deemed to be also produced in the present action. (Keefe Decl. Ex. B.)

23 TPL's accusations of Local Rule violations are similarly frivolous. Because it could take up to 30
24 days for the ITC to issue a public redacted version of the ID, HTC confidentially lodged a redacted copy
25 with the Court (copying counsel for TPL) so as to permit the Court to review the ID without delay. HTC

26 ¹ TPL first notified HTC of its intention to file this motion on Wednesday after the close of business, more than 24
27 hours after it knew that HTC had provided a copy of the redacted ID to the Court. HTC attempted to discuss the
28 issue with TPL's counsel in an effort to avoid burdening the Court with TPL's ill-conceived motion, but TPL's
counsel refused to discuss the matter and filed this motion without any attempt to meet and confer. (Keefe Decl. Ex. C.)

1 file the public version of the ID in the record once the ITC issues it, so there are no sealing issues for this
2 Court to resolve. There is no reason this Court, which is expressly permitted to receive Confidential
3 Business Information from an ITC proceeding, cannot review the ID during the interim period before the
4 ITC issues a redacted public version of the ID.

5 TPL's allegations regarding improper *ex parte* contacts with the Court are similarly baseless. As
6 explained in the accompanying Declaration of Heidi Keefe, HTC filed a Request for Judicial Notice on
7 September 6 attaching the public notice of the ID. [Dkt. No. 561] When the full ID became available this
8 week, counsel for HTC contacted the Court's courtroom deputy to notify him that HTC had received the
9 full ID and was working on a way to expeditiously provide it to the Court. The discussions were purely
10 ministerial matters concerning providing the ID to the Court and did not entail any discussions regarding
11 substance of the ID or any other issue in the case. (Keefe Decl. ¶ 3.)

12 TPL's motion is little more than an improper and disingenuous attempt to deprive this Court of
13 access to the ID prior to ruling on HTC's summary judgment motions. TPL's motion should be denied in
14 its entirety.

15 Dated: September 12, 2013

Respectfully submitted,

COOLEY LLP

18 By: /s/ Heidi L. Keefe
19 Heidi L. Keefe

20 Attorneys for Plaintiffs
21 HTC CORPORATION and
22 HTC AMERICA, INC.

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 HEIDI L. KEEFE (SBN 178960) (hkeefe@cooley.com)
 2 MARK R. WEINSTEIN (SBN 193043) (mweinstein@cooley.com)
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 CORPORATION and ALLIACENSE
 20 LIMITED,

21 Defendants.

Case No. 5:08-cv-00882 PSG

**DECLARATION OF HEIDI KEEFE IN SUPPORT
 OF OPPOSITION TO DEFENDANTS
 "EMERGENCY MOTION"**

Judge: Hon. Paul. Gera

Trial Date: September 23, 2013

1 I, Heidi Keefe, declare as follows:

2 1. I am a partner at the law firm of Cooley LLP, counsel in this action for Plaintiffs
3 HTC Corporation and HTC America, Inc. (collectively "HTC"). I have personal knowledge of the
4 facts contained within this declaration, and if called as a witness, could testify competently to the
5 matters contained herein.

6 2. Before anything was lodged with the Court, I specifically spoke with Vince Lam
7 from HTC and obtained his permission to lodge the ID containing HTC Confidential Business
8 Information with the Court.

9 3. I also had two conversations with the Court. During the first conversation, on
10 Monday, September 9, 2013, I informed the Court that the ID had issued, but we could not send it
11 because it contained confidential business information that we were either redacting or getting
12 permission to lodge. During the second conversation, on Tuesday, September 10, 2013, I
13 informed the Court that we would be lodging a redacted version. Nothing of any substance was
14 discussed.

15 4. Attached hereto as Exhibit A is a true and correct copy of the International Trade
16 Commission, Commission Rule 210.5(c).

17 5. Attached hereto as Exhibit B is a true and correct copy of the Cross-Use of
18 Documents and Discovery agreement between HTC and TPL.

19 6. Attached hereto as Exhibit C is a true and correct copy of an email dated
20 September 11, 2013 received from Jim Otteson, TPL's counsel, refusing to meet and confer.

