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March 29, 2013

Via Electronic Filing

U.S. Magistrate Judge Paul Singh Grewal
United States District Court
Northern District of California
San Jose Division
280 S. 1st Street, Courtroom 5, 4th Floor
San Jose, CA 95113

**Re: *Acer Inv., et al. v. Technology Properties Ltd., et al.,
Case No. 5:08-cv-00877-PSG and HTC Corporation et al v. Technology
Properties Limited et al Case No. 5:08-cv-00882-PSG (N.D. Cal.)***

Dear Judge Grewal:

Defendant and Counter-claimant Technology Properties Limited LLC (“TPL”) respectfully responds to this Court’s March 27, 2013 Order Inviting Briefing Re: Effect Of Automatic Stay (the “Briefing Order”).¹ TPL respectfully requests expedited treatments of this issue to avoid losing the trial date already calendared in this case.

Introduction

TPL’s legal and factual points, supported below, are as follows:

- TPL’s counterclaims against Acer, Inc., et. al. (“Acer”) and HTC Corp., et. al. (“HTC”) (collectively, “Plaintiffs”) are not subject to the automatic stay of 11 U.S.C. § 362(a), which applies only to claims brought *against* a debtor.

¹ The Briefing Order states as follows: “[t]he court issued an order staying the case pursuant to 11 U.S.C. § 362 and requiring the parties to submit status updates every 90 days. TPL submitted two more notices in which it suggested that its counterclaims could continue against Acer and HTC and that the cases against Patriot Scientific Corp. and Alliacense Ltd. may proceed if they can be separated from the TPL case. The court now invites briefing from the parties on this issue.”



The Honorable Paul S. Grewal
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- Plaintiffs' declaratory relief claims against TPL (that they are not infringing TPL's patents) are a precise mirror image of TPL's counterclaims (that they are infringing).
- Should this Court try TPL's counterclaims, it will resolve all claims in this case in their entirety. No portion of the relief that Plaintiffs' declaratory relief complaint seeks would be left unresolved should the Court proceed as requested.
- The automatic stay does not protect or apply to Plaintiffs, and does not entitle them to a breathing spell from litigation, nor does it apply to the other defendants.
- To ensure clarity, TPL proposed to stipulate to complete relief from stay in the Bankruptcy Court. Plaintiffs refused to stipulate, presumably in an attempt to give themselves an improper continuance. Accordingly, on March 25, 2013, TPL filed a motion for relief from stay in the Bankruptcy Court to lift any automatic stay against itself as to these District Court actions. TPL's motion is set to be heard April 11, 2013, and any oppositions and supporting declarations are due by April 8, 2013.

Argument

A. The Automatic Stay Does Not Extend To TPL's Claims Against Plaintiffs.

The automatic stay created by Section 362 of the Bankruptcy Code prohibits the continuation of a judicial action "*against* the debtor" that was commenced before the bankruptcy. *White v. City of Santee*, 186 B.R. 700, 704 (9th Cir. BAP 1995); 11 U.S.C. § 362(a)(1). The stay does not extend to claims made *by a debtor*.

The policy behind Section 362 is to protect the debtor's bankruptcy estate from depletion by creditors' lawsuits and seizures of property and to provide the debtor with a breathing spell to promote reorganization. *Lehman Commercial Paper, Inc. v. Palmdale Hills Prop.*, 423 B.R. 655, 663 (9th Cir. BAP 2009). The automatic stay thus prevents "piecemeal dismemberment" of the bankruptcy estate and protects assets for both the estate and creditors. *Id.*

When faced with both claims against a debtor and counterclaims, courts "must disaggregate litigation so that particular claims, counterclaims, cross claims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay." *Id.* at 665; *see also, Parker v. Bain*, 68 F.3d 1131, 1137 (9th Cir. 1995) (quoting *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204-1205 (3d Cir. 1992) ("All proceedings in a single case are not lumped together for purposes of automatic stay analysis. Even if the first claim filed in a case was originally brought against a debtor, Section



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 March 29, 2013
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362 does not necessarily stay all other claims in the case . . . some actions may be stayed, others not.”).

