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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

**MOTION FOR ORDER SHORTENING
TIME ON DEFENDANTS'
EMERGENCY MOTION TO MODIFY
CASE SCHEDULE DUE TO ACER'S
DISCOVERY ABUSES**

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

Date: February 8, 2013
Time: 4:45 p.m.
Dept. Courtroom 4, 5th Floor
Judge: Hon. Paul S. Grewal

(Requesting February 8, 2013 Hearing Date)

1 Pursuant to Civil L.R. 6-3 and Judge Grewal's December 2010 Standing Order,
2 Defendants Technology Properties Ltd., Patriot Scientific Corporation, and Alliacense Ltd.
3 (collectively, "TPL") move for an order shortening time to hear Defendants' Emergency Motion
4 to Modify Case Schedule Due to Acer's Discovery Abuses. Defendants request that their
5 emergency motion be heard at the hearing already scheduled for February 8, 2013 at 4:45 p.m.
6 Defendants further request that Acer file any response to the motion by Friday, February 8, 2013
7 at noon. HTC has already filed a notice of non-opposition.

8 **A. Factual Background**

9 Yesterday, the Court granted Acer's request for shortened time for Defendants to respond
10 to Acer's motion to compel 30(b)(6) testimony, ordering a response by today, February 7, 2013,
11 and a hearing on Friday, February 8, 2013 at 4:45 p.m. Defendants filed their opposition
12 yesterday on February 6, 2013. On February 5, 2013, Defendants filed a motion to seal and
13 served their Confidential Emergency Motion to Modify Case Schedule Due to Acer's Discovery
14 Abuses on Plaintiffs. Since that time, Acer has failed to serve the schematics and other technical
15 documents relating to the products accused in this case that Acer now admits it has in its
16 possession custody and control—further underscoring the emergency nature of Defendants'
17 motion.

18 **B. Good Cause Exists**

19 With fact discovery scheduled to close on February 8, 2013, and expert reports due on
20 February 15 and March 15, 2013, good cause exists for hearing Defendants' emergency motion
21 on shortened time. Further, as the Court has already ordered a hearing for this Friday, which
22 coincides with the last day of fact discovery, hearing Defendants' motion at the same time will
23 promote efficiency for all involved. Because the evidence at issue is central to Defendants'
24 infringement allegations, and Acer has failed to produce any of it as of the day before the end of
25 fact discovery, an order shortening time is warranted.

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Dated: February 7, 2013

Respectfully submitted,

AGILITY IP LAW, LLP

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

Attorneys for Defendants
TECHNOLOGY PROPERTIES LIMITED
and ALLIACENSE LIMITED

KIRBY NOONAN LANCE & HOGE

By: /s/ Charles T. Hoge
Charles T. Hoge

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

Defendants.)

Case No. 5:08-cv-00877 PSG

**DECLARATION OF THOMAS T.
CARMACK IN SUPPORT OF MOTION
FOR ORDER SHORTENING TIME ON
DEFENDANTS' EMERGENCY
MOTION TO MODIFY CASE
SCHEDULE DUE TO ACER'S
DISCOVERY ABUSES**

HTC CORPORATION and HTC)
AMERICA, INC.,)

Plaintiffs,)

v.)

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PATRIOT SCIENTIFIC CORPORATION)
and ALLIACENSE LIMITED,)

Defendants.)

Case No. 5:08-cv-00882 PSG

Date: February 8, 2013
Time: 4:45 p.m.
Dept. Courtroom 4, 5th Floor
Judge: Hon. Paul S. Grewal

(Requesting February 8, 2013 Hearing Date)

1 I, Thomas T. Carmack, declare the following:

2 1. I am an attorney licensed to practice in the State of California and am a partner with
3 the firm Agility IP Law, LLP, counsel for Defendants Technology Properties Limited (“TPL”) and
4 Alliacense Limited in this action. 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. I have reviewed Acer’s discovery responses in this action and the related ITC
7 investigation, and have met and conferred numerous times with different members of Acer’s
8 counsel at the law firm of K&L Gates LLP, including Timothy P. Walker, Harold H. Davis, Jr.,
9 and Jas Dhillon about various deficiencies in Acer’s discovery responses in both actions.

