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3 [Additional Attorneys on Signature Page]

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9 Attorneys for Defendants
10 TECHNOLOGY PROPERTIES LIMITED and
11 ALLIACENSE LIMITED

12 CHARLES T. HOGE, State Bar No. 110696

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16 San Diego, CA 92101
17 Telephone: (619) 231-8666
18 Facsimile: (619) 231-9593

19 Attorneys for Defendant
20 PATRIOT SCIENTIFIC CORPORATION

21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN JOSE DIVISION

24 _____)
25 HTC CORPORATION and HTC)
26 AMERICA, INC.,)

27 Plaintiffs,)

28 v.)

29 TECHNOLOGY PROPERTIES LIMITED,)
30 PATRIOT SCIENTIFIC CORPORATION)
31 and ALLIACENSE LIMITED,)

32 Defendants.)
33 _____)

Case No. 5:08-cv-00882 PSG

**DEFENDANTS' OPPOSITION TO
EMERGENCY MOTION REGARDING
APPLICATIONS ON THUNDERBOLT
PHONE (EXHIBIT 1628)**

Judge: Hon. Paul S. Grewal
Date: September 30, 2013
Time: 9:00 a.m.
Place: Courtroom 5, 4th Floor

1 **Introduction**

2 At issue is whether two applications, “CPU Usage Monitor” and “A1 CPU Tool” (“the
3 Apps”), must be removed from Exhibit 1628, the HTC Thunderbolt phone HTC produced as
4 HTCTPL_I00210195-220. The Court admitted Exhibit 1628 following testimony by two HTC
5 witnesses regarding the phone, including the Apps. HTC now complains that the Apps should be
6 excluded because Defendants did not separately list them on their exhibit list. This is the wrong
7 question, however. There is no dispute that Defendants disclosed their intent to use Exhibit 1628
8 “running” the Apps and that HTC did not object to this use. Accordingly, the proper question is
9 whether HTC waived its objection to the Apps. As demonstrated below, the answer is yes. In
10 addition, because the Apps have already been published to the jury without objection as proper
11 impeachment evidence, HTC can suffer no prejudice from the Apps’ admission. For these reasons,
12 HTC’s emergency motion should be denied.

13 **I. HTC WAIVED ITS OBJECTION TO THE APPS.**

14 On the night before trial commenced, September 22, 2013, Defendants gave notice of their
15 intent to use Exhibit 1628 with the Apps. Prior to the time the parties had established for the
16 exchange of exhibits, Defendants disclosed the Apps, provided links to their pages in the Android
17 app store and invited HTC to inspect the phone “running” the apps. HTC now claims that
18 Defendants did not identify the phone running the Apps as an exhibit because the notice email
19 used the word “items” instead of exhibits. This is demonstrably incorrect.

20 As the email shown below reveals, Defendants used the word “items” because the
21 disclosed list included both Exhibit 1628 and demonstratives. This is self-evident from the list
22 itself, which identifies the Thunderbolt phone running the Apps by exhibit number, while it
23 identifies no exhibit numbers for the other items. *See Ex. A.*

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1 **Subject:** HTC v. TPL et al. - Physical Demonstratives/Inspection Offer
 2 **Date:** Sunday, September 22, 2013 5:48:44 PM Pacific Daylight Time
 3 **From:** Thomas T. Carmack
 4 **To:** HTC Group
 5 **CC:** TPL-MMP-CAND, Charles Hoge

6 Counsel:

7 In advance of our 7pm exchange, we wanted to notify you our intent to use certain physical items tomorrow and give you the opportunity to inspect them if you so desire. They are as follows:

- 8 • The HTC Thunderbolt phone produced by HTC (Bates labeled HTCTPL_I00210199 and marked as Ex. 1628) running "A1 CPU Tool" (<https://play.google.com/store/apps/details?id=com.a1dev.cputool>) and "CPU Usage Monitor" (<https://play.google.com/store/apps/details?id=com.pocketappbuilders.cpuusagestatusbar>)
- 9 • A metronome
- 10 • Some of the items photographed in Ex. 556

11 If HTC would like to inspect any of these items, we will make them available at our offices tonight—just let us know the time and we will make arrangements.