Claims made by a debtor are not stayed by Section 362. *See Seiko Epson Corp. v. Nu-Kote Int’l, Inc.*, 190 F.3d 1360, 1364 (Fed.Cir.1999) (“The rule also permits claims by the debtor, and counterclaims, to proceed.”); *Merrick v. Whitmore*, 175 B.R. 333, 336-337 (primary objective of stay is inapplicable to a debtor’s offensive actions thus making it “clear” that § 362 “does not stay the hand of the trust from continuing to prosecute a pre-bankruptcy lawsuit instituted by the debtor”); *Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) (“the automatic stay of the Bankruptcy Code extends only to actions ‘against the debtor’ . . . counterclaims asserted by a debtor are not actions ‘against the debtor’ which are subject to the automatic stay.”); *Eisinger v. Way*, 229 B.R. 11, 13 (9th Cir. BAP 1998) (purpose of Section 362 does not apply to lawsuits initiated by a debtor to which the stay therefore does not apply); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989) (statutory language refers to actions “against the debtor”); *Maritime Elec. Co.*, 959 F.2d at 1205 (“thus, within one case, actions against a debtor will be suspended even though closely related claims asserted by the debtor may continue. Judicial proceedings resting on counterclaims and third-party claims asserted by a defendant-debtor are not stayed, while same-case proceedings arising out of claims asserted by the plaintiff are stayed.”).

Letting TPL’s counterclaims proceed would not run afoul of the policy behind Section 362 (protecting the debtor’s estate from depletion). If anything, successful prosecution of the counterclaims would significantly add to the estate, as Plaintiffs could be subject to considerable damages for infringement.

B. The Claims and Counterclaims Pursued by and Plaintiffs and Defendants Are Mirror Images Of Each Other.

As this Court is well aware, Acer and HTC originally filed these related cases as declaratory judgment action. Defendants’ counterclaims assert that Acer and HTC infringe the ’749, ’890, ’336 and/or ’148 patents. Plaintiffs will obviously defend against Defendants’ counterclaims by arguing that the patents are not infringed and/or are invalid. For their affirmative “claims,” Acer and HTC simply seek declarations that they do not infringe the patents, and/or that the patents are invalid.

Thus, viewed from either perspective, the Court must ultimately rule on the infringement and validity of the asserted patents. A ruling on either the claims or the counterclaims will entirely resolve the issues in the case – except for the issue of damages, which is only a component of Defendants’ counterclaims (which are *not* automatically stayed under Section 362), but not Plaintiffs’ affirmative declaratory judgment claims.



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C. The Automatic Stay Does Not Protect Plaintiffs Nor Prevent Other Defendants From Continuing to Litigate.

As a general rule, the automatic stay protects only the debtor, property of the debtor or property of the estate. *See* 11 U.S.C. §§ 362(a); 541(a) (defining property of the estate); *Advanced Ribbons & Office Prods., Inc. v. U.S. Interstate Distrib., Inc.*, 125 B.R. 259, 263 (9th Cir. B.A.P. 1991) (citation omitted). The stay “does not protect non-debtor parties or their property. *Boucher v. Shaw*, 572 F.3d 1087, 1092 (9th Cir. 2009).

The bankruptcy of one defendant in a multi-defendant case does not stay the case as to the remaining defendants. *In re Miller*, 262 B.R. 499, 502-504 (9th Cir. BAP 2001); *Seiko Epson Corp.*, 190 F.3d at 1364 (“It is clearly established that the automatic stay does not apply to non-bankrupt co-defendants of a debtor ‘even if they are in a similar legal or factual nexus with the debtor.’”); *Teachers Ins. & Annuity Ass’n v. Butler*, 803 F.2d 61, 65 (2d Cir.1986) (“It is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants.”); *Marcus, Stowell & Beye Gov’t Securities, Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 230 n. 4 (5th Cir.1986) (“The well established rule is that an automatic stay of judicial proceedings against one defendant does not apply to proceedings against co-defendants.”).

Acer and HTC cannot decline to proceed based upon a stay of their claims against TPL, as they are not entitled to the stay’s protection as a matter of law. Moreover, neither Patriot Scientific Corporation nor Alliacense, both co-defendants and counterclaimants in the action, can be precluded from continuing the litigation. Section 362(a) does not attempt to stay any claim other than those *against* a debtor.

