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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 Chapter 11 Date: October 14, 2014 Time: 2:00 p.m. Place: United States Bankruptcy Court 280 South First Street Courtroom 3099 San Jose, California

OBJECTION OF SANDISK TO DISCLOSURE STATEMENT RE: JOINT PLAN OF REORGANIZATION BY OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND DEBTOR (September 4, 2014)

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STATUTES

SanDisk Corporation ("SanDisk"), a defendant in certain litigation commenced by Technology Properties Limited LLC (the "Debtor") in the United States District Court for the District of Delaware ("Delaware court"), hereby submits this objection[1] to the *Disclosure Statement Re: Joint Plan of Reorganization By Official Committee of Unsecured Creditors and Debtor* (September 4, 2014) (the "Disclosure Statement") (Dkt. No. 538) filed in conjunction with the Chapter 11 Plan of Reorganization by Official Committee of Unsecured Creditors and Debtor (September 17, 2014) (Dkt. No. 539).

On September 17, 2014, counsel for the Debtor filed the Disclosure Statement, which specifically identifies one pending litigation matter to which SanDisk is a party: a civil action filed by the Debtor and a non-Debtor subsidiary (HSM Portfolio LLC) (collectively, the "Plaintiffs") and pending in Delaware court against SanDisk and three other companies (*HSM Portfolio LLC et al. v. Micron Tech., Inc. et al.*, Civ. A. No. 11-cv-770 RGA) (hereafter, "the Fast Logic Litigation" or "the Litigation"). The Disclosure Statement's sole reference to the Litigation is limited to a single paragraph that is brief, vague, incomplete and materially misleading by omission.[2] Any other references are, at best, in passing and also materially misleading.

As set forth below, the Disclosure Statement fails to provide creditors with "adequate information" as defined in 11 U.S.C. § 1125 as it relates to the Fast Logic Litigation.[3] Specifically, the Disclosure Statement fails to provide any concrete details on the status of the

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[1] The *Declaration of Lori Sinanyan in Support of Objection of SanDisk to Disclosure Statement Re: Joint Plan of Reorganization By Official Committee of Unsecured Creditors and Debtor (September 4, 2014)* (the "Declaration") is filed concurrently with this objection.

[2] This paragraph of the Disclosure Statement states: "In September 2011, TPL and others filed suit in the United States District Court for Delaware for infringement of the Fast Logic patents against 18 different companies (which equated to 13 defendant groups). The Delaware litigation seeks an award for damages for past infringement. The four patents that are asserted in the case have all expired either shortly before the filing of suit or shortly afterwards. The Defendants filed a variety of defenses asserting that the identified Fast Logic patents are invalid and that the identified products do not infringe the identified Fast Logic patents … . Following a Markman hearing, the Court issued a Claim Construction Order on June 30, 2014 and pursuant to such order, all asserted patents remain in the case. On September 5, 2014, the Court denied Defendants' request to file early summary judgment motions. To date, TPL has successfully licensed the Fast Logic patents to 8 of the Defendant Groups. … [F]our defendant groups remain as parties in the case (STMicroelectronics, Toshiba, SanDisk, and Micron). Trial has been recently re-scheduled for the remaining defendant groups as follows: STMicroelectronics - Nov. 30, 2015; Toshiba - Dec. 14, 2015; SanDisk - Jan. 25, 2016; and Micron - Feb. 22, 2016." Disclosure Statement pp.17-18.

[3] This Objection contains only a summary of SanDisk's arguments in the Fast Logic Litigation. SanDisk reserves all rights to make additional or different arguments in the Fast Logic Litigation.

Fast Logic Litigation, potential recoveries, and potential risk of pursuit of the Litigation. While elsewhere acknowledging the critical importance of a Markman claim construction ruling, the Disclosure Statement fails to provide critical detail of the Delaware court's Markman ruling (Claim Construction Order) in June 2014 by simply summarizing that "all asserted patents remain in the case." Disclosure Statement at p. 18. As discussed below, the Delaware court overseeing the Fast Logic Litigation has adopted many of Defendants' – including SanDisk's – proposed constructions of the patent claims, rejecting the Plaintiffs' positions. Due to this rejection, as well as other factors, Plaintiffs do not have any viable infringement claims against SanDisk in the Litigation. The Debtor also neglected to disclose that the Delaware court has indicated that certain of Plaintiffs' infringement claims are unlikely to succeed. The Disclosure Statement further fails to provide any meaningful discussion of the potential damages in the Fast Logic Litigation, including of the various limitations on the amount that may be recovered (if any at all) from SanDisk. Finally, rather than adequately warning creditors and interested parties of the potential, significant fee shifting that may occur if the Fast Logic Litigation is pursued and not dismissed – wherein the Plaintiffs will be ordered to pay SanDisk's (and other Defendants') costs and attorneys' fees in the Fast Logic Litigation – the Debtor states "the investments made to date [in pursuing the Litigation] are expected to pay off in revenues over the next 5 years." Disclosure Statement at p.63.

Unless the Disclosure Statement is amended to address these concerns, approval of the Disclosure Statement should be denied as creditors cannot assess whether and how to vote on the Plan based on this incomplete and materially misleading Disclosure Statement.

I. RELEVANT BACKGROUND

A. Overview of the Delaware Fast Logic Litigation

The Fast Logic Litigation was first filed in 2011. The portfolio that is the subject of the Litigation includes a total of 27 patents, of which 14 are U.S. patents and 13 are non-U.S. patents. SanDisk is accused of infringing only two of these 27 patents: the '853 patent and the '949 patent, both of which are U.S. patents; no foreign patents are asserted against SanDisk. SanDisk's

accused products are 39 so-called "Secure Digital" (SD) memory cards.[4] The deadline to file summary judgment motions in the Litigation is not until June 12, 2015, and trial against SanDisk is currently scheduled to take place on January 25, 2016.

B. The Claims Construction Order Foreshadows the Outcome for the Patent Infringement Case, Yet is Not Discussed in the Disclosure Statement.

Although the Disclosure Statement acknowledges the importance of a Markman hearing and claim construction to the merits of a patent infringement case,[5] the Disclosure Statement fails to disclose that most of the claim construction rulings by the Delaware court on June 30, 2014 (the "Claim Construction Order") with respect to the only two SanDisk patents at issue – '853 and '949 patents – were in favor of the Defendants in the Litigation, which include SanDisk.[6] The Delaware court specifically rejected Plaintiffs' competing proposals and significantly narrowed the scope of the asserted claims to make proof of infringement much more difficult. The significance cannot be overstated as even the Debtor acknowledges that the Delaware court's claim construction ruling can indicate a likely outcome for the patent infringement case as a whole against SanDisk and the other Defendants.[7]

The Delaware court specifically ruled in favor of SanDisk in multiple instances. For example, for the '853 patent, the parties disputed the construction of the key claim term "predetermined factor K." The Defendants had proposed that this term referred to a specific equation number 37 within the specification of the '853 patent, whereas Plaintiffs had proposed that there were other ways to calculate this factor and that it should not be limited to just using Equation 37. *See* Claim Construction Order at pp.3-4. The Delaware court held in SanDisk's

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[4] Plaintiffs have also accused SanDisk of infringement based on two Toshiba products that are neither manufactured nor sold by SanDisk. SanDisk has informed Plaintiffs that there is no merit to their claims attempting to accuse SanDisk of infringement with respect to non-SanDisk products.

[5] In relevant part, the Disclosure Statement states "A Markman hearing is a pretrial hearing in which a judge examines evidence from all parties on the appropriate meanings of relevant key words used in a patent claim…. Markman hearings are important, since the court determines patent infringement cases by the interpretation of claims. A Markman hearing may encourage settlement, since the judge's claim construction finding can indicate a likely outcome for the patent infringement case as a whole…." Disclosure Statement p.13, n.5.

[6] A true and correct copy of the Claim Construction Order is attached as Exhibit A to the Declaration.

[7] These other Defendants include Micron, STMicroelectronics and Toshiba.

favor, stating, "The intrinsic evidence is that the patentee intended Equation 37, and only that equation, to define 'predetermined factor [K].'" *Id.* at 5 (emphasis added). In ruling against the Plaintiffs, the Delaware court noted the difficulties Plaintiffs would encounter proving infringement under this narrower claim construction, stating, "Proving infringement using Equation 37 … appears to present difficult issues." *Id.* at 4. Nonetheless, this did not impact the Delaware court ruling in that it stated, "How easy it would be to determine infringement using Equation 37 is irrelevant at this stage. There is no canon of claim construction that prefers an 'easy to prove infringement' construction." *Id.* at 4–5.

As another example for the '853 patent, the Plaintiffs had proposed that a certain claim term delete from its construction language requiring a certain transistor width ratio in order to infringe. The Delaware court disagreed and instead adopted a construction that "stay[ed] as true to the claim language as possible." *Id.* at 6. In rejecting Plaintiffs' proposed deletion,, the Delaware court agreed with SanDisk's interpretation and refused to broaden the scope of the claimed invention as Plaintiffs had requested.

As an example for the '949 patent, which pertains to a specific latching circuit, Plaintiffs and Defendants disputed both the meaning of the claim term "bit lines" and whether the claimed latching circuit required "bit lines." *Id.* at 7-9. The Delaware court ruled for SanDisk and against Plaintiffs on both counts. First, the Delaware court stated, "I disagree that the term 'bit line' in the body of the claim is not a limitation," thereby holding that the claimed latching circuit had to have bit lines. *Id.* at 8–9. Second, the Delaware court rejected Plaintiffs' "argu[ment] that 'bit line' has a plain and ordinary meaning, or, alternatively, that it refers to 'signal lines for transmitting binary values.'" *Id.* at 9. According to the Delaware court, "Defendants argue that Plaintiffs' proposed construction would cover both 'word lines' and 'bit lines,' and would render the distinction meaningless. I agree. … Because Plaintiffs' proposed construction is too broad, I adopt [Defendants'] proposed construction."[8]

[8] Following the Delaware court's claim construction ruling on "bit lines," Plaintiffs thereafter filed a motion asking the Delaware court to reconsider its decision. The court rejected that reconsideration request as well. A true and correct copy of the order rejecting reconsideration is attached as Exhibit B to the Declaration. Indeed, the Delaware court's order denying Plaintiffs' reconsideration request indicated that Plaintiffs' request was frivolous, stating, "It seems that the entirety of [Plaintiffs' reconsideration]

The Disclosure Statement fails to address these claim construction rulings and does not provide any meaningful discussion whatsoever of the claim construction from the Fast Logic litigation including, specifically, that the Delaware court rejected most of Plaintiffs' proposals and adopted SanDisk's proposals as discussed above. The Delaware court's claim construction order foreshadows the outcome of Plaintiffs' patent infringement case against SanDisk in SanDisk's favor.

C. The Disclosure Statement Fails to Acknowledge the Deficiencies of Plaintiffs' Infringement Case Against San Disk.

Due to these and other claim construction rulings by the Delaware court in the Fast Logic Litigation, Plaintiffs do not have a viable infringement case against SanDisk. These deficiencies with Plaintiffs' infringement allegations are not, however, included in the Disclosure Statement.

For the entire duration of the Litigation, Plaintiffs have never calculated any "predetermined factor K" for any of the accused SanDisk products. As the Delaware court noted in the Claim Construction Order, making such a calculation "present[s] difficult issues." *Id.* at 4. Without the calculation, Plaintiffs cannot prove that SanDisk infringes the '853 patent. Nonetheless, Plaintiffs have not provided any such calculation. Nor have Plaintiffs calculated the transistor width ratio required to infringe the '853 patent. Plaintiffs have similarly failed to provide a viable infringement argument post-claim construction with respect to the '949 patent. For example, Plaintiffs have not identified any "bit lines" that are part of SanDisk's accused latch circuit.

To the extent the Delaware court has already considered arguments on the merits of Plaintiffs' infringement claims, it generally has rejected them. For example, Plaintiffs have accused SanDisk of contributory infringement. However, the Delaware court already granted a motion to dismiss a similar contributory infringement claim against one of SanDisk's

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motion is based on the Court incorrectly referring to statements made by the Examiner during a restriction requirement as extrinsic evidence rather than intrinsic evidence. … Plaintiffs argue that 'bit line' should not have been construed to require connection to a memory circuit, but rather should be construed to only have the capability to be connected to a memory circuit. I disagree. The arguments presented by the Plaintiffs are the same arguments presented at the Markman hearing and in the briefing." *See* Declaration Exhibit B at 1.

codefendants. In granting the motion to dismiss, the Delaware court stated: "[Defendant's] main argument is that the accused semiconductor chips are not components especially designed for an infringing product because they are accused of direct infringement in and of themselves. I agree. … Plaintiffs' arguments do not make legal sense. I will therefore dismiss the contributory infringement claim."[9] Because Plaintiffs' contributory infringement allegations against SanDisk are similar, it is unlikely that claim against SanDisk will survive summary judgment.

Plaintiffs have also sought to assert infringement claims against SanDisk and to recover damages for foreign sales of the accused SanDisk SD cards. But Plaintiffs have not asserted any viable theory to recover foreign sales damages, which are unrecoverable under black-letter patent law limiting the extraterritorial effect of U.S. patents. "The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law. The traditional understanding that our patent law operates only domestically and does not extend to foreign activities is embedded in the Patent Act itself, which provides that a patent confers exclusive rights in an invention within the United States." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (internal citation and quotation marks omitted).

The Disclosure Statement fails to provide any discussion of these substantial deficiencies to Plaintiffs' infringement claims in the Fast Logic litigation.

D. The Disclosure Statement Fails to State that Injunctive Relief is Unavailable and Damages will be Limited At Best.

The Disclosure Statement acknowledges that the Fast Logic Portfolio patents "have all expired." However, the Disclosure Statement fails to disclose that the patents' expiration eliminates any possibility of ongoing or future damages or injunctive relief[10] and fails to further describe that additional damages limitations also exist that foreclose any substantial recovery from SanDisk.

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[9] ECF No. 854, at 2–3. A true and correct copy of the Order on Toshiba's Motion to Dismiss ("Order on MTD") is attached as Exhibit C to the Declaration.

[10] In fact, the Disclosure Statement states that the "remedy sought by initiating litigation in a US District Court is the entry of a judgment against the Defendant ordering the payment of damages as well as an injunction." Disclosure Statement at p.79.

SanDisk is accused of infringing only two of the 27 patents from the Fast Logic portfolio. It is axiomatic that under the patent damages statute, 35 U.S.C. § 284, damages are only awarded "for the use made of the invention by the infringer." As a result, numerous Federal Circuit cases have repeatedly held that a patent holder can only recover damages attributable to the infringing feature of a multi-feature product. The most recent Federal Circuit case explaining this substantial limit on patent damages is *VirnetX, Inc. v. Cisco Sys., Inc.*, 2014 U.S. App. LEXIS 17748 (Fed. Cir. Sept. 1, 2014). *VirnetX* reiterated the Supreme Court's mandate that a patentee:

> must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.

Id. at *36 (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884) (emphasis added)). "[A] reasonable royalty analysis requires a court to … carefully tie proof of damages to the claimed invention's footprint in the market place." *Id.* at *37 (quoting *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010)).

Under this recent legal precedent of *VirnetX* and *ResQNet*, even Plaintiffs' theoretical damages against SanDisk, if any, will be extremely limited for a number of reasons, the most significant of which are detailed here. First, SanDisk's 39 accused SanDisk SD cards are multi-component and multi-circuit products, most of which Plaintiffs concede do not infringe. As a result, should Plaintiffs be able to prove infringement, Plaintiffs nonetheless will be forced to apportion their damages to only the allegedly-infringing circuits—including having the burden to produce reliable and competent evidence to that effect. Second, Plaintiffs' earlier licenses under the Fast Logic portfolio are for all 27 patents of the portfolio. In the Litigation, however, SanDisk is only accused of infringing two of the 27 patents, including none of the foreign patents. As a result, apportionment of damages to just the two asserted patents will significantly decrease any recovery by Plaintiffs, even assuming use of Plaintiffs' past licensing agreements as a benchmark. *See* Disclosure Statement at p.18 ("To date, TPL has successfully licensed the Fast

Logic patents to 8 of the Defendant Groups."). Third, SanDisk has its own patents on its 39 accused SD cards that demonstrate its own invention of many circuits within the accused products, which will further decrease damages. Fourth, there is no significant difference between the asserted '853 and '949 patents and the prior art to those patents, which further decreases the value of and damages for those patents. Fifth, there is no evidence that SanDisk's customers are aware of the particular circuits within SanDisk's accused SD cards, or that any of the allegedly-infringing circuits drive customer demand for those cards. Sixth, Plaintiffs will not be able to recover for SanDisk's foreign sales of its accused SD cards, because the asserted patents are limited to U.S. patents and the extraterritorial limits of these patents exclude those foreign sales as a matter of law.

Thus, at best, if Plaintiffs were to prevail despite the Delaware courts' early indications in the Claim Construction Order to the contrary, the potential damages would be severely limited. The Disclosure Statement fails to provide any discussion of the continued impact and expense of the litigation in light of the limited potential for recovery.

E. The Disclosure Statement Fails to Discuss the Risk of Potential Fee Shifting.

Due to the lack of merit to Plaintiffs' case against SanDisk, SanDisk anticipates seeking its costs and attorneys' fees in the Litigation. The Supreme Court recently stated the low threshold for fee-shifting and recovery of attorneys' fees in a patent case, holding that "an 'exceptional' case [under 35 U.S.C. § 285] is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1756 (2014).[11] As already discussed, the Delaware court has indicated significant weaknesses with Plaintiffs' infringement claims.

The determination and any accounting of attorneys' fees and costs will not be determined until the resolution of the Fast Logic Litigation. Given the problems with Plaintiffs' infringement

[11] The Supreme Court also held in the related case of *Highmark, Inc. v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744 (2014), that a district court's exceptional-case determination under 35 U.S.C. § 285 is reviewed for abuse of discretion. As a result, any attorneys' fee award