21 I declare under the laws of the United States of America that to the best of my knowledge
22 the foregoing is true and correct. Executed this 12th day of September, 2013 at Palo Alto,
23 California

24
25 /s/ Heidi Keefe
Heidi Keefe

26
27 1170897 v1/HN

28

EXHIBIT A

AdChoices 


19 CFR 210.5 - Confidential business information.

Code of Federal Regulations - Title 19: Customs Duties (2011)

Updated to: April 01, 2011

Linked as: <http://cfr.vlex.com/vid/210-5-confidential-business-information-19651346>



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Text

Title 19: Customs Duties

CHAPTER II: UNITED STATES INTERNATIONAL TRADE COMMISSION

SUBCHAPTER C: INVESTIGATIONS OF UNFAIR PRACTICES IN IMPORT TRADE

PART 210: ADJUDICATION AND ENFORCEMENT

Subpart A: Rules of General Applicability

210.5 - Confidential business information.

(a) Definition and submission. Confidential business information shall be defined and identified in accordance with ? 201.6 (a) and (c) of this chapter. Unless the Commission, the administrative law judge, or another section of this part states otherwise, confidential business information shall be submitted in accordance with ? 201.6(b) of this chapter. In the case of a complaint, any supplement to the complaint, and a motion for temporary relief filed under this part, the number of nonconfidential copies shall be prescribed by ? 210.8(a) of this part.

(b) Restrictions on disclosure. Information submitted to the Commission or exchanged among the parties in connection with an investigation or a related proceeding under this part, which is properly designated confidential under paragraph (a) of this section and ? 201.6(a) of this chapter, may not be disclosed to anyone other than the following persons without the consent of the submitter:

(1) Persons who are granted access to confidential information under ? 210.39(a) or a protective order issued pursuant to ? 210.34(a);

(2) An officer or employee of the Commission who is directly concerned with?

(i) Carrying out or maintaining the records of the investigation or related proceeding for which the information was submitted;

(ii) The administration of a bond posted pursuant to subsection (e), (f), or (j) of section 337 of the Tariff Act of 1930;

(iii) The administration or enforcement of an exclusion order issued pursuant to subsection (d), (e), or (g), a cease and desist order issued pursuant to subsection (f), or a consent order issued pursuant to subsection (c) of section 337 of the Tariff Act of 1930; or

(iv) Proceedings for the modification or rescission of a temporary or permanent order issued under subsection (d), (e), (f), (g), or (i) of section 337 of the Tariff Act of 1930, or a consent order issued under section 337 of the Tariff Act of 1930;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337 (d), (e), or (g) of the Tariff Act of 1930 resulting from the investigation or related proceeding in connection with which the information was submitted.

(c) Transmission of certain records to district court. Notwithstanding paragraph (b) of this section, confidential business information may be transmitted to a district court and be admissible in a civil action, subject to such protective order as the district court determines necessary, pursuant to 28 U.S.C. 1659.

(d) Confidentiality determinations in preinstitution proceedings. After a complaint is filed under section 337 of the Tariff Act of 1930 and before an investigation is instituted by the Commission, confidential business information designated confidential by the supplier shall be submitted in accordance with ? 201.6(b) of this chapter. The Secretary shall decide, in accordance with ? 201.6(d) of this chapter, whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as set forth in ? 201.6(e) and (f) of this chapter.

(e) Confidentiality determinations in investigations and other related proceedings. (1) If an investigation is instituted or if a related proceeding is assigned to an administrative law judge, the administrative law judge shall set the ground rules for the designation, submission, and handling of information designated confidential by the submitter. When requested to do so, the administrative law judge shall decide whether information in a document addressed to the administrative law judge, or to be exchanged among the parties while the administrative law judge is presiding, is entitled to confidential treatment. The

EXHIBIT B

CROSS-USE OF DOCUMENTS AND DISCOVERY

This Cross-Use of Documents Agreement (the “Agreement”), effective as of January 24, 2013 (the “Effective Date”), is entered into by and between Technology Properties Limited LLC (“TPL”), Phoenix Digital Solutions LLC, Alliacense Ltd., and Patriot Scientific Corporation (collectively the “TPL Parties”) on the one hand and HTC Corporation and HTC America, Inc. (collectively the “HTC Parties”) on the other hand. The TPL Parties and the HTC Parties are collectively referred to herein as the “Parties.”