D. TPL Moved For Relief From the Stay in the Bankruptcy Court.

As detailed above, the law is clear that the automatic stay of Section 362 does not apply to the offensive claims brought by TPL, nor does it apply to the other defendants in this litigation. For the avoidance of any doubt, TPL filed a motion in the Bankruptcy Court seeking complete relief from stay.

TPL does not believe it can unilaterally waive any applicable stay and proceed with the litigation, as courts have held that a debtor's conduct cannot constitute a waiver of the automatic stay. *See Ostano Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) (debtor may not waive automatic stay since it also protects creditors); *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (same); *but cf. In re Boates*, 2005 Bankr. LEXIS 2821 (Bankr. E.D. Pa. July 6, 2005) (conduct of the debtor may waive the stay as to a particular creditor).



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Accordingly, in an abundance of caution, TPL sought approval from the Bankruptcy Court. TPL first asked Acer and HTC to agree to a stipulation. On Friday, March 22, 2013, together with TPL's reorganization counsel, Robert G. Harris, of Binder & Malter, LLP, I spoke on the telephone with Timothy Walker of K&L Gates LLP, counsel for Acer, Inc., Acer America Corp., and Gateway, Inc. in the 877 Acer matter. We requested that counsel stipulate to stay relief and consent to a hearing on shortened time on a motion if no stipulation was possible. Mr. Walker's email response declining any agreement on either point is attached to the declaration of Mr. Harris attached hereto as Exhibit "A."

Later that day (and again on March 25, 2013), I communicated with attorney Kyle Chen at Cooley LLP, counsel for HTC America, Inc., in the 882 HTC action. Although he originally expressed that HTC might stipulate to lift the stay, Mr. Chen later declined to consent to shortened time or stay relief, as the Otteson Declaration attached hereto as Exhibit "B" indicates.

Consequently, on March 25, 2013, TPL filed a motion for relief from stay in the Bankruptcy Court, seeking to lift any automatic stay against itself as to these District Court actions. Bankruptcy Judge Johnson specially set TPL's motion for April 11, 2013, and directed Plaintiffs to file and serve any opposition and supporting declarations by April 8, 2013. A copy of Judge Johnson's order is attached hereto as Exhibit "C."

Conclusion

Based on the foregoing, this Court should not allow TPL's Chapter 11 filing to delay the case before it, impact the discovery ordered, or untrack the trial date. Bankruptcy Code § 362(a) only stays claims *against* a debtor, not claims made by a debtor. Moreover, the other Defendants and Counter-claimants must be entitled to continue to pursue their claims against Plaintiffs as there is no basis upon which to stay their claims.

Determination of TPL's unstayed counterclaims will resolve all claims in these cases. If and to the extent any concern exists about the authority to resolve the claims against TPL, the April 11 bankruptcy hearing on relief from stay will fully and finally settle that issue.

Sincerely,

A handwritten signature in blue ink, appearing to read 'James C. Otteson', with a long horizontal flourish extending to the right.

James C. Otteson

EXHIBIT A

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Proposed Attorneys for Debtor and Debtor In
Possession Technology Properties Limited, LLC

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, DIVISION 5**

In re Case No: 13-51589 SLJ
TECHNOLOGY PROPERTIES LIMITED, Chapter 11
LLC, RS No.: RGH-006
No Hearing Set
Debtor.

**DECLARATION OF ROBERT G. HARRIS IN SUPPORT OF
EX PARTE APPLICATION FOR ORDER SHORTENING TIME
FOR HEARING ON MOTION FOR RELIEF FROM STAY
BY DEBTOR FOR CAUSE (11 U.S.C. §362(d)(1))
(FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(a))**

I, Robert G. Harris, know the following matters to be true of my own, personal
knowledge and, if called as a witness, could and would testify competently thereto:

1. I am a member of the State Bar of California in good standing and
admitted to practice before this Court. I am proposed reorganization counsel for debtor
and debtor in possession Technology Properties Limited, LLC (“TPL”). I am submitting
this declaration in support of the Ex Parte Application for Order Shortening Time For

DECLARATION OF ROBERT G. HARRIS IN SUPPORT OF EX PARTE APPLICATION FOR ORDER
SHORTENING TIME FOR HEARING ON MOTION FOR RELIEF FROM STAY BY DEBTOR FOR CAUSE

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2 Hearing On Motion for Relief From Stay By Debtor For Cause (11 U.S.C. §362(d)(1))
3 (Federal Rule of Bankruptcy Procedure 9006(a)).

