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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN JOSE DIVISION

17 \_\_\_\_\_ )  
 18 HTC CORPORATION and HTC )  
 AMERICA, INC., )  
 19 Plaintiffs, )  
 v. )  
 20 TECHNOLOGY PROPERTIES LIMITED, )  
 21 PATRIOT SCIENTIFIC CORPORATION )  
 and ALLIACENSE LIMITED, )  
 22 Defendants. )

23 AND ALL RELATED COUNTERCLAIMS )  
 24 )  
 25 )  
 26 )  
 \_\_\_\_\_ )

Case No. 5:08-cv-00882 PSG

**DEFENDANTS' EMERGENCY  
 MOTION FOR CURATIVE  
 INSTRUCTION REGARDING  
 OPENING STATEMENT**

Judge: Hon. Paul S. Grewal  
 Date: September 24, 2013  
 Time: 9:00 p.m.

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1 **Notice of Motion**

2 PLEASE TAKE NOTICE that Defendants Technology Properties Ltd. (“TPL”), Patriot  
3 Scientific Corporation (“Patriot”), and Alliacense Ltd. (“Alliacense”) (collectively, “Defendants”)  
4 move this Court, on an emergency basis, pursuant to Civil Local Rules 6-3 and 7-11, for an order  
5 instructing the jury to disregard improper argument by HTC’s counsel made during opening  
6 statements wherein counsel mischaracterized and misled the jury regarding the meaning and scope  
7 of the asserted patent claims.

8 This Motion is based on the following Memorandum of Points and Authorities, set forth  
9 below, and other matters as may be presented at the hearing on this Motion and allowed by the  
10 Court.

11 **Memorandum of Points and Authorities**

12 During opening statements, HTC’s counsel repeatedly and inexplicably made assertions to  
13 the jury that flatly mischaracterized the construction and scope of the ‘336 patent claims at issue in  
14 this trial. Even more troubling, HTC’s counsel’s statements invited the jury to disregard the  
15 Court’s claim construction and employ a construction the Court rejected in its claim construction  
16 order. HTC’s counsel’s improper and prejudicial remarks likely misguided the jury and if allowed  
17 to stand may lead to an erroneous verdict. For this reason, Defendants request the Court provide  
18 the jury on the correct claim construction, inform the jury to disregard the improper remarks, and  
19 admonish counsel to abstain from such further conduct in this trial.

20 During claim construction, HTC argued that the term “clocking said CPU” should be  
21 construed such that the CPU “will always execute at the maximum frequency possible, but never  
22 too fast.” The Court rejected this construction, finding “[t]here is no support in the claim language  
23 itself for the requirement that the clock always forces the CPU to operate at its maximum  
24 frequency.” Claim Construction Order, dated August 21, 2013, at 16 (Dkt. 509). The Court  
25 further held that “operating at the maximum frequency is merely the preferred embodiment and  
26 not the only manner in which the invention can operate.” *Id.* at 16-17.

27 Notwithstanding the Court’s clear rejection of HTC’s proposed construction, HTC’s  
28 counsel, during opening statement, repeatedly told the jury that HTC’s products do not infringe

1 the '336 patent because the patent requires that the CPU operate at the maximum speed possible  
2 and HTC's products do not operate in that way. Mr. Smith told the jury: "But the patent calls for  
3 maximizing the CPU speed in all conditions, as fast as you can go if it's hot, as fast as you can go  
4 if it's cold, and everything in between." Transcript of Proceedings, Sept. 23, 2013, at 188:21-23.  
5 He further informed them, "[w]e want to make sure that phone works, so we don't go as fast as we  
6 can." *Id.* at 187:15-16; *see also, id.* at 189:13-15 ([i]f you're clocking the CPU with max speed all  
7 the time and that speed is varying based upon different conditions, that phone will crash); *id.* at  
8 189:24-25 ("[w]e don't let it run as fast as it can"); *id.* at 196:21-22 ("[t]heir whole point of their  
9 invention is to go as fast as you can under the invention, speed, speed, speed"). Arguing a rejected  
10 claim construction to the jury, as HTC did here, is highly improper, particularly because the jury is  
11 unlikely to understand the important distinction between the aspirational statements in the  
12 specification and the requirements of the properly construed claims. In light of the high risk of  
13 prejudice, the jury should be instructed as soon as practical as to the proper claim construction and  
14 to disregard HTC's inappropriate statements otherwise.