1. The Parties agree that documents and things (as defined below in paragraph 2) produced or to be produced in *HTC Corp. et al. v. Technology Properties Limited et al.*, 5:08-cv-00882 (N.D. Cal. 2008) (hereinafter, the “District Court Action”) shall be deemed contemporaneously produced by the responding Party and useable by any Party in the ITC Investigation No. 337-TA-853 (the “ITC Investigation”), so long as such documents and things are produced before the close of fact discovery in the ITC Investigation (February 22, 2013 as of the date of execution for this Agreement) or before a deadline mutually agreed upon in writing by the Parties, with confidentiality preserved (i.e., all documents and things produced in the District Court Action designated with any level of confidentiality shall be deemed “Confidential Business Information” for purposes of the ITC Investigation), all objections of the originally producing party preserved, and subject to the rights of the Parties to object on any otherwise available grounds to the admissibility of such documents and things. Such documents and things deemed produced in the ITC Investigation shall be governed by any applicable protective order and/or any other applicable orders or stipulations in such ITC Investigation for purposes of use in the ITC Investigation. The Parties further agree that documents and things (as defined below in paragraph 2) produced or to be produced in the ITC Investigation shall be deemed contemporaneously produced and usable in the District Court Action, so long as such documents and things are produced before the close of fact discovery in the District Court Action (February 8, 2013 as of the date of execution for this Agreement) or before a deadline mutually agreed upon in writing by the Parties, with confidentiality preserved (i.e., all documents and things produced in the ITC Investigation designated as “Confidential Business Information” shall be deemed to be designated as “Highly Confidential – Attorneys’ Eyes Only” in the District Court Action), all objections of the originally producing Party preserved, and subject to the rights of the Parties to object on any otherwise available grounds to the admissibility of such documents and things. Such documents and things deemed produced in the District Court Action shall be subject to any applicable protective order and/or any other applicable orders or stipulations in such District Court Action for purpose of use in the District Court Action. Nothing herein shall prevent any party from seeking additional protection from the applicable court or tribunal for any particular materials.

2. “Documents and things” produced shall be interpreted to include:
- a. deposition and hearing transcripts; and
 - b. any and all documents and things (excluding any written discovery responses by the Parties such as their interrogatory responses) produced during the course of discovery.

CROSS-USE AGREEMENT

ITC Inv. No. 337-TA-853
Case No. 5:08-cv-00882-PSG

3. Subject to the provisions of this Agreement, the Parties shall be permitted to use in the ITC Investigation, documents and things that are produced or served in the District Court Action according to Paragraph 1 above, to the extent such use is consistent with the Commission Rules, Grounds Rules, Protective Order and any other applicable orders or stipulations in the ITC Investigation. All use under this paragraph shall be with confidentiality preserved, all objections of the originally producing party preserved, and subject to the rights of the Parties to object on any otherwise available grounds to the admissibility of such documents and things.

4. Subject to the provisions of this Agreement, the Parties shall be permitted to use in the District Court Action, documents and things that are produced or served in the ITC Investigation according to Paragraph 1 above, to the extent such use is consistent with the Federal Rules of Civil Procedure, Federal Rules of Evidence, Local Court Rules, Protective Order and any other applicable orders or stipulations in the District Court Action. All use under this paragraph shall be with confidentiality preserved, all objections of the originally producing party preserved, and subject to the rights of the Parties to object on any otherwise available grounds to the admissibility of such documents and things.

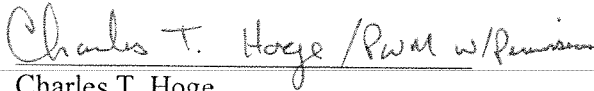
5. Notwithstanding Paragraphs 3 and 4, no form of discovery in the District Court Action shall modify discovery limitations or deadlines in the ITC Investigation and no form of discovery in the ITC Investigation shall modify discovery limitations or deadlines in the District Court Action. The Parties may rely in the ITC Investigation upon the documents and things produced in the District Court Action by referencing the Bates number used by the Party in the District Court Action. Likewise, the Parties may rely in the District Court Action upon the documents and things produced in the ITC Investigation by referencing the Bates number used by the Party in the ITC Investigation. The Parties are not obligated to reproduce or designate such documents and things with a Bates number specific to the ITC Investigation or the District Court Action.