10 3. Although Acer has continued to produce documents in the related ITC
11 investigation, since Defendants filed their emergency motion February 5 Acer has not made any
12 production of schematics or other technical documents in this case.

13 4. Since the filing of Defendants’ emergency motion, former counsel for Defendants
14 at Farella Braun & Martel LLP has made Defendants’ current counsel aware of additional
15 statements made by Acer’s regarding the discovery at issue. Attached hereto as Exhibit A is a true
16 and correct copy of correspondence from this case received from Farella since Defendants filed
17 their emergency motion. In it, Acer’s counsel promises to provide additional “product-level”
18 documents. However, despite its best efforts, counsel for Defendants has been unable to locate
19 any such documents relating to the products accused in this case in Acer’s production.

20 5. The documents at issue in Defendants’ emergency motion are central to
21 Defendants’ case. Because fact discovery closes tomorrow and expert reports are due in less than
22 two weeks, Acer’s failure to produce these documents is highly prejudicial. Further, an order
23 shortening time with respect to Defendants’ motion will alleviate further prejudice that would
24 arise from further delay.

25 6. Although there have been previous time modifications in the case, Defendants’
26 requested time modification for the briefing and hearing on their pending Emergency Motion will
27 not alter any event or deadline already fixed by the Court. Indeed, it is meant to take advantage of
28 the efficiencies that will result from hearing Defendants’ emergency motion at a hearing the Court

1 has already scheduled.

2 I declare under penalty of perjury under the laws of the United States of America that the
3 foregoing is true and correct. Executed this 7th day of February 2013, at Menlo Park, California.

4
5 /s/ Thomas T. Carmack
Thomas T. Carmack

EXHIBIT A

K&L|GATES

K&L Gates LLP
630 Hansen Way
Palo Alto, CA 94304
T 650.798.6700 www.klgates.com

May 13, 2011

Jeffrey M. Ratinoff
D 650-798-6714
F 650.798.6701
jeffrey.ratinoff@klgates.com

Via E-Mail and First Class Mail

David Ismay
Farella Braun + Martel LLP
Russ Building
235 Montgomery Street
San Francisco, CA 94104
DIsmay@fbm.com

Re: *Acer, Inc. v Technologies Properties Limited, et al.*, Case No. 5:08-CV-00877 JF

Dear David:

I am writing in response to your April 28, 2011 letter. While I will attempt to address the issues raised therein, we should still schedule a live meet and confer conference early next week to work through any remaining issues.

Issue 1: Production of Native Files with ESI.

Without any legal support, you claim that TPL is “entitled” to “information (as metadata or otherwise) that will enable TPL to identify original file locations, by folder (if used) and by custodian” because “it reflects the documents’ use in the ordinary course of business.” This statement overlooks the fact that the “documents” that are subject to the parties’ dispute are emails and that Acer produced them in a form which provides sufficient information concerning their “use” in the ordinary course of business.

Further, as noted in my March 24, 2011 letter to Mr. McKinney, the requirement in Rule 34 that data be produced as ordinarily maintained or in a “reasonably usable” form does not require that all metadata be turned over automatically in every case. *See Kentucky Speedway, LLC v. Nat’l Assoc. of Stock Car Auto Racing*, 2006 WL 5097354, *8 (E.D. Ky. Dec. 18, 2006); *see also Michigan First Credit Union v. Cumis Ins. Society, Inc.*, 2007 WL 4098213, *2 (E.D. Mich. Nov. 16, 2007) (court denied production despite timely request for metadata because it was not relevant and production would be unduly burdensome). As I have previously explained in correspondence and during prior meet and confer conferences with your colleagues, we were not provided with any Lotus-based or Outlook-based folder structures for the emails. Rather, we produced the emails in a reasonably usable form, *i.e.* .msg files in rough chronological order. This is sufficient under recognized e-discovery