12 If HTC plans to use any physical items tomorrow, please identify them so that we can determine whether we want to inspect them tonight.

13 We will send our demonstratives and a list of the exhibits we may use on direct exam at 7pm.

14 Regards,
 15 Tom

16 Defendants' identification of the Apps by name and the inclusion of the exact links HTC could follow to inspect and download the Apps leaves no doubt that HTC was fully aware of them. After Defendants sent the above disclosure email, three important things happened. First, both sides recognized Defendants' intent to offer the phone running the Apps as an exhibit. Second, HTC declined Defendants' invitation to inspect the phone. Finally, HTC failed to object to the phone, as disclosed and as actually used during trial.

17 In its response to Defendants' notice email, HTC repeatedly referred to Defendants' disclosures as "exhibits" and "physical exhibits." And, while HTC questioned Defendants' production of other physical items pictured in Exhibit 556, HTC raised no objection to the phone running the Apps. HTC also declined to inspect the phone and then raised no objection to the phone and Apps the next day before or during trial when they were used. *See* Ex. B.

1 **Subject:** RE: HTC v. TPL et al. - Physical Demonstratives/Inspection Offer
2 **Date:** Sunday, September 22, 2013 7:01:58 PM Pacific Daylight Time
3 **From:** Leary, Matt
4 **To:** Thomas T. Carmack
5 **CC:** TPL-MMP-CAND, Charles Hoge, z/HTC-TPL

6 Counsel:

7 HTC intends to use the following physical items tomorrow:

- 8 1. HTC One Smartphone: 32 GB; Model PN07200; MEID DEC: 256691437405582916
- 9 2. HTC G1: S/N HT852KV36764
- 10 3. HTC T-Mobile Pocket PC – Phone Edition: S/N HT236CF0953

11 If TPL would like to inspect any of these items, we will make them available tonight at our hotel near the court house.

12 We have a question regarding what we understand is TPL's intent to use physical exhibits that are photographed in Ex. 556. We are unaware that these physical exhibits were ever produced or made available to HTC at any point during the litigation. If that is incorrect, please let us know when the physical exhibits (as opposed to the photograph) were ever produced or made available for inspection. These exhibits were clearly within the scope of the discovery that HTC asked for during the discovery period. If they were not produced or made available during that period, HTC objects to any use of these physical exhibits.

13 HTC does not expect to inspect the physical exhibits you identified below.

14
15 Regards,
16 **Matthew J. Leary**
17 Cooley LLP
380 Interlocken Crescent • Suite 900
Broomfield, CO 80021-8023
Direct: (720) 566-4021 • Fax: (720) 566-4099

18 Following HTC's recognition of the phone running the apps as a physical exhibit,
19 Defendants' also characterized it as a physical exhibit that same evening. See Ex. C.

1 **Subject:** RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange
2 **Date:** Sunday, September 22, 2013 7:18:43 PM Pacific Daylight Time
3 **From:** Jed Phillips
4 **To:** Leary, Matt, Thomas T. Carmack
5 **CC:** TPL-MMP-CAND, Charles Hoge, z/HTC-TPL
6 Matt,
7 **In addition to the physical exhibits identified earlier,** Defendants intend to use the following exhibits
8 tomorrow:
9 Ex. 245;
10 Ex. 556;
11 Ex. 1626;
12 Please note, Defendants will update their exhibits and demonstratives to comply with Judge Grewal's
13 order regarding HTC's motion in limine addressing the prosecution of the '336.
14 Defendants' power point presentations will follow by separate email. If necessary, we will convert them
15 to pdf to make certain they fit within email limits.
16 Jed

17 After the September 22, 2013 disclosure of their intent to use Exhibit 1628 running the
18 Apps, Defendants renewed their notice each day. *See, e.g.*, Ex. D. HTC did not object.