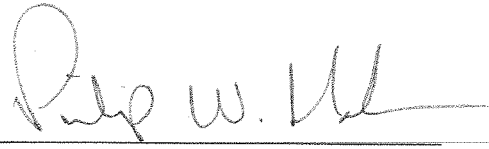
6. Notwithstanding this Agreement, parties may otherwise meet and confer and agree in writing to the use of information or documents not included in paragraph 2 in either the District Court Action or the ITC Investigation. Each Party shall consider in good faith any request by the other Party to use (a) information or documents associated with the ITC Investigation and not included in paragraph 2 in the District Court Action, or (b) information or documents associated with the District Court Action and not included in paragraph 2 in the ITC Investigation.

CROSS-USE AGREEMENT

ITC Inv. No. 337-TA-853
Case No. 5:08-cv-00882-PSG

Dated: January 30, 2013

 Charles T. Hoge / PwM w/Permission

 Philip W. Marsh

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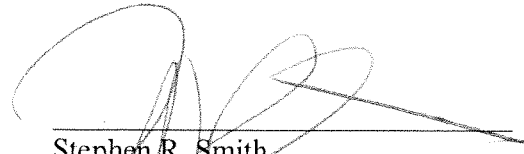
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*Counsel for Technology Properties Limited
LLC, Alliacense Limited and Phoenix Digital
Solutions LLC*

CROSS-USE AGREEMENT

ITC Inv. No. 337-TA-853
Case No. 5:08-cv-00882-PSG



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Fax: 650.849.7400
Email: HTC-TPL@cooley.com

*Counsel for HTC Corporation and HTC
America, Inc.*

EXHIBIT C

Keefe, Heidi

From: Jim Otteson [jim@agilityiplaw.com]
Sent: Wednesday, September 11, 2013 7:55 PM
To: Keefe, Heidi
Cc: Weinstein, Mark; Chen, Kyle; TPL-MMP-CAND; Charles Hoge; Smith, Stephen; Lemieux, Ron
Subject: Re: HTC v. TPL, et al: Violation of Protective Orders and L.R. 79-5

Heidi:

Tomorrow is clearly too late. The damage caused by HTC's improper ex parte communications and violations of the protective orders has already been done.

-- Jim

On 9/11/13 7:47 PM, "Keefe, Heidi" <hkeefe@cooley.com> wrote:

>Can we please discuss this tomorrow?

>

>On Sep 11, 2013, at 6:29 PM, "Jim Otteson"

><jim@agilityiplaw.com<mailto:jim@agilityiplaw.com>> wrote:

>

>HTC Counsel:

>

>Your improper ex parte letter to Judge Grewal with your unilateral
>redactions of some CBI (but not other CBI) is a violation of the ITC's
>Protective Order, the District Court's Protective Orders, and Civil
>Local Rules 79-5 and 11-4(c). We intend to file a motion to strike,
>and for sanctions. We assume that you will oppose our motion. If you
>will not oppose, please let us know immediately.

>

>Thanks.

>

>-- Jim

>

>Jim Otteson

>Agility IP Law, LLP

>149 Commonwealth Drive

>Menlo Park, CA 94025

>Tel: 650-227-4800, ext. 101

>Dir: 650-318-3470

>Cell: 650-714-8521

>www.AgilityIPLaw.com

>

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>Revenue Code or (ii) for promoting, marketing or recommending to
>another party any transaction or matter addressed herein.
>

>

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 2 MARK R. WEINSTEIN (SBN 193043) (mweinstein@cooley.com)
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Case No. 5:08-cv-00882 PSG

**DECLARATION OF STEPHEN SMITH IN
 SUPPORT OF OPPOSITION TO DEFENDANTS'
 EMERGENCY MOTION**

Judge: Hon. Paul. Gera

Trial Date: September 23, 2013

1 I, Stephen Smith, declare as follows:

2 1. I am a partner at the law firm of Cooley LLP, counsel in this action for Plaintiffs
3 HTC Corporation and HTC America, Inc. (collectively "HTC"). I have personal knowledge of the
4 facts contained within this declaration, and if called as a witness, could testify competently to the
5 matters contained herein.