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principles. *See* The Sedona Conference® Glossary: E-Discovery & Digital Information Management (3d ed. Sept.2010), at p. 31 (definition of “email metadata”); Sedona Principles 2d Principle 12, cmt 12(b) (2007) (recognizing that native production includes the entire file and associated metadata and affords the requesting party access to the same information and functionality available to the producing party).

As further noted, TPL must show a “particularized need” for metadata that is sufficient to overcome the burden that Acer would incur in complying with TPL’s demands. *See Kentucky Speedway*, 2006 WL 5097354 at *8-9. Notwithstanding my repeated requests, TPL has yet to sufficiently explain: (a) why the metadata contained in the native .msg files fails to provide TPL with sufficient information concerning those documents; and (b) why TPL still requires information beyond what was already provided by this native production. In this regard, it remains unclear how or why the “folder location” of where emails were kept bears any relation to a claim, issue or relevant fact in this action.

You also state that the sender and recipient fields of the emails produced by Acer will “never show” whether there were any “bcc” recipients. This is untrue and is illustrative of TPL’s continued attempts to create discovery issues where none exist. Indeed, there are *thousands* of emails produced by Acer that identify “bcc” recipients. *See, e.g.*, ACER0153280, ACER0860222, ACER1122905, ACER1200942. Conversely, since TPL has failed to produce emails in native format (or with appropriate load files), TPL has deprived Acer of the type of information that TPL incorrectly claims Acer’s native production fails to include.

I further disagree with your conclusory assertion that TPL has already met “similar obligations” in producing documents to Acer. As of my March 24th letter, none of the documents produced by TPL were in native format or were otherwise produced in a reasonably usable form. Further, none of TPL’s emails were produced in any folder structure or by custodian. Again, please advise whether TPL is prepared to re-produce all 2 million pages either in native format or in a text-searchable format with associated metadata and an appropriate “load file.”

Finally, your assertion that TPL’s production of documents related to the earlier Eastern District of Texas litigation were produced “in the form in which those documents were originally kept” is incorrect. Under the standards that TPL is seeking to impose on Acer, those emails should have been produced in their original native format and folder structure as kept by individual custodians rather than its litigation counsel.

Issue 2: Acer’s Collection of Documents.

TPL’s demand that counsel for Acer provide information concerning how it “physically”

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maintains documents and emails in the ordinary course of business is not appropriate. It also appears to be irrelevant to TPL's infringement claims. As I explained in my March 24th letter, relevant custodial information is readily apparent from emails produced by Acer. Notwithstanding my repeated requests, however, TPL has failed to adequately explain why this information is insufficient or why TPL needs any additional information. TPL's continued refusal to confirm whether it is willing to provide similar information concerning its own search and production of responsive documents undermines its continued demands.

Issue 4: Chip-Level and Product-Level Documents.

Acer has conducted an additional reasonable and diligent search for so-called "product-level" and "chip-level" documents. Acer has located additional non-privileged product-related documents, which must be processed by our vendor. We expect to produce these documents within the next several weeks. While we understand that Acer does not have any "chip-level" documents other than those previously produced, to the extent that any additional "chip level" documents exist, they would be included in Acer's forthcoming production.¹

Issue 5: List of Acer's Aliases or Code Names for the Accused Products.

We anticipate providing Gateway's response to TPL's Fourth Set of Interrogatories on Monday, May 16, 2011. Acer has also been conducting a reasonable and diligent inquiry in response to those interrogatories. However, we may require an additional week to complete Acer's responses. Please advise whether TPL will provide Acer with an additional one-week extension.

Issue 7: Production of Gateway's Documents.