19 WITNESSES:
20 Defendants, time permitting, expect to call the following witnesses tomorrow:
21 * Charles Moore
22 * Dan Leckrone
23 * Baher Haroun
24 * Gloria Felcyn
25 EXHIBITS:
26 **Any previously disclosed exhibits, plus the following:**
27 * Ex. 1
28 * Ex. 245
* Ex. 357
* Ex. 365
* Ex. 369
* Ex. 373
* Ex. 391
* Ex. 399
* Ex. 404

1 **II. THE APPS SHOULD BE ADMITTED BECAUSE THEY HAVE ALREADY BEEN**
2 **PUBLISHED TO THE JURY AND ARE THE PROPER SUBJECT OF REBUTTAL**
3 **TESTIMONY.**

4 Following Defendants' disclosure of intent to use Exhibit 1628 running the Apps, counsel
5 for Defendants demonstrated the Apps to the jury during opening statements. Day 1 Tr. 183:4-13.
6 HTC did not object. Defendants then attempted to use Exhibit 1628 running the Apps with Dr.
7 Oklobdzija. While HTC objected to this use, its sole basis was that use of the apps was not
8 disclosed in Dr. Oklobdzija's report. HTC did not object based on Defendants' alleged failure to
9 disclose the Apps with the Thunderbolt phone, as it does now. Day 2 Tr. 615:14-23.

10 During HTC's case in chief, two of its employees, Martin Fichter and Edward Liang,
11 testified that the CPUs in the accused HTC phones operate at a fixed frequency. Because the Apps
12 reveal that the Thunderbolt phone operates at multiple frequencies, the phone running the Apps is
13 proper impeachment evidence. When counsel for Defendants demonstrated the Apps to the jury
14 during Mr. Fichter's testimony, HTC did not object.¹ Thereafter, HTC agreed to the admission of
15 Exhibit 1628 and the Court admitted it subject to further discussion regarding the Apps.

16 Because the Apps have already been published to the jury as proper impeachment evidence,
17 and because Mr. Fichter had the opportunity to testify about why he didn't believe the Apps
18 rebutted his testimony, HTC will suffer no prejudice from the Apps' admission as part of Exhibit
19 1628. Further, because HTC has elicited testimony from its witnesses that the frequency of the
20 CPUs in its phones is fixed, running the Apps on Exhibit 1628 is properly within the scope of
21 Defendants' rebuttal case.

22 **Conclusion**

23 For the foregoing reasons, Defendants respectfully request that the Court deny HTC's
24 motion in its entirety.

25 ¹ HTC does not object to the admission of the Thunderbolt phone itself. Further,
26 both Mr. Fichter and Mr. Liang authenticated Exhibit 1628, and Mr. Liang testified about various
27 aspects of the phone and packaging that are unrelated to the Apps. For these reasons, the Court
28 should not reconsider the admission of Exhibit 1628 should HTC request it even if the Court
ultimately decides that the Apps must be removed.

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Dated: September 30, 2013

Respectfully Submitted,
AGILITY IP LAW, LLP

By: /s/ Thomas T. Carmack
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

Attorneys for Defendants
TECHNOLOGY PROPERTIES LIMITED
and ALLIACENSE LIMITED

KIRBY NOONAN LACE & HOGE

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

Attorneys for Defendant
PATRIOT SCIENTIFIC CORPORATION

1 JAMES C. OTTESON, State Bar No. 157781

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6 Menlo Park, CA 94025

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9 Attorneys for Defendants

10 TECHNOLOGY PROPERTIES LIMITED and

11 ALLIACENSE LIMITED

12 CHARLES T. HOGE, State Bar No. 110696

13 choge@knlh.com

14 KIRBY NOONAN LANCE & HOGE

15 35 Tenth Avenue

16 San Diego, CA 92101

17 Telephone: (619) 231-8666

18 Facsimile: (619) 231-9593

19 Attorneys for Defendant

20 PATRIOT SCIENTIFIC CORPORATION

21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN JOSE DIVISION

24 HTC CORPORATION and HTC
25 AMERICA, INC.,

26 Plaintiffs,

27 v.