4 2. I declare as follows as required by BLR 9006-1(c):

5 a. Reason for Particular Shortening of Time Requested.

6 TPL is a defendant and cross-plaintiff in HTC CORPORATION and HTC
7 AMERICA, INC. vs. TECHNOLOGY PROPERTIES LIMITED, PATRIOT SCIENTIFIC
8 CORPORATION, and ALLIACENSE LIMITED, case number 5:08-cv-00882-PSG, and
9 ACER, INC., ACER AMERICA CORP., and GATEWAY, INC. vs. TECHNOLOGY
10 PROPERTIES LIMITED, case number 5:08-cv-00877-PSG, both pending in the United
11 States District Court for the Northern District of California. A trial in these cases is set
12 for September 23, 2013. Critical discovery and witness reports are about to be
13 exchanged. Any delay would very possibly cause the loss of the trial date and causes
14 the estates unnecessary expense. Though TPL's counter-claims against ACER,
15 Gateway and HTC are not stayed, the District Court may remove the case from the
16 track to trial it is currently on, given its March 21, 2013 placement of the matters on a
17 90-day status to report regarding the bankruptcy.

18 b. Previous Time Modifications Related to the Subject of the Request.

19 No request for shortened time has previously been made in this case as to any
20 matter.

21 c. The Effect of the Requested Time Modification on the Schedule for
22 the Case.

23 Allowing discovery to conclude, trial preparation to proceed, and the September
24 23 trial to go on as scheduled would speed administration of the case inasmuch as the
25 proceeds from a positive outcome would help fund a plan.

26 d. Absence of Stipulation.

27 On Friday, March 22, 2013, proposed special counsel James Otteson and I

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spoke on the telephone with Timothy Walker of K&L Gates LLP, counsel for Acer, Inc., Acer America Corp., and Gateway, Inc. in United States District Court case number 5:08-cv-00877-PSG. I requested that counsel forward TPL's request for a stipulation for stay relief and consent to a hearing on shortened time on a motion if no stipulation was possible. Mr. Walker's email response declining any agreement on either point is attached hereto.

Attorney Otteson later that day (and again on March 25, 2013), communicated with attorney Kyle Chen at Cooley LLP, counsel for HTC America, Inc. Mr. Chen has also refused to consent to shortened time or stay relief. I expect that Patriot Scientific Corporation, and Alliacense Limited will file statements of non-opposition or consent to the Ex Parte Application.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 26th day of March, 2013, at Santa Clara, California.

/s/ ROBERT G. HARRIS
ROBERT G. HARRIS

XDEC ON MOTION for Relief From Stay.wpd

Mini Domenici

From: Roya Shakoori
Sent: Monday, March 25, 2013 10:21 AM
To: Rob Harris
Subject: FW: Acer v. TPL; TPL Bankruptcy
Fyi...

From: Walker, Timothy [mailto:timothy.walker@klgates.com]
Sent: Monday, March 25, 2013 10:11 AM
To: Jim Otteson; Heinz Binder; Roya Shakoori; Ryan Penhallegon
Cc: Davis, Harold H. Jr.; Ratinoff, Jeffrey M.; Dhillon, Jas
Subject: Acer v. TPL; TPL Bankruptcy

Jim:

Responding to your telephone request for a stipulation on a motion to the bankruptcy court for relief of the stay, Acer cannot stipulate to the motion or the shortened time.

Tim



Timothy P. Walker
K&L Gates LLP
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San Francisco, CA 94111
Tel. 415-882-8031
Fax 415-882-8220
timothy.walker@klgates.com
www.klgates.com

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EXHIBIT B

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Proposed Attorneys for Debtor and Debtor In
Possession Technology Properties Limited, LLC

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, DIVISION 5**

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In re Case No: 13-51589 SLJ
TECHNOLOGY PROPERTIES LIMITED, Chapter 11
LLC, RS No.: RGH-006
No Hearing Set
Debtor.