6 2. Before anything was lodged with the Court, I specifically spoke with Sarah
7 Volbrecht in-house counsel from Texas Instruments ("TI") and obtained her permission to lodge
8 the ID containing TI Confidential Business Information with the Court.

9 3. After I saw the Motion to Strike filed by TPL last night, I again spoke to TI to
10 obtain their written confirmation of their prior consent. Attached hereto as Exhibit A is a copy of
11 the email confirming TI's prior oral consent.

12 I declare under the laws of the United States of America that to the best of my knowledge
13 the foregoing is true and correct. Executed this 12th day of September, 2013 at Palo Alto,
14 California

15
16 /s/ Stephen R. Smith
17 Stephen R. Smith

18 **FILER'S ATTESTATION**

19 Pursuant to Civil Local Rule 5.1(i)(3), the undersigned attests that Stephen R. Smith has
20 concurred in the filing of his Declaration in Support of Opposition to Defendants' Emergency
21 Motion.

22 DATED: September 12, 2013 COOLEY

23
24
25 By: /s/ Heidi L. Keefe
26 Heidi L. Keefe

EXHIBIT A

From: Vollbrecht, Sarah [<mailto:s-vollbrecht@ti.com>]
Sent: Thursday, September 12, 2013 10:23 AM
To: Smith, Stephen
Subject: TI's Confidential Business Information

Steve,

TI consents to your sharing TI's confidential business information from Judge Gildea's Initial Determination in ITC Inv. No. 337-TA-853 with Judge Grewal, under the applicable Protective Order.

Regards,
Sarah Vollbrecht
Retained Legal Counsel
Texas Instruments Incorporated
13588 N Central Expressway, MS3999
Dallas, TX 75243
s-vollbrecht@ti.com
214.479.1290

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 20 LIMITED,

21 Defendants.

Case No. 5:08-cv-00882 PSG

**DECLARATION OF BENJAMIN DAMSTEDT IN
 SUPPORT OF OPPOSITION TO DEFENDANTS'
 MOTION TO STRIKE HTC'S IMPROPER *EX*
PARTE COMMUNICATIONS AND FOR
 SANCTIONS**

Judge: Hon. Paul. Gera

Trial Date: September 23, 2013

1 I, Benjamin Damstedt, declare as follows:

2 1. I am a partner at the law firm of Cooley LLP, counsel for Qualcomm Incorporated.
3 I have personal knowledge of the facts contained within this declaration, and if called as a witness,
4 could testify competently to the matters contained herein.

5 2. Before anything was lodged with the Court, I specifically spoke with Qualcomm in-
6 house counsel and obtained Qualcomm’s permission to lodge the ID containing Qualcomm
7 Confidential Business Information with the Court.

8 3. On September 11, 2013, I wrote to provide written confirmation of Qualcomm’s
9 prior consent. Attached hereto is Exhibit A is a copy of my email to HTC’s counsel confirming
10 Qualcomm’s consent.

11 I declare under the laws of the United States of America that to the best of my knowledge
12 the foregoing is true and correct. Executed this 12th day of September, 2013 at Palo Alto,
13 California

14
15 /s/ Benjamin Damstedt
16 Benjamin Damstedt

17 **FILER’S ATTESTATION**

18 Pursuant to Civil Local Rule 5.1(i)(3), the undersigned attests that Benjamin Damstedt has
19 concurred in the filing of his Declaration in Support of Opposition to Defendants’ Emergency
20 Motion.

21
22 DATED: September 12, 2013 COOLEY

23
24
25 By: /s/ Heidi L. Keefe
Heidi L. Keefe

26 1170895 v1/HN

EXHIBIT A

Keefe, Heidi

From: Damstedt, Ben
Sent: Wednesday, September 11, 2013 10:35 PM
To: Keefe, Heidi; Weinstein, Mark; Smith, Stephen; Lemieux, Ron; Chen, Kyle
Subject: HTC v. TPL

As I indicated on September 9th, this email confirms that Qualcomm has consented to the disclosure of any Qualcomm confidential information in the ITC's initial determination to Judge Grewal and his staff.

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