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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: TECHNOLOGY PROPERTIES LIMITED, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Debtor.	Case No.: 13-51589-SLJ-11 Creditor Charles H. Moore's Notice of Hearing on His Supporting Motion To Appoint Chapter 11 Trustee and To Remove Debtor In Possession Chapter 11 Date: January 23, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

NOTICE OF HEARING ON CREDITOR CHARLES H. MOORE'S SUPPORTING MOTION (TO THE CREDITOR'S COMMITTEE MOTION) FOR ORDER APPOINTING CHAPTER 11 TRUSTEE AND REMOVING DEBTOR IN POSSESSION

To: The Debtor, The United States Trustee, The Official Committee of Unsecured Creditors, Secured Creditors and Other Parties In Interest:

NOTICE IS HEREBY GIVEN of the following:

1. On March 20, 2013, (the "Petition Date") Technology Properties Limited LLC (the "Debtor") commenced the above-entitled Chapter 11 bankruptcy case by filing a Voluntary

Petition in this Court.

2. A trustee has not been appointed for the Debtor, and it has continued to function as the debtor-in-possession pursuant to 11 U.S.C. Sec. 1107 and 1108.

3. On March 28, 2013, the Office of The United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") in this case, pursuant to 11 U.S.C. Sec. 1102.

4. On December 16, 2013, the Committee filed the Motion Of Creditors' Committee For Orders: (1) Directing the Appointment of a Chapter 11 Trustee; and (2) Directing The Debtor and Daniel E. Leckrone To Appear and Show Cause Why They Should Not Be Held In Contempt of Court For Violation of this Court's Order [Docket 313] (the "Motion"). The Committee's Motion requests that that the Court enter an order (a) appointing a chapter 11 trustee in this case and (b) directing the Debtor and its responsible individual Daniel E. Leckrone to appear and show cause why they should not be held in contempt of court for their illegal and detrimental conduct in this case.

5. On December 27, 2013, Creditor Charles H. Moore ("Moving Party Moore") filed his "Supporting Motion (To The Creditor's Committee Motion) for Order Appointing Chapter 11 Trustee and Removing Debtor In Possession" ("Creditor Moore's Motion"). Creditor Moore's Motion supports and joins in the Committee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee (Part (1) of Paragraph 4 above).

6. Creditor Moore's Motion is based upon this Notice, on the "Declaration of Charles H. Moore In Support of His Supporting Motion To Appoint Chapter 11 Trustee" submitted herewith; on his memorandum of points and authorities in support of motion submitted herewith; in his request for judicial notice in support of motion submitted herewith; on the pleadings and papers on file herein; on such reply papers as may be filed subsequently; and on such oral and documentary evidence and argument as may be presented at the time of the hearing.

7. A hearing to consider approval of the Committee's Motion, and of Creditor Moore's Motion, will be held on **January 23, 2014, at 2:00 p.m. (Pacific Standard Time)**

before the Honorable Stephen L. Johnson, United States Bankruptcy Judge, United States Courthouse and Federal Building, 280 South First Street, Room 3099, San Jose, CA 95113.

8. Pursuant to 9014-1(c)(1) of the Bankruptcy Local Rules for the Northern District of California, the deadline for serving and filing of written objections to Creditor Moore's Motion is fourteen (14) days in advance of the hearing (January 9, 2014), and the deadline for serving and filing of written replies to any such objections is seven (7) days in advance of the hearing (January 16, 2014).

9. Creditors and parties in interest with questions or who desire copies of Creditor Moore's Motion may contact counsel for Creditor Moore at the contact information provided at the top of the first page of this notice.

Dated: December 27, 2013

CHILES and PROCHNOW, LLP

By: *s/Kenneth H. Prochnow*
Kenneth H. Prochnow
Attorneys for Creditor Charles H. Moore

/////

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: TECHNOLOGY PROPERTIES LIMITED, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Debtor.	Case No.: 13-51589-SLJ-11 **Creditor Charles H. Moore's Points and Authorities in Support Supporting Motion To Appoint Chapter 11 Trustee and To Remove Debtor-In-Possession** Chapter 11 Date: January 23, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

The Committee of Creditors has moved to appoint a Chapter 11 Trustee and to remove debtor-in-possession Daniel Leckrone, with hearing set for the above date and time. Creditor Charles H. Moore hereby submits his supporting motion for the same relief – for appointment of a Chapter 11 Trustee and to remove Daniel Leckrone as debtor-in-possession in this Chapter 11 proceeding.

1. Authority for Appointment of a Trustee; Removal of the Debtor-in-Possession

Section 1104 of Title 11 (the "Code") authorizes appointment of a trustee or examiner under the following circumstances:

> (a) At any time after the commencement of the case but before confirmation of a plan, on the request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee –
>
> (1)For cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2)If such appointment is in the best interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders if securities of the debtor or the amount of assets or liabilities of the debtor.

11 USC Sec. 1104(a)**.**

a. **Who may move for Section 1104(a) relief?** Section 1104(a) affords standing to any "party in interest" to this proceeding. "Party in interest" is not defined in the Code; however, according to Section 1109, "parties in interest" include "the debtor, the trustee, **a creditors' committee**, an equity security holders' committee, **a creditor**, an equity securities holder, or any indenture trustee" (**emphasis** supplied). Here, the moving party – the creditors' committee – is clearly authorized by the Code to move for a trustee and to replace the debtor-in-possession. Similarly, Charles H. Moore, a creditor in this proceeding, is also a "party in interest," who would be authorized to move under Section 1104(a) in his own right and who here supports the pending motion of the creditor's committee motion for Section 1104(a) relief.

b. **What burden does the moving party carry in seeking Section 1104(a) relief?** Here, the statute is a bit misleading. On its face, Section 1104(a)(1) sets out four bases for removal for cause – fraud, dishonesty, incompetence and gross mismanagement – and states an imperative: if any of the four bases is present, the debtor-in-possession "shall" be removed through appointment of a trustee.

In practice, however, "the appointment of a trustee in a chapter 11 case is an extraordinary remedy." A.RESNICK & H.SOMMER, 7 COLLIER ON BANKRUPTCY [16TH ED.] Sec. 1104.02[3][b][i], at 1104-9 [Rel. 124-12/2012], *citing, inter alia, In re Sovereign Estates, Ltd.* (Bankr. E.D. Pa 1989), 104 B.R. 702, 704-05; *In Re Anchorage Boat Sales, Inc.* (Bankr. E.D.N.Y. 1980), 4 B.R. 635, 644-45 (appointing trustee). Moving parties here must acknowledge the "strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee," 7 COLLIER ON

BANKRUPTCY, *supra, citing, inter alia, Committee on Dalkon Shield Claimants v. A.H. Robins Co., Inc.* (4th Cir. 1987), 828 F.2d 239, 241-42 (declining to appoint trustee despite debtor misconduct); *In Re Parker Grande Development, Inc.* (Bankr. S.D. Ind. 1986), 64 B.R. 557, 560-63 (acknowledging presumption in favor of debtor-in-possession but nonetheless appointing trustee); *In Re Evans* (Bankr. W.D. Tex. 1985), 48 B.R. 46, 47-49 (acknowledging presumption but nonetheless appointing trustee).