28 TECHNOLOGY PROPERTIES LIMITED,
Patriot Scientific Corporation
and ALLIACENSE LIMITED,

Defendants.

Case No. 5:08-cv-00882 PSG

**DECLARATION OF THOMAS T.
CARMACK IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
EMERGENCY MOTION REGARDING
APPLICATIONS ON THUNDERBOLT
PHONE (EXHIBIT 1628)**

Judge: Hon. Paul S. Grewal

Date: September 30, 2013

Time: 9:00 a.m.

Place: Courtroom 5, 4th Floor

1 I, Thomas T. Carmack, 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. I have personal knowledge of the facts set forth below and, if called upon to do so,
5 could and would testify competently thereto.

6 2. Attached hereto as Exhibit A is a true and correct copy of email correspondence I
7 sent to counsel for HTC on September 22, 2013.

8 3. Attached hereto as Exhibit B is a true and correct copy of the response to Exhibit A,
9 from HTC counsel Matthew Leary, on the same day.

10 4. Attached hereto as Exhibit C is a true and correct copy of email correspondence
11 from my colleague Jed Phillips to counsel for HTC also on September 22, 2013.

12 5. Attached hereto as Exhibit D is a true and correct copy of email correspondence
13 between Mr. Phillips and counsel for HTC on September 23, 2013.

14 I declare under penalty of perjury under the laws of the United States of America that the
15 foregoing is true and correct. Executed this 30th day of September 2013, at Menlo Park,
16 California.

17
18 /s/ Thomas T. Carmack
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EXHIBIT A

Subject: HTC v. TPL et al. - Physical Demonstratives/Inspection Offer

Date: Sunday, September 22, 2013 5:48:44 PM Pacific Daylight Time

From: Thomas T. Carmack

To: HTC Group

CC: TPL-MMP-CAND, Charles Hoge

Counsel:

In advance of our 7pm exchange, we wanted to **notify you our intent to use certain physical items tomorrow** and **give you the opportunity to inspect them** if you so desire. They are as follows:

- **The HTC Thunderbolt phone** produced by HTC (Bates labeled HTCTPL_I00210199 and **marked as Ex. 1628** running "A1 CPU Tool" (<https://play.google.com/store/apps/details?id=com.a1dev.cputool>) and "CPU Usage Monitor" (<https://play.google.com/store/apps/details?id=com.pocketappbuilders.cpuusagestatusbar>))
- A metronome
- Some of the items photographed in Ex. 556

If HTC would like to inspect any of these items, we will make them available at our offices tonight—just let us know the time and we will make arrangements.

If HTC plans to use any physical items tomorrow, please identify them so that we can determine whether we want to inspect them tonight.

We will send our demonstratives and a list of the exhibits we may use on direct exam at 7pm.

Regards,
Tom

Thomas T. Carmack
Agility IP Law, LLP
149 Commonwealth Drive
Menlo Park, California 94025
Direct: (650) 318-3478
Main: (650) 227-4800
Fax: (650) 318-3483
www.agilityiplaw.com

EXHIBIT B

Subject: RE: HTC v. TPL et al. - Physical Demonstratives/Inspection Offer
Date: Sunday, September 22, 2013 7:01:58 PM Pacific Daylight Time
From: Leary, Matt
To: Thomas T. Carmack
CC: TPL-MMP-CAND, Charles Hoge, z/HTC-TPL

Counsel:

HTC intends to use the following physical items tomorrow:

1. HTC One Smartphone: 32 GB; Model PN07200; MEID DEC: 256691437405582916
2. HTC G1: S/N HT852KV36764
3. HTC T-Mobile Pocket PC – Phone Edition: S/N HT236CF0953

If TPL would like to inspect any of these items, we will make them available tonight at our hotel near the court house.