15 HTC's counsel also incorrectly told the jury that the '336 patent requires the clock and the  
16 CPU to vary together based on all three parameters: processing, voltage **and** temperature. Mr.  
17 Smith asserted, for example: "but the patent requires that the CPU and the clock vary together  
18 based upon temperature, voltage and process variations, and we'll get to that in great detail."  
19 Trans. of Proceedings, Sept. 23, 2013, at 187:24-188:2. In fact, the claims at issue require only  
20 that the processing frequency of the CPU and the clock rate vary as a function of "one or more  
21 fabrication or operational parameters." *See*, '336 patent, claims 6 and 13. HTC is well aware that  
22 before the start of trial, Defendants dismissed all claims based on any '336 patent claim that  
23 requires variation in all three parameters. Thus, Mr. Smith misled the jury when he told them:  
24 "First, what does it [the patent] require? A CPU speed has to vary based upon environmental  
25 conditions like temperature." *Id.* at 201:19-20. Again, to correct the high risk of prejudice to  
26 Defendants, as soon as practical, the jury should be instructed regarding the proper construction of  
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1 the claims regarding fabrication and environmental parameters and to disregard HTC's statement  
2 to the contrary.

3 **Conclusion**

4 As set forth above, HTC's counsel made statements to the jury which erroneously  
5 characterize the patent claims at issue and misguide the jury. To address the high risk of prejudice,  
6 Defendants' request for a curative instruction and admonishment to HTC's counsel should be  
7 granted.

8  
9 Dated: September 24, 2013

Respectfully submitted,  
AGILITY IP LAW, LLP

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11 By: /s/ James C. Otteson  
James C. Otteson

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14  
15 KIRBY NOONAN LANCE & HOGE

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17 By: /s/ Charles T. Hoge  
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Case No. 5:08-cv-00882 PSG  
**[PROPOSED] ORDER GRANTING  
 EMERGENCY MOTION FOR  
 CURATIVE INSTRUCTION  
 REGARDING OPENING STATEMENT**  
 Date: September 24, 2013  
 Time: 9:00 a.m.  
 Place: Courtroom 5, 4th Floor  
 Judge: Hon. Paul S. Grewal

1           Having considered the Defendants Emergency Motion for Curative Instruction Regarding  
2 Opening Statement, the record in this case and all related facts and circumstances, and good  
3 cause appearing therefor, IT IS HEREBY ORDERED THAT:

4           Defendants' motion is GRANTED and the jury shall be instructed that the asserted '336  
5 patent claims do not require that the CPU operate at its maximum frequency. The jury shall be  
6 instructed to disregard remarks by HTC's counsel in opening statement suggesting or otherwise  
7 indicating that the '336 patent claims at issue require the CPU to operate at its maximum speed  
8 or that HTC's accused products do not infringe because their CPUs do not operate at their  
9 maximum speed.

10           It is further ordered that the jury shall be instructed that the '336 patent claims at issue do  
11 not require that the frequency of the CPU and the clock rate vary in the same way due to both  
12 fabrication and environmental parameters and that the claims require only that they vary in the  
13 same way as a function of parameter variations in one or more fabrication or operational  
14 parameters. The jury shall be instructed to disregard remarks by HTC's counsel in opening  
15 statement to the extent they were inconsistent therewith.

16           IT IS SO ORDERED.

17 Dated: \_\_\_\_\_, 2013

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19 Hon. Paul S. Grewal  
20 United States Magistrate Judge  
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