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**DECLARATION OF JAMES OTTESON IN SUPPORT OF
EX PARTE APPLICATION FOR ORDER SHORTENING TIME
FOR HEARING ON MOTION FOR RELIEF FROM STAY
BY DEBTOR FOR CAUSE (11 U.S.C. §362(d)(1))
(FEDERAL RULE OF BANKRUPTCY PROCEDURE 9006(a))**

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I, James Otteson, know the following matters to be true of my own, personal
knowledge and, if called as a witness, could and would testify competently thereto:

1. I am a member of the State Bar of California in good standing and
admitted to practice before this Court. I am proposed special counsel for debtor and
debtor in possession Technology Properties Limited, LLC (“TPL”). I am submitting this
declaration in support of the Ex Parte Application for Order Shortening Time For
Hearing On Motion for Relief From Stay By Debtor For Cause (11 U.S.C. §362(d)(1))
(Federal Rule of Bankruptcy Procedure 9006(a)).

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2. I declare as follows as required by BLR 9006-1(c):

d. Absence of Stipulation.

On Friday, March 22, 2013, and again on March 25, 2013, I communicated with attorney Kyle Chen at Cooley LLP, counsel for HTC America, Inc. Mr. Chen advised me that HTC will not consent to shortened time for a hearing or stay relief itself at this point.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 25th day of March, 2013, at Menlo Park, California.

/s/ JAMES OTTESON
JAMES OTTESON

EXHIBIT C

Entered on Docket
March 27, 2013
GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

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The following constitutes
the order of the court. Signed March 27, 2013

Stephen L. Johnson
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

TECHNOLOGY PROPERTIES LIMITED,
LLC,

Debtor(s).

Case No. 13-51589 SLJ

Chapter 11

**ORDER (1) DENYING EX PARTE APPLICATION FOR ORDER SHORTENING TIME
AND (2) SPECIALLY SETTING HEARING ON MOTION FOR RELIEF FROM STAY**

On March 26, 2013, Debtor filed a Motion for Relief from Stay by Debtor for Cause (“Relief From Stay Motion”), requesting the court to grant relief from stay to all parties involved in two district court litigation so the litigation may proceed. Debtor concurrently filed an Ex Parte Application for Order Shortening Time (“Application”), seeking to have the Relief From Stay Motion heard on March 28, 2013. The Declaration of Robert G. Harris in support of the Application states that Debtor contacted opposing counsel who refused to consent to shortened time and by all indication will oppose relief from stay. The Application is denied for the following reasons.

A request to shorten time usually requires at least 72 hours notice to parties, absent exigent circumstances. B.L.R. 9006-1(c). This court’s procedure for motions for relief from stay provides for an expedited proceeding requiring only 14 days notice. See B.L.R. 4001-1. The reason for shortening of time is that Debtor may lose the trial date, which has been set for September 23, 2013.

1 According to Debtor, the district court, on March 21, 2013, issued an order requiring the parties to
2 file status reports every 90 days updating the court on the status of the bankruptcy case. Neither of
3 these events explains why the Relief From Stay Motion must be heard on less than 3 days notice as
4 opposed to 14 days. Although it appears discovery cutoff was set for March 29, 2013 and Debtor
5 asserts that discovery was about to be exchanged, there is no indication that the district court would
6 not agree to extend discovery cutoff. Given the character of the underlying litigation, the likelihood
7 of opposition to the Relief From Stay Motion, and opposing parties' refusal to consent to shortening
8 time, a hearing on shortened time will not allow sufficient time for the parties to respond nor the
9 court to consider the parties' respective positions.

10 For the foregoing reasons, IT IS HEREBY ORDERED as follows:

11 (1) The Ex Parte Application for Order Shortening Time is DENIED.

12 (2) The hearing on the Relief from Stay Motion is specially set for **April 11, 2013, at 10:00**

13 **a.m.**

14 (3) Debtor shall file and serve Notice of Hearing no later than March 28, 2013 by First Class
15 Mail, providing 14 days notice consistent with BLR 4001-1. Debtor, at its discretion, may choose to
16 serve via overnight delivery, electronic transmission, or fax.

17 (4) B.L.R. 4001-1(f) is hereby modified, and the Notice of Hearing shall so state, that any
18 opposition to relief from stay must be in writing, supported by points and authorities and
19 declarations, and must be filed by 4:00 p.m. on April 8, 2013. Service shall be made by ECF
20 notification, electronic transmission, or fax at the same time as filing.

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22 *** * * END OF ORDER * * ***
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COURT SERVICE LIST

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[ECF Notifications Only]

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California