We have a question regarding what we understand is TPL's intent to use physical exhibits that are photographed in Ex. 556. We are unaware that these physical exhibits were ever produced or made available to HTC at any point during the litigation. If that is incorrect, please let us know when the physical exhibits (as opposed to the photograph) were ever produced or made available for inspection. These exhibits were clearly within the scope of the discovery that HTC asked for during the discovery period. If they were not produced or made available during that period, HTC objects to any use of these physical exhibits.

HTC does not expect to inspect the physical exhibits you identified below

Regards,

Matthew J. Leary

Cooley LLP
380 Interlocken Crescent • Suite 900
Broomfield, CO 80021-8023
Direct: (720) 566-4021 • Fax: (720) 566-4099

From: Thomas T. Carmack [mailto:tom@agilityiplaw.com]
Sent: Sunday, September 22, 2013 5:49 PM
To: z/HTC-TPL
Cc: TPL-MMP-CAND; Charles Hoge
Subject: HTC v. TPL et al. - Physical Demonstratives/Inspection Offer

Counsel:

In advance of our 7pm exchange, we wanted to notify you our intent to use certain physical items tomorrow and give you the opportunity to inspect them if you so desire. They are as follows:

- The HTC Thunderbolt phone produced by HTC (Bates labeled HTCTPL_I00210199 and marked as Ex. 1628) running "A1 CPU Tool" (<https://play.google.com/store/apps/details?id=com.a1dev.cputool>) and "CPU Usage Monitor" (<https://play.google.com/store/apps/details?id=com.pocketappbuilders.cpuusagestatusbar>)
- A metronome
- Some of the items photographed in Ex. 556

If HTC would like to inspect any of these items, we will make them available at our offices tonight—just let us know the

time and we will make arrangements.

If HTC plans to use any physical items tomorrow, please identify them so that we can determine whether we want to inspect them tonight.

We will send our demonstratives and a list of the exhibits we may use on direct exam at 7pm.

Regards,
Tom

Thomas T. Carmack
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EXHIBIT C

Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange
Date: Sunday, September 22, 2013 7:18:43 PM Pacific Daylight Time
From: Jed Phillips
To: Leary, Matt, Thomas T. Carmack
CC: TPL-MMP-CAND, Charles Hoge, z/HTC-TPL

Matt,

In addition to the physical exhibits identified earlier, Defendants intend to use the following exhibits tomorrow:

Ex. 245;
Ex. 556;
Ex. 1626;

Please note, Defendants will update their exhibits and demonstratives to comply with Judge Grewal's order regarding HTC's motion in limine addressing the prosecution of the '336.

Defendants' power point presentations will follow by separate email. If necessary, we will convert them to pdf to make certain they fit within email limits.

Jed

From: Leary, Matt [mailto:mleary@cooley.com]
Sent: Sunday, September 22, 2013 7:08 PM
To: Thomas T. Carmack
Cc: TPL-MMP-CAND; Charles Hoge; z/HTC-TPL
Subject: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Counsel – the parties agreed to a 7pm exchange of exhibits/demonstratives/witnesses. HTC sent its side of this exchange at 7:00pm as agreed.

We have still not received any of TPL's demonstratives or list of witnesses. Please send them immediately. If you believe you have already sent them, please double-check to ensure that the size of the email is reasonable.

Matthew J. Leary

Cooley LLP
380 Interlocken Crescent • Suite 900
Broomfield, CO 80021-8023
Direct: (720) 566-4021 • Fax: (720) 566-4099

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EXHIBIT D

Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange
Date: Monday, September 23, 2013 7:39:55 PM Pacific Daylight Time
From: Jed Phillips
To: Leary, Matt
CC: Trial Team, HTC Cooley

Matt--The slides are correct, but Dr. O should be on the list, though we may not get to him.

-----Original Message-----

From: Leary, Matt [<mailto:mleary@cooley.com>]
Sent: Monday, September 23, 2013 7:36 PM
To: Jed Phillips
Cc: Trial Team; HTC Cooley
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Jed -- Given that these slides start with Dr. O's resume, can you please confirm that these are in fact the demonstratives for the four witnesses identified below (which does not include Dr. O) ?

Matthew J. Leary
Cooley LLP
380 Interlocken Crescent * Suite 900
Broomfield, CO 80021-8023
Direct: (720) 566-4021 * Fax: (720) 566-4099

-----Original Message-----

From: Jed Phillips [<mailto:jed@agilityiplaw.com>]
Sent: Monday, September 23, 2013 7:28 PM
To: Leary, Matt; z/HTC-TPL
Cc: Trial Team
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Matt,

Here is the second.

Best,

Jed

-----Original Message-----

From: Jed Phillips
Sent: Monday, September 23, 2013 7:19 PM
To: 'Leary, Matt'
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Matt,

I'll break it down now. It will take a second. In the interim, here is the email without the attachment, so you have everything else. Please note that if we are unable to reach a stipulation on Sina Dena, we'll call him, but that is tentative at this point. Also, I inadvertently omitted Ex. 367 from the below list.

TPL doesn't have any objections to the exhibits HTC identified.

Best,

Jed

Counsel-

WITNESSES:

Defendants, time permitting, expect to call the following witnesses tomorrow:

- * Charles Moore
- * Dan Leckrone
- * Baher Haroun
- * Gloria Felcyn

EXHIBITS:

Any previously disclosed exhibits, plus the following:

- * Ex. 1
- * Ex. 245
- * Ex. 357
- * Ex. 365
- * Ex. 369
- * Ex. 373
- * Ex. 391
- * Ex. 399
- * Ex. 404
- * Ex. 406
- * Ex. 407
- * Ex. 440
- * Ex. 441
- * Ex. 451
- * Ex. 532
- * Ex. 594
- * Ex. 1334
- * Ex. 1431
- * Ex. 1618
- * Ex. 1619
- * Ex. 1620
- * Ex. 3105
- * Ex. 3106
- * Ex. 3107
- * Ex. 3013
- * Ex. 3033
- * Ex. 3332

We believe this list is complete, however to the extent additional exhibits are included in the attached demonstrative slides, Defendants intend to use those as well.

DEMONSTRATIVES:

- * Wafer Sample
- * Chip Sample
- * HTC Thunderbolt - torn down
- * "Intel The Making of a Chip with 22nm-3D Transistors": <https://www.sendthisfile.com/NPeeU4tPFdTcH2k6vNpOpJS0>
- * Attached power point slides in pdf format

-----Original Message-----

From: Leary, Matt [<mailto:mleary@cooley.com>]
Sent: Monday, September 23, 2013 7:09 PM
To: Jed Phillips
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Jed -- Have you sent the two 7Meg versions?

-----Original Message-----

From: Leary, Matt
Sent: Monday, September 23, 2013 7:04 PM
To: 'Jed Phillips'
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

I have not rx'd it yet. 14 Meg is iffy. Two 7Meg files should work fine. Please send them that way.
-M

-----Original Message-----

From: Jed Phillips [<mailto:jed@agilityiplaw.com>]
Sent: Monday, September 23, 2013 7:02 PM
To: Leary, Matt
Subject: RE: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

Matt--I've sent the list, but the pdf'd slides are ~14mb. Let me know if it doesn't come through in the next few minutes and I'll break it down for you.

Best,

Jed

-----Original Message-----

From: Leary, Matt [<mailto:mleary@cooley.com>]
Sent: Monday, September 23, 2013 6:43 PM
To: Jed Phillips
Subject: Automatic reply: HTC/TPL - Exhibit/Demonstrative/Witness-list Exchange

I will be at trial starting Monday, September 23, and will be slow returning calls and emails. If this is urgent, please contact Joy Spalding at 720 566 4141.

Thank you,
-Matthew Leary

This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. If you are the intended recipient, please be advised that the content of this message is subject to access, review and disclosure by the sender's Email System Administrator.

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