This court need not hold a full evidentiary hearing on a motion for appointment of a trustee. *In Re Casco Bay Lines, Inc.* (B.A.P. 1st Cir. 1982), 17 B.R. 946, 950-52*; In Re Ionosphere Clubs, Inc.* (Bankr. S.D.N.Y. 1990), 113 B.R. 164, 167-68. Whether or not an evidentiary hearing is ordered, the party moving for appointment of a trustee (here, the creditors' committee with Creditor Moore in support) must carry the burden of proof. 7 COLLIER ON BANKRUPTCY, *op cit.*, Sec. 1104.02[4][b] "Procedures," at 1104-20 (citations omitted). The courts differ on whether the standard of proof is preponderance of the evidence (e.g., *Keeley & Grabanski Land Partnership v. Keeley* (B.A.P. 8th Cir 2011), 455 B.R. 153, 161-63 (rejecting Third Circuit clear and convincing evidence standard as inconsistent with later Supreme Court decision), or clear and convincing evidence *(e.g., Official Committee of Asbestos Claimants v. G-1 Holdings, Inc.* (3d Cir. 2004), 385 F.3d 313, 319-21.

Collier suggests that the "clear and convincing evidence" standard represents the majority position, 7 COLLIER ON BANKRUPTCY, *supra*, at 1104-21. Creditor Moore can find no applicable Ninth Circuit authority on the question, so this argument will assume that the evidence in support of appointment of a trustee must be clear and convincing.

The need for replacement of Mr. Leckrone as debtor-in-possession, and for appointment of a Chapter 11 trustee in his place, could not be clearer; nor could the evidence in support of motion be more convincing.

2. ***Removal and replacement for cause – Section 1104(a)(1).***

As noted above, the stated bases for "cause" upon which a trustee "shall" be appointed "include[e] fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management." The creditor's committee here makes a showing of clear and convincing evidence of fraud and dishonesty by the debtor-in-possession – his appropriation of all proceeds of an uncertain number of non-MMP licenses, without notice to or approval by the creditors' committee (per negotiated, court-ordered procedure); without accounting for the proceeds of those licenses; and without provision that the creditor's committee retain 20% of the gross proceeds in partial payment of creditor claims.

Of significance here: the unknown licenses issued by Mr. Leckrone's separate, wholly owned company (Alliacense) are indeed non-MMP licenses. As they must be: Patriot and Creditor Moore were previously victimized by Alliacense issuance of an MMP license to a major Silicon Valley electronics firm, in which Mr. Leckrone, pre-bankruptcy, sought to convert the majority of the license proceeds to his own use by claiming that the license fee was split 80% for TPL's Non-MMP Patents and 20% for the MMP Portfolio. This supposed negotiation was, to coin a phrase, patently absurd: the MMP Portfolio would represent the overwhelming majority of value in any mix of its patents with TPL's Non-MMP Patents.

Patriot filed litigation and settled that litigation, gaining oversight through PDS of all future MMP Portfolio licensing by Mr. Leckrone and Alliacense; more to the point, not only must the terms of license be disclosed to PDS prior to issuance but the license must itself be signed by Carl Johnson (the Patriot representative on the PDS board).

PDS/Patriot oversight prevents Mr. Leckrone and Alliacense for making off with the gross proceeds of any MMP Portfolio license written by Alliacense.

The creditor's committee had not previously been burned in the same fashion – until today, as evidenced by its present motion. The court will surely hear argument from Mr. Leckrone and from Alliacense that its order was ambiguous and allowed for Alliacense issuance of licenses and appropriation of proceeds without committee oversight, approval or knowledge.

But Alliacense's expected argument amounts to nothing more than an admission that Mr. Leckrone (himself a lawyer, represented by bankruptcy lawyers here, with his attorney daughter functioning as TPL's in-house counsel and with a lawyer/son running Mr. Leckrone's wholly owned, hopelessly conflicted company Alliacense), has violated only the spirit of this Court's order (to his advantage) while obeying its letter.

The simple fact is that the committee desired, and this Court ordered, notice and approval of non-MMP licenses to be issued through Alliacense for TPL's benefit. Mr. Leckrone and Alliacense have violated this provision for notice and approval. Several million dollars in licensing proceeds have thus gone missing, and remain unaccounted for and unavailable to the Committee for its use in addressing creditor claims.

This Court is left with a compelling case for removal for debtor fraud and dishonesty.

Section 1104(a), however, imposes other duties upon the debtor: its four bases for removal are not exhaustive but are merely suggestive. See 7 COLLIER ON BANKRUPTCY, *supra*, Sec. 1104.02[3][c], at 1104-11 ("Use of the word 'including' means that the [four] grounds listed are not exclusive and that a finding of cause [for appointment/removal] may be based on other factors as well"), *citing In re Marvel Entertainment Group, Inc.* (3d Cir. 1998), 140 F.3d 463, 472.

The present case is informed by the following decisions representing trustee removal above and beyond the four stated factors of the statute itself -

- *In re Oklahoma Refining Co.* (10th Cir. 1988), 838 F.2d 1133, 1136 (debtor in possession failed to keep adequate records and to file reports, coupled with <u>a history of questionable transactions between the debtor and affiliated companies</u>; trustee appointed);

- *In re Embrace Systems Corp.* (Bankr. W.E. Mich. 1995), 178 B.R. 112, 128-29 (debtor's principal had irreconcilable conflict through interest in another enterprise seeking to acquire debtor's technology; principal more concerned with his other enterprise than with the debtor, and an independent, disinterested person was necessary to manage the debtor and investigate various causes of action that might exist; underlying conflicts and self-dealing held to constitute cause for <u>court *sua sponte* appointment</u> of a trustee);

- *Keeley & Grabanski Land Partnership v. Keeley, supra*, 455 B.R. at 153, 163-65 (controlling partner rented land from debtor/partnership at below market rate and failed to move case forward; appointment of trustee affirmed under both "cause" and 1104(a)(2) "best interests" standards);

- *In re Cajun Electrical Power Coop Inc.* (5th Cir. 1995), 69 F.3d 746, rehearing granted and result reversed, 74 F.3d 599, 600 (conflicts among debtor's cooperative and debtor in possession failure to collect payments due from family members provided basis for appointment of trustee);

- *In re Marvel Entertainment Group, supra*, 140 F.3d at 472-74 (intense, irreconcilable acrimony between debtor and creditors; trustee appointed);

- *In re Celeritas Techs, LLC*, (Bankr. D. Kan. 2011), 446 B.R. 514, 519-21 (acrimony, coupled with debtor using bankruptcy as litigation tactic and filing of reorganization proposals that were mere ruses, led to finding of cause for appointment of trustee under 1104(a)(1) as well as "best interests" finding for such appointment under 1104(a)(2);

- *In re Ionosphere Clubs, Inc., supra*, 113 B.R. at 168-72 (debtor's consistent failure to meet its own operating projections or to satisfy requirements for its own plan proposals required appointment of a trustee under both "cause" and "best interests" criteria);

- *In re Bibo, Inc.* (9th Cir. 1996), 76 F.3d 256, 259 (Ninth Circuit affirmed appointment of trustee where debtor in possession was looting estate through use of an independent company he hired to provide management services to the debtor; compare, the Alliacense relationship to debtor TPL here, where Mr. Leckrone's wholly owned licensing company Alliacense is the sole source of revenue to TPL and receives compensation, separate and apart from TPL and from control by this Court, for its licensing efforts and is reimbursed for supposed expenses, which reimbursements reduce the net revenues available for TPL).

No man can serve two masters. As debtor in possession, Mr. Leckrone here serves this Court and TPL's creditors; through Alliacense, he serves his own interests, and those of his family members, by owning and controlling the means to Debtor TPL's revenues. The only solution to this conflict is to break it: Mr. Leckrone should serve Alliacense; the creditors' committee should achieve appointment of an independent, disinterested professional to run Debtor TPL and to secure their interests in its revenue.

And here, an end to the conflict of interest will also launch TPL (and Patriot, and Mr. Moore, all dependent upon MMP Portfolio revenues) in a promising new direction. This year has seen unremitting attacks by courts and commentators; by patent practitioners and politicians, on so-called “patent trolls.” Alliacense here finds itself in the unenviable and unavoidable position of bearing that label. Indeed, within the past few days, in a ruling against Debtor TPL on one of the very non-MMP patents at issue here, the International Trade Commission has, mid-course, changed the rules of the game and announced that from now on, licensing efforts alone will not suffice to demonstrate a “domestic industry” in need of protection from infringement (see Exhibit 4 to request for judicial notice submitted herewith).

For Alliacense, the handwriting is not on the wall; it is at the bottom of the ITC decision. Even if there were not grounds aplenty for removal for cause of Mr. Leckrone as debtor in possession, this ITC sea change – in a decision not only on point but actually involving TPL and the licensing of its non-MMP patents – forces a dramatic change in course for those licensing or litigating against patent infringers.

Fortunately for Debtor TPL, Mr. Moore remains an owner of his MMP patents; he can and will lend his name and his testimony to protect patents that he himself practices (he builds on his invention by building chips that employ it and carry it forward).

No stronger or more dramatic case for removal of a debtor in possession can be imagined. And the result here will favor all concerned, including Mr. Leckrone who stands, post-bankruptcy, to resume ownership and control over a TPL that will continue to receive MMP licensing proceeds for years to come.

3. Best interests of the Estate – Section 1104(a)(2).

In many cases, the “interests” standard of Section 1104(a)(2) coincides with the “cause” criteria of Section 1104(a)(1); that is, in the typical case the best interests of the estate will be satisfied by appointment of a trustee only if a showing of cause for the appointment is made out under Section 1104(a)(1). See generally 7 COLLIER ON BANKRUPTCY, *op cit.*, Sec. 1104.02[3][d][i] – 1104.02[3][d][ii], at pp. 1104-14 through 1104-16. Collier suggests that a “best interests of the Estate” scenario, separate and apart from any showing of 1104(a)(1) "cause," might exist "if creditors and equity security holders have entirely lost confidence in the current management of the debtor." *Ibid.*, Sec. 1104.03[3][d][iii], at 1104-16.

Here, creditors and this Court were promised a 100% plan many months ago, coupled with a quick exit from bankruptcy. The debtor has instead proposed a plan that, in its initial form, apparently would continue to infinity, with no assurance of creditor payment or a date for emergence from bankruptcy. TPL's creditors and this Court can have little confidence in TPL's prospects under current management. And the ITC has now changed the rules for litigating injunctive actions, in a way that precludes TPL and Alliacense from effective action to protect TPL's patents and their revenues. <u>Any</u> confidence in present management would be misplaced.

This Court has already ended exclusivity, in part because of concern that the reorganization plan proposed by debtor reflected only debtor in possession desires rather than creditors' committee input and negotiation. Plainly, present debtor in possession, running a wholly owned licensing company that controls debtor's revenues has been incapable of setting aside his own financial interests and concerns in his licensing company to address the concerns of the creditors' committee or to allay the committee's all-too-real fears that debtor in possession is maximizing his return outside of bankruptcy at the expense of meeting creditor obligations before this Court. The war on patent trolls may not be over, but debtor in possession's business model for TPL – the use of Alliacense to license its patents – is already a casualty.

TPL needs the fresh start and new direction that will follow when new TPL management carries out the creditors' committee reorganization plan.

This is the unusual case in which there is an independent basis for claiming that the best interests of the debtor will be served by appointment of a trustee – as well as clear and convincing evidence of cause for appointing that trustee.

4. Conclusion

For the reasons and on the authorities stated, the creditors' committee and Creditor Moore have provided this Court with clear and convincing evidence that cause exists for the appointment of a chapter 11 trustee, along with evidence that appointment of that trustee will serve the best interests of all concerned. This Court should enter its order granting the creditor's committee motion for appointment of a chapter 11 trustee and Creditor Moore's motion for the same relief, to permit this case to proceed to and through plan approval, reorganization and the payment of all creditor claims though the plan submitted by the creditors' committee and now before this Court.

Respectfully submitted,

Dated: December 26, 2013

Chiles and Prochnow, LLP

By: *s/Kenneth H. Prochnow*
Kenneth H. Prochnow
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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: TECHNOLOGY PROPERTIES LIMITED, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Debtor.	Case No.: 13-51589-SLJ-11 **Declaration of Charles H. Moore In Support of Supporting Motion To Appoint Chapter 11 Trustee and To Remove Debtor-In-Possession** Chapter 11 Date: January 23, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

I, Charles H. Moore, declare:

1. I am over the age of 18 and am competent to and would testify to all matters set forth in this Declaration if called upon to do so as a witness.

2. I am a 1960 graduate of Massachusetts Institute of Technology where I received a Bachelor's of Science degree in Physics. Thereafter I engaged in post-graduate studies in mathematics at Stanford University. My work experience has included many diverse areas including programming to predict Moonwatch satellite observations at the Smithsonian Astrophysical Observatory, programming to calculate satellite orbits, electron beam steering at

the Stanford Linear Accelerator Center, and programming a real-time gas chromatograph on a minicomputer. I am known internationally for inventing the Forth computer language in 1968.

3. In the 1980s I concentrated on developing microprocessor chips. During that time I developed the Sh-Boom microprocessor chip in collaboration with Russell Fish, out of which work the patents eventually called the "Moore Microprocessor Patent" ("MMP") portfolio were derived. Russell Fish and I are indicated to be the inventors of the series of patents of the portfolio. Since 2005, MMP patent licenses have been issued to third parties, generating revenues in excess of $300,000,000. I am informed and believe that additional licensing revenues of at least that amount could be expected through reasonable licensing and litigation efforts with respect to the MMP portfolio.

4. I am informed and believe that by 2005, Russell Fish's rights to the MMP Portfolio of patents had been transferred to Patriot Scientific Corporation ("Patriot"). Meanwhile, on or about October 21, 2002, through a so-called "Commercialization Agreement" or "ComAg," I had hired a licensing company, Technology Properties Limited (the debtor in these proceedings; hereafter, "TPL") to evaluate the market for licensing the MMP portfolio to third parties and to generate royalties. Under my 2002 ComAg agreement, TPL was to pay me 55% of the net recovery TPL realized from its licensing of the MMP Portfolio. At all pertinent times, I am informed and believe that attorney Daniel Leckrone has been the owner and chief executive officer of TPL.

5. In or about 2003, I became the Chief Technology Officer of TPL. I remained in that position until 2007. In that capacity, I was the most knowledgeable TPL employee concerning the MMP portfolio attributes (logically, as the inventor), and learned of its marketability and value from my day to day activities at TPL. I reviewed many of TPL's product analyses, teardown studies, claim charts, DeCaps, relevant (infringing) revenue analyses by infringers, and similar information from which the strategies were derived to approach and notify over 400 infringing companies and to plan the appropriate terms of MMP licenses to require from those infringing parties. That, and the many reports I received from

TPL representatives over the years, provided me the ability to value the MMP technology for licensing purposes relative to TPL's other technologies.

6. TPL also acquired patent rights to other technologies during my employment, including portfolios known as "Fast Logic" and "Core Flash" (I will refer to these other patent portfolios as “TPL’s Non-MMP Patents”). As the TPL Chief Technology Officer, I had occasion to become informed about the TPL’s Non-MMP Patents and their underlying technologies. I then understood the relative value of TPL’s Non-MMP Patents compared to the MMP portfolio, and I know how TPL valued them relative to the MMP portfolio.

7. In or about April 2010, I learned – from Patriot, not from TPL or from Mr. Leckrone – that TPL had entered into a license transaction with a major Silicon Valley electronics firm. I am informed and believe that with this license, TPL granted the licensee rights not only under the MMP Portfolio of patents but also under TPL’s Non-MMP Patents. I was never given any notice by TPL of this multi-patent license; upon information and belief, Patriot only learned of it after the fact. I am informed and believe that the gross licensing fee received by TPL for this license was substantially less than what this major Silicon Valley firm should have paid for use of the MMP Portfolio technology.

8. However, the true loss to the MMP Portfolio – and to me, to Patriot and to TPL – was substantially greater. I understand that under this license negotiated by TPL and Mr. Leckrone, 20% of the proceeds were to be given to the MMP portion of the license, while 80% were allocated to TPL’s Non-MMP Patents (meaning the Mr. Leckrone would receive 80% of the total license fee, given his control over revenues accruing to TPL’s Non-MMP Patents).

9. Then and now, the MMP portfolio was far and away TPL's most valuable licensing asset. Under any reasonable royalty analysis, the contributions of TPL’s Non-MMP Patents to the total value of the April 2010 multi-patent license would have been minimal relative to the value of the MMP portfolio. Allocating less than 20% of the consideration received from Apple to the MMP portfolio, and permitting TPL to retain 80% of that consideration for its other technologies, was absurd.

10. I regarded the allocation of less than 20% of this major license to the MMP portfolio to be a breach of TPL's fiduciary duties to me under our licensing agreement.

11. I am informed and believe that Patriot felt the same way: Patriot filed a Santa Clara County Superior Court action against TPL. Patriot settled that action with an adjustment of the MMP portfolio license fees that TPL had received from the major Silicon Valley electronics firm. Upon information and belief, those fees now totaled some $960,000 (still a fraction of what an MMP portfolio license should have yielded, but better than the fractional portion of the license fee that had initially been assigned as the MMP portfolio share).

12. Of greater long-term significance to the health of the MMP portfolio, in its 2010 settlement with TPL, Patriot secured for itself advance notice and review of all future MMP portfolio licenses that TPL would issue through its Alliacense subsidiary.

13. At some point unknown to me, TPL spun off its Alliacense subsidiary. Alliacense was now a separate corporation, wholly owned by Mr. Leckrone (as was TPL).

14. I resigned as TPL's Chief Technology Officer in 2007, because I was not getting paid my 55% royalty. I re-negotiated my 2002 ComAg in late 2007, augmenting in part my entitlement to 55% of TPL's net MMP Portfolio receipts with an "off-the-top" advance of a much smaller percentage of TPL gross MMP Portfolio receipts. I then believed that a percentage of the gross was the only way for me to realize any return from my invention, because of repeated representations by Mr. Leckrone that TPL's expenses exceeded its licensing revenues.

15. TPL has received at least $120 million in revenues from licensing my MMP Portfolio of patents. Despite my entitlement to 55% of TPL's net MMP Portfolio revenues, I was paid only $11 million of that revenue to and through January 2013. The last payment of any kind that I received from TPL was $15,000, received on November 13, 2009.

16. I know from TPL's press releases that it wrote many MMP licenses between July 2008 and July 2012. I received no royalties related to those licenses, and no accounting with respect to any of the proceeds received by TPL with respect to those licenses. I was never paid any "off the top" portion of MMP licensing revenues received by TPL.

17. Following the episode concerning the mis-allocation of MMP portfolio licensing proceeds received by TPL and Mr. Leckrone from the major Silicon Valley electronics firm, I filed an action in Santa Clara County Superior Court against TPL, Alliacense, Mr. Leckrone and other individuals associated with him. My lawsuit was known as *Charles H. Moore v. Technology Properties Limited, LLC, et al*, and was assigned file no. 1-10-CV-183613 by the clerk of court, Santa Clara County Superior Court (the "*Moore v. TPL* State Court Litigation"). Mr. Leckrone and TPL filed a cross-complaint against me in the *Moore v. TPL* State Court Litigation.

18. In early 2012, I learned that Chet and Marcie Brown had obtained a ruling in their own lawsuit against TPL that would entitle them to some $10 million from TPL when that ruling was reduced to judgment.

19. On January 31, 2013, I agreed to a negotiated settlement of my claims against TPL, Alliacense, Mr. Leckrone and the other defendants. Although the terms of the settlement are confidential, the rights and obligations of TPL under the January 31, 2013 Settlement Agreement are being assumed under all plans of reorganization presently before this Court.

20. I have filed a creditor claim in this matter. My claim is contingent upon assumption of the January 31, 2013 Settlement Agreement by TPL. If the January 31, 2013 Settlement Agreement is not assumed by TPL, my creditor claim is for the $30 million due to me by TPL under my 2002 and 2007 ComAg agreements and their promise of 55% of net MMP Portfolio revenues to me. The January 31, 2013 Settlement Agreement replaces this TPL obligation to pay over 55% of net revenues with my acceptance of a smaller share (23.975% instead of 27.5% of MMP revenues paid by PDS, not by TPL). TPL, for its part, saw its share of MMP revenues increased from 22.5% of the net to 26.025% of MMP revenues paid out by PDS.

21. In addition, a major effect of the January 31, 2013 Settlement Agreement eliminates me as TPL's largest creditor, and allows the promulgation of reorganization plans that pay me nothing (given my agreement to accept a lesser share of PDS-source

MMP revenues to replace the 55% of the net that I had negotiated in my ComAg Agreements).

22. It was anticipated by all parties to the January 31, 2013 Settlement Agreement that the public announcement of settlement of all disputes between and among those with ownership or licensing interests in the MMP portfolio would be a boon to further licensing and litigation efforts.

23. Indeed, the moment TPL obtained my agreement to the January 31, 2013 Settlement Agreement, its representatives put a licensing agreement before me. This agreement, with a major automobile manufacture, had been negotiated in anticipation of the settlement, because the manufacturer had refused to sign off on the license without written assurance from me that the license was issued with my consent and approval.

24. I should of course had been paid my just-agreed percentage share of this multi-million dollar license, given that my settlement-based approval was critical to its issuance. TPL insisted, however, that this license was a pre-settlement negotiation, to which my percentage did not apply. Because I did not want to litigate an agreement that had yet to be reduced to writing, and break the peace just made, I allowed this license to be treated as pre-settlement, and I received none of its proceeds.

25. Notwithstanding this concession, I have since learned that this license is a subject of continuing dispute between Alliacense (Mr. Leckrone's licensing company) and PDS (which would here distribute licensing proceeds, 50/50, between Patriot and TPL). Alliacense insists on retaining expense and other supposed entitlements (benefitting Mr. Leckrone and reducing payments to Debtor TPL and to Patriot).

26. Under the January 31, 2013 Settlement Agreement, I am to receive consulting fees from PDS, for services I can provide in litigation (technical testimony and testimony from a patent owner who "practices" his invention – in my case, who manufactures microprocessor chips). An inventor who practices his patents (and thereby creates a domestic industry to be defended in patent and ITC litigation) is a valuable asset in an era of hostility to so-called "patent trolls" who aggregate patents and sue for

infringement without themselves creating any product or article of commerce from the invention.

27. Following the January 31, 2013 Settlement Agreement, through my counsel I offered my services to testify in ongoing litigation concerning the MMP portfolio.

28. My offer was not taken up in the TPL/Alliacense litigation before the International Trade Commission. That case was tried during 2013, with no involvement from me, and was lost before an ITC Administrative Law Judge. An appeal is pending.

29. A second trial was held later in 2013, before a jury in the Northern District of California. This time, my testimony was requested; indeed, in this second trial I sat with trial counsel as the face of the patents alleged to be infringed and as the business representative of the client. A jury verdict of infringement resulted in this trial, in favor of TPL and against the defendant HTC.

30. My representatives and I met with Mr. Leckrone, Alliacense and patent litigation counsel, shortly after the January 31, 2013 Settlement Agreement was signed. At that time, we urged that Alliacense take advantage of the favorable publicity of the settlement and the united front it showed to infringers, to settle one or two of the eleven pending claims of infringement before the ITC. Such settlements, on a confidential basis, would have exerted substantial pressure on the remaining defendants to "catch the [settlement] train before it left the station." I am informed and believe that Alliacense made no substantial efforts to resolve claims against the ITC defendants until shortly before trial, with the result that only one ITC defendant settled, for a nominal amount, and the other defendants successfully defended their infringing products before the ITC.

31. At trial before the Northern District, TPL trial counsel presented a compelling case for infringement by the defendant HTC. I was appalled, however, to hear testimony that TPL had issued some MMP licenses not because they were market rate but because TPL was short of funds; TPL trial counsel had to say during final argument that the jury should ignore such "fire sale" licenses in establishing damages.

32. Further, defense counsel argued to the jury that TPL through Alliacense had quoted an initial license fee to the major Silicon Valley electronics firm discussed earlier – of $1.5 billion. From this initial $1.5 billion demand, the evidence of the 2010 settlement gave an MMP license value of $960,000. Trial counsel for TPL argued for a reasonable value of $9 to $10 milllion for an HTC license; the jury's award of the same $960,000 (against HTC, another major electronics manufacturer) is a clear indication that TPL's abusive "mixed" license in 2010 dramatically and negatively impacted the damages the jury awarded to a similarly situated defendant at trial.

33. The Alliacense negotiation strategy cost the MMP Portfolio at least $8 million of a possible award against HTC; the loss will be compounded as HTC uses the limited $960,000 to cap its license fee for later and future products not covered by the verdict, and other manufacturers take that same number to the bank to undercut future licensing of the MMP portfolio.

34. Alliacense has conducted very little licensing activity on the MMP portfolio since the January 31, 2013 Settlement Agreement was signed. It now appears that Alliacense has instead devoted its efforts to TPL's Non-MMP Patents, with the result that licenses are being written without creditors' committee oversight or approval, and without any funds accruing for payment to TPL creditors. To all appearances, Alliacense is ignoring my MMP Portfolio (where licenses must be approved by PDS before issuing, and where revenues flow through PDS and not through Alliacense); it is instead licensing where its activities cannot be monitored or controlled, and its license proceeds cannot be secured for the benefit of TPL and its creditors.

35. By any measure, it is time for a fresh start to MMP portfolio marketing, by a licensor not tainted by past mistakes and low-yielding licensing, and not easily characterized and dismissed as a "patent troll" – a label that will surely be applied to Alliacense in its future marketing efforts. I urge this Court to salvage the MMP portfolio and to permit the TPL bankruptcy to proceed in an orderly and profitable manner under new management. A trustee should be appointed.

I hereby authorize submission of a copy of this declaration bearing my facsimile or electronic signature with the same purpose and effect as if the original were available.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration is executed on December 26, 2013.

C H Moore

Charles H. Moore

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Attorneys For Creditor Charles H. Moore

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: TECHNOLOGY PROPERTIES LIMITED, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, Debtor.	Case No.: 13-51589-SLJ-11 Creditor Charles H. Moore's Request For Judicial Notice In Support of - - Joinder In Creditor Committee Motion; and - Creditor Moore's Motion To Appoint Chapter 11 Trustee and To Remove Debtor In Possession [Bankruptcy Rule 9017; F.R. Evid 201] Chapter 11 Date: January 23, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

TO THE HONORABLE STEPHEN L. JOHNSON, UNITED STATES BANKRUPTCY JUDGE:

Creditor Charles H. Moore respectfully requests that pursuant to Bankruptcy Rule 9017 and Rule 201 of the Federal Rules of Evidence, this honorable Court take judicial notice of the following documents, attached as Exhibits hereto, for the purposes set out below:

Exhibit 1: An article from the June 4, 2013 New York Times, originally printed at Page B1 of the Times' New York Edition, which article is entitled "Obama Orders Regulators To Root Out 'Patent Trolls.'" This exhibit is not offered for the truth of matters asserted within it but for the

purpose of showing that the news media is currently reporting hostility by the Executive Branch to those fitting the definition of so-called "patent trolls."

<u>Exhibit 2</u>: An Op-Ed article from the June 5, 2013 New York Times, originally printed at Page A25 of the paper, which article is entitled "Make Patent Trolls Pay In Court." This exhibit is not offered for the truth of the matters asserted within it, but as a statement of anti-patent troll attitude and opinion by its three authors – the Chief Judge of the United States Court of Appeals for the Federal Circuit and two law professors.

<u>Exhibit 3</u>: An Internet news report, authored by Dan Graziano and dated June 25, 2013, entitled "ITC Plans New Action To Prevent Patent Trolls." This exhibit is not offered for the truth of the matters asserted within it, but as a report of reaction by the International Trade Commission, an Executive Branch agency, to calls by the Obama Administration (see Exhibit 1) for action against "patent trolls."

<u>Exhibit 4</u>: The United States International Trade Commission's December 19, 2013 "Notice of Commission Determination Terminating The Investigation With A Finding Of No Violation Of Section 337 [19 U.S.C. Sec. 1337]" in that matter known as "In the Matter of CERTAIN COMPUTERS AND COMPUTER PHERIPHERAL DEVICES, AND COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME," ITC Investigation No. 337-TA-841. This exhibit is offered for the truth of the fact (a) that the ITC has filed such Notice in a matter in which Technology Properties Limited, LLC (**Debtor TPL herein**) is a party, seeking relief against certain foreign entities for alleged infringement of certain of TPL's Non-MMP Patents; (b) that the ruling is against Debtor TPL (affirming Administrative Law Judge findings adverse to Debtor TPL as to three of four patents, and reversing an Administrative Law Judge finding of infringement that had been favorable to Debtor TPL as to the so-called '623 patent); and (c) the reversal rests in part on an ITC finding that "TPL has not demonstrated the existence of an article protected by the '623 patent." (The ITC echoed this finding with respect to the three affirmed, "noninfringing" patents, stating that "TPL failed to demonstrate the existence of a domestic industry because it failed to demonstrate the existence of articles practicing these patents.")

Alliacense is regrettably, irretrievably and irreversibly on the wrong side of the patent troll debate now embroiling the Executive Branch and its agencies, the courts and the court of public opinion. Mr. Leckrone's ownership of Alliacense has at all times constituted a demonstrable conflict of interest with Debtor TPL and the patent portfolios on which TPL relies for all of its revenues. Now, with TPL needing a life preserver to sustain its chances to survive and thrive on patent licensing revenues, Alliacense has proved to be an anchor.

The best interests of Debtor TPL will be served by appointment of a chapter 11 trustee and the implementation of the creditor's committee plan, which contemplates severance of all relationships between Alliacense and Debtor TPL with respect to those patent portfolios in which Debtor TPL has an ownership or licensing revenue interest.

The public and political clamor against "patent trolls" made severance of the TPL/Alliacense relationship desirable. The ITC's just-received ruling against Debtor TPL – with an adverse domestic industry ruling that rests on licensing that Debtor TPL carried out through Alliacense – makes that severance a necessity.

Respectfully submitted,

Dated: December 26, 2013

CHILES and PROCHNOW, LLP

By: Kenneth H. Prochnow
Kenneth H. Prochnow
Attorneys for Creditor Charles H. Moore

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Exhibit 1

The New York Times

June 4 2013

Obama Orders Regulators to Root Out 'Patent Trolls'

By EDWARD WYATT

WASHINGTON — One company threatened to sue 8,000 coffee shops, hotels and retailers for patent infringement because they had set up Wi-Fi networks for their customers. Another claimed that hundreds of small businesses were violating its patents by attaching a document scanner to an office computer system. One claimed rights to royalties from anyone producing a podcast.

Now the Obama administration is cracking down on what many call patent trolls, shell companies that exist merely for the purpose of asserting that they should be paid because they hold patents that are being infringed by some software or electronic process.

The companies exploded onto the technology scene in the last two years, accounting for more than half of the 4,000 patent infringement lawsuits filed in the United States last year, according to several studies, up from 45 percent the year before and from less than 30 percent in every prior year.

That surge can be traced partly to the very law that was supposed to stamp out some of the trouble. The America Invents Act, signed in 2011, made it illegal to file a single lawsuit claiming a whole bunch of defendants had infringed a patent in the same way. Now, a patent holder must file individual lawsuits against each company, which has caused the number of lawsuits to soar, patent experts say.

On Tuesday, President Obama took direct aim at the companies and their practices, announcing several executive orders "to protect innovators from frivolous litigation" by patent trolls.

Mr. Obama ordered the Patent and Trademark Office to require companies to be more specific about exactly what their patent covers and how it is being infringed. The administration also told the patent office to tighten scrutiny of overly broad patent claims and said it would aim to curb patent-infringement lawsuits against consumers and small-business owners who are simply using off-the-shelf technology.

But some big software companies, including Microsoft, expressed dismay at some of the proposals, saying they could themselves stifle innovation. A trade group known as BSA: The Software Alliance, which represents software companies, urged caution.

"Some of the White House proposals are problematic," Matt Reid, senior vice president for external affairs for the group, said in a statement.

Mr. Reid said a proposal to expand the patent office's program allowing for special review of computer-related patents "could inadvertently put at risk innovation for many industries that rely on software, from manufacturing to biotech." Changing measures that have been in effect for less than a year "before we see the results doesn't make sense," he said.

Some states have decided to act. Vermont passed a law last month that would allow companies singled out by patent-infringement lawsuits to sue their tormentors. Usually companies cannot fight back by countersuing because the patent trolls don't make anything that itself could violate a company's patents.

In Vermont, companies that bring patent lawsuits and lose could be forced to pay the legal fees of the winning side and damages up to $150,000. Vermont has one of the highest per-capita rates of issued patents in the country.

Lawmakers encountered resistance in 2011 to some of the measures Mr. Obama ordered on Tuesday. The opposition came from, among others, pharmaceutical companies that feared that the legislation would hinder their ability to defend their own patents.

Representative Robert W. Goodlatte, a Virginia Republican who is chairman of the House Judiciary Committee and drafting a bill to address the patent troll issue, said at a panel discussion Tuesday that the opposition was stiff enough that "it led a number of people to believe that it was going to delay overall patent reform."

Mr. Goodlatte said the jump in the number of lawsuits brought the issue back to the fore.

Arti K. Rai, a patent law professor at Duke University, said in an interview that those numbers "are a little bit manipulated."

There probably would still be more lawsuits without the provision in the 2011 law that required a plaintiff to file separate lawsuits, said Ms. Rai, who in 2009-10 was the administrator for the Office of External Affairs at the patent office.

But, she added, it was ironic that victims of patent infringement suits were asking for relief because of a law that was created to help them.

Microsoft expressed wariness about some of the president's plans. Horacio Gutierrez, deputy general counsel at Microsoft, said in a blog post that the company was "concerned and surprised" that the proposal "goes beyond patent assertion entities and instead targets software innovations more broadly."

Intellectual Ventures, one of the largest companies that specializes in owning and protecting patents, said it believes the provisions requiring more disclosure on ownership of a patent are "misguided and merit further discussion."

Senator Patrick Leahy, a Vermont Democrat who is chairman of the Senate Judiciary Committee and who was a primary sponsor of the 2011 law, said he backs the president's effort to suppress patent trolls.

"The United States patent system is vital for our economic growth, job creation, and technological advance," Mr. Leahy said in a statement. "Unfortunately, misuse of low-quality patents through patent trolling has tarnished the system's image."

Others described the patent-assertion entities in less polite language.

"These guys are terrorists," said John Boswell, chief legal officer for SAS, a business software and services company, said at a panel discussion on Tuesday. SAS was cited in the White House report as an example of a company that has spent millions to defend itself against what it believes are frivolous lawsuits.

"It does not cost much to be a troll and to make broad, vague demands," Mr. Boswell said in the White House report. "On the other hand, the risk to the company receiving a troll threat is enormous."

Exhibit 2

The New York Times

June 4, 2013

Make Patent Trolls Pay in Court

By RANDALL R. RADER, COLLEEN V. CHIEN and DAVID HRICIK

FROM an early age we are taught the importance of fighting fairly. But as the vast number of frivolous patent lawsuits have shown, too many people are rewarded for doing just the opposite.

The onslaught of litigation brought by "patent trolls" — who typically buy up a slew of patents, then sue anyone and everyone who might be using or selling the claimed inventions — has slowed the development of new products, increased costs for businesses and consumers, and clogged our judicial system.

Their business plan is simple: trolls (intellectual-property lawyers use less evocative terms like "non-practicing entities" and "patent-assertion entities") make money by threatening companies with expensive lawsuits and then using that cudgel, rather than the merits of a case, to extract a financial settlement. In the apt summary of President Obama, who on Tuesday announced a plan to stave off frivolous patent litigation, trolls just want to "hijack somebody else's idea and see if they can extort some money."

So far, legislative action against the practice has been meager. In May, Gov. Peter Shumlin, Democrat of Vermont, signed legislation — the first of its kind — that amends the state's consumer protection laws to empower its attorney general and others to sue patent holders who assert infringement claims against a Vermont business or resident in bad faith. But lawmakers in the remaining 49 states and in Congress, where no less than four bills now sit in various committees, have yet to legislate specifically against patent trolling.

Mr. Obama's latest proposals echo those in several bills, including making it harder for patent litigants to set up shell companies to hide their activities.

In the meantime, vexatious patent litigation continues to grind through our already crowded courts, costing defendants and taxpayers tens of billions of dollars each year and delaying justice for those who legitimately need a fair hearing of their claims. Trolls, in fact, filed the majority of the roughly 4,700 patent suits in 2012 — and many of those were against small companies and start-ups that often can't afford to fight back.

The problem stems largely from the fact that, in our judicial system, trolls have an important strategic advantage over their adversaries: they don't make anything. So in a patent lawsuit, they have far fewer documents to produce, fewer witnesses and a much smaller legal bill than a company that does make and sell something.

Because they don't manufacture products, they need not fear a counterclaim for infringing some other patent. They need not be concerned with reputation in the marketplace or with their employees being distracted from business, since litigation is their business.

Trolls, moreover, often use lawyers to represent them on a contingent-fee basis (lawyers get paid only when they win), allowing trolls to defer significant legal costs that manufacturers, who generally must pay high hourly fees, cannot.

With huge advantages in cost and risk, trolls can afford to file patent-infringement lawsuits that have just a slim chance of success. When they lose a case, after all, they are typically out little more than their own court-filing fees. Defendants, on the other hand, have much more to lose from a protracted legal fight and so they often end up settling.

Lost in the debate, however, is that judges already have the authority to curtail these practices: they can make trolls pay for abusive litigation.

Section 285 of the Patent Act, as well as Rule 11 of the Federal Rules of Civil Procedure, give judges the authority they need to shift the cost burden of litigation abuse from the defendant to the troll. But remarkably, judges don't do so very often: by our count, fees were shifted under Section 285 in only 20 out of nearly 3,000 patent cases filed in 2011.

Our judicial system's bias against shifting fees partly explains that reluctance, but Section 285 is flexible enough to help defend against trolls. And even though many cases settle, the prospect of paying fees will discourage aggressive suits and frivolous demands.

To make sure Section 285 is implemented with appropriate vigor, judges must look more closely for signs that a patent lawsuit was pursued primarily to take improper advantage of a defendant — that is, using the threat of litigation cost, rather than the merits of a claim, to bully a defendant into settling.

One sign of potential abuse is when a single patent holder sues hundreds or thousands of users of a technology (who know little about the patent) rather than those who make it — or when a patent holder sues a slew of companies with a demand for a quick settlement at a fraction of the cost of defense, or refuses to stop pursuing settlements from product users even after a court has ruled against the patentee.

Other indications of potential bullying include litigants who assert a patent claim when the rights to it have already been granted through license, or distort a patent claim far beyond its plain meaning and precedent for the apparent purpose of raising the legal costs of the defense.

Judges know the routine all too well, and the law gives them the authority to stop it. We urge them to do so.

Randall R. Rader is chief judge of the United States Court of Appeals for the Federal Circuit. Colleen V. Chien is an assistant professor of law at Santa Clara University. David Hricik is a professor of law at Mercer University.

Exhibit 3

ITC plans new action to prevent patent trolls

By Dan Graziano (http://bgr.com/author/dan-graziano/) on Jun 25, 2013 at 10:45 PM

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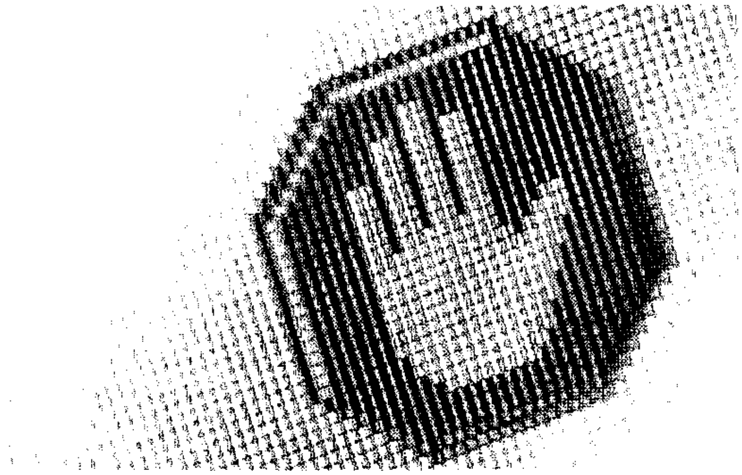

The International Trade Commission announced on Monday that it will be taking new steps to cut down on the number of lawsuits filed by patent trolls. According to *Reuters* (http://www.reuters.com/article/2013/06/24/us-usa-patents-litigation-idUSBRE95N1F920130624), the agency will soon require companies to show that they have "a significant presence in the United States" before filing a patent complaint. A pilot program has been created that will be led by six administrative judges who will determine whether a company has a large enough presence in U.S. production, licensing and research to utilize the court. The committee will determine whether or not a company qualifies within 100 days. The ITC has seen an increased number of patent lawsuits in recent years (http://bgr.com/2012/06/26/patent-troll-suits-total-29-billio/) brought on by non-practicing entities. The agency's latest move to prevent lawsuits from patent trolls (http://bgr.com/2013/06/20/motorola-patent-troll-lawsuit/) was praised by companies like Google (http://bgr.com/tag/google), HP, Intel and Oracle.

Exhibit 4

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN COMPUTERS AND COMPUTER PERIPHERAL DEVICES, AND COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME	Investigation No. 337-TA-841

NOTICE OF COMMISSION DETERMINATION TERMINATING THE INVESTIGATION WITH A FINDING OF NO VIOLATION OF SECTION 337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to terminate the above-captioned investigation with a finding of no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 2, 2012, based on a complaint filed by Technology Properties Limited, LLC ("TPL") of Cupertino, California. 77 *Fed. Reg.* 26041 (May 2, 2012). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, by reason of infringement of certain claims of U.S. Patent Nos. 6,976,623 ("the '623 patent"), 7,162,549 ("the '549 patent"), 7,295,443 ("the '443 patent"), 7,522,424 ("the '424 patent"), 6,438,638 ("the '638 patent"), and 7,719,847 ("the '847 patent"). The complaint further alleged the existence of a domestic industry. The notice of investigation named twenty-one respondents, some of whom have since settled from the investigation. As a result of these settlements, the '638 patent is no longer at issue, as it has not been asserted against the remaining respondents. The remaining respondents are Acer Inc. of New Taipei City, Taiwan; Canon Inc. of Toyko, Japan; Hewlett-Packard Company of Palo Alto, California; HiTi Digital, Inc. of New Taipei City, Taiwan; Kingston Technology Company, Inc. of Fountain Valley, California; Newegg, Inc. and Rosewill Inc., both of City of Industry, California; and Seiko Epson Corporation of Nagano, Japan.

On October 4, 2012, the ALJ issued a *Markman* order construing disputed claim terms of the asserted patents. Order No. 23. On January 7-11, 2013, the ALJ conducted an evidentiary hearing, and on August 2, 2013, the ALJ issued the final ID. The ALJ found that TPL demonstrated the existence of a domestic industry, as required by 19 U.S.C. § 1337(a)(2), through TPL's licensing investment under 19 U.S.C. § 1337(a)(3)(C). ID at 152-55. The ALJ rejected TPL's domestic-industry showing based upon OnSpec Electronic, Inc.'s research and development, and engineering investments under section 337(a)(3)(C), as well as subsections (a)(3)(A) and (a)(3)(B). *Id.* at 155-57.

The ALJ found that the respondents had not shown that any of the asserted patent claims are invalid. However, the ALJ found that TPL demonstrated infringement of the '623 patent, and not the other patents. With respect to the '623 patent, the ALJ found that TPL demonstrated direct infringement of the asserted apparatus claims (claims 1-4 and 9-12). Accordingly, the ALJ found a violation of section 337 by the four respondents accused of infringing these apparatus claims.

On August 19, 2013, the parties filed petitions for review, and on August 27, 2013, the parties filed responses to each other's petitions.

On October 24, 2013, the Commission issued a notice that determined to review the ID in its entirety. The Commission notice invited briefing from the parties on five enumerated topics, and briefing from the parties and written submissions on remedy, the public interest, and bonding. On November 7, 2013, the parties filed opening briefs and written submissions, and non-party Intel Corp. filed a submission on remedy and the public interest. On November 15, 2013, the parties filed responses to each other's filings.

On December 11, 2013, TPL and Acer filed a joint motion to terminate the investigation as to Acer on the basis of a settlement agreement. Having examined the record of this investigation, including the December 11, 2013 motion and exhibits thereto, the Commission has determined to grant the motion to terminate the investigation as to Acer. *See* 19 C.F.R. § 210.21. The Commission finds that settlements are generally within the public interest and that terminating Acer will not cause an adverse effect on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. *See* 19 C.F.R. § 210.50(b)(2).

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, and the briefing in response to the notice of review, the

Commission has determined to terminate the investigation with a finding of no violation of section 337.

The Commission has determined to find no violation of section 337 for the following reasons. For the '623 patent, the Commission adopts the respondents' proposed construction of "accessible in parallel." The Commission therefore reverses the ID's finding of infringement as to that patent. Based upon that claim construction, the Commission also finds that TPL has not demonstrated the existence of an article protected by the '623 patent. The Commission finds that the Federal Circuit's decisions in *InterDigital Communications, LLC v. ITC*, 690 F.3d 1318 (Fed. Cir. 2012), 707 F.3d 1295 (Fed. Cir. 2013) and *Microsoft Corp. v. ITC*, 731 F.3d 1354 (Fed. Cir. 2013), require a complainant to make such a demonstration regardless of whether the domestic industry is alleged to exist under 19 U.S.C. § 1337(a)(3)(A), (B), or (C).

For the '443, '424, and '847 patents, the Commission affirms the ID's determination that TPL failed to demonstrate that the accused products infringe the asserted claims. The Commission also finds for these three patents that TPL failed to demonstrate the existence of a domestic industry because it failed to demonstrate the existence of articles practicing these patents.

TPL did not raise the '549 patent in its petition for review. 19 C.F.R. § 210.43(b)(2). The Commission affirms the ID's noninfringement finding, and its finding that TPL failed to show that its domestic industry products meet certain claim limitations.

The reasons for the Commission's determinations will be set forth more fully in the Commission's opinion.

Commissioner Aranoff dissents from the Commission's finding that TPL was required to demonstrate the existence of articles practicing the asserted patents in order to show a domestic industry based on licensing under 19 U.S.C. § 1337(a)(3)(C).

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-46, and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46, 210.50).

By order of the Commission.

Lisa R. Barton
Acting Secretary to the Commission

Issued: December 19, 2013

CERTAIN COMPUTERS AND COMPUTER PERIPHERAL DEVICES AND COMPONENTS THEREOF AND PRODUCTS CONTAINING THE SAME — **Inv. No. 337-TA-841**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served upon the following parties as indicated on **December 19, 2013**.

Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainant Technology Properties Limited LLC:

Anthony G. Simon, Esq.
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( ) Via Express Delivery
(✓) Via First Class Mail
( ) Other:______________

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( ) Other:______________

On Behalf of Respondent HiTi Digital Inc.:

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On Behalf of Respondent Acer Inc.:

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( ) Other:______________

On Behalf of Respondent Seiko Epson Corporation:

Louis S. Mastriani, Esq. **ADDUCI, MASTRIANI & SCHAUMBERG LLP** 1133 Connecticut Avenue, NW, 12th Floor Washington, DC 20036	( ) Via Hand Delivery ( ) Via Express Delivery (✓) Via First Class Mail ( ) Other:____________

On Behalf of Respondent Canon Inc.:

David M. Maiorana, Esq. **JONES DAY** 901 Lakeside Avenue Cleveland, OH 44114	( ) Via Hand Delivery ( ) Via Express Delivery (✓) Via First Class Mail ( ) Other:____________

On Behalf of Respondent Kingston Technology Company, Inc.:

Christine Yang, Esq. **LAW OFFICES OF S.J. CHRISTINE YANG** 17220 Newhope Street, Suites 101-103 Fountain Valley, CA 92708	( ) Via Hand Delivery ( ) Via Express Delivery (✓) Via First Class Mail ( ) Other:____________

On Behalf of Respondents Newegg Inc. and Rosewill Inc.:

Kent E. Baldauf, Esq. **THE WEBB LAW FIRM** 420 Ft. Duquesne Boulevard, Suite 1200 Pittsburgh, PA 15222	( ) Via Hand Delivery ( ) Via Express Delivery (✓) Via First Class Mail ( ) Other:____________

On Behalf of Respondent Dane Memory, S.A. (a/k/a Dane-Elec Memory):

Jeffrey G. Jacobs, Esq. **THE LAW OFFICE OF JEFFREY G. JACOBS PC** 15770 Laguna Canyon Road, Suite 100 Irvine, CA 92618	( ) Via Hand Delivery ( ) Via Express Delivery (✓) Via First Class Mail ( ) Other:____________