Similar to Acer, Gateway is not in the business of manufacturing products and their components, and therefore does not have many "product-level" documents. Gateway employees also do not engage in component-based product design and therefore Gateway does not have "chip level documents" for the accused Gateway products. To the extent that Gateway has information concerning the chips and components used in the particular accused Gateway products, it is available to TPL at <http://support.gateway.com/us/en/support/default.aspx>. More specific information concerning product, chip and component design would likely be in the possession of the ODMs used by Gateway, such as Quanta, Wistron, Foxconn and Elitegroup Computer

¹ TPL's continued insistence that Acer produce "chip level" documents appears to be moot at this juncture given that it has issued subpoenas to the relevant chip and component manufacturers.

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Page 4

Systems, and the third-party manufacturers of the chips and components used by those ODMs. Nonetheless, Gateway is conducting an additional reasonable and diligent search for documents concerning the accused Gateway products and will produce any non-privileged, responsive documents found (if any) within the next several weeks.

Issue 8: Outstanding Issues With TPL's Productions.

In my March 24th letter, I raised several issues with respect to TPL's prior productions that your letter fails to address. First, I requested that TPL confirm whether TPL employed de-duplication or otherwise selectively produced one copy of an email from only one of several custodians that were identified on such emails. Second, I asked for clarification whether "mmp" as used in the cc field of many emails produced by TPL was a distribution list and who at TPL receives emails sent to that address.

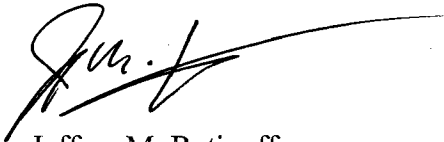
Third, I sought confirmation whether TPL searched for and produced responsive emails from Mac Leckrone and Dan Leckrone. I further requested that TPL provide sufficient examples, by Bates number, of emails that were directly produced from their respective accounts.

Finally, TPL has never identified the custodians that were subject to its search and production of documents. TPL has also avoided confirming whether its search for responsive documents included all relevant custodians that were involved in its licensing activities with Acer and other entities.

* * *

Please let me know your availability on Monday and Tuesday of next week to further discuss these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff M. Ratino", with a long horizontal flourish extending to the right.

Jeffrey M. Ratino

JMR:ch

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Case No. 5:08-cv-00877 PSG

**[PROPOSED] ORDER GRANTING
MOTION FOR ORDER SHORTENING
TIME ON DEFENDANTS'
EMERGENCY MOTION TO MODIFY
CASE SCHEDULE DUE TO ACER'S
DISCOVERY ABUSES**

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Case No. 5:08-cv-00882 PSG

Date: February 8, 2013
Time: 4:45 p.m.
Dept. Courtroom 4, 5th Floor
Judge: Hon. Paul S. Grewal

(Requesting February 8, 2013 Hearing Date)

1 The Court having considered Defendants' Motion for an Order Shortening Time to Hear
2 Defendants' Confidential Emergency Motion to Modify Case Schedule Due to Acer's Discovery
3 Abuses, and good cause appearing, the Court hereby grants the motion.

4 IT IS HEREBY ORDERED THAT the Defendants' Motion for Order Shortening Time is
5 GRANTED.

6 IT IS HEREBY FURTHER ORDERED THAT Defendants' Motion for an Order
7 Shortening Time to Hear Defendants' Confidential Emergency Motion to Modify Case Schedule
8 Due to Acer's Discovery Abuses will be heard on February 8, 2013 at 4:45 pm, and Plaintiff Acer
9 must file its response to Defendants' Motion for an Order Shortening Time to Hear Defendants'
10 Confidential Emergency Motion to Modify Case Schedule Due to Acer's Discovery Abuses by
11 February 8, 2013 by noon.

12 **IT IS SO ORDERED.**

13
14 Dated: _____

Honorable Judge Paul S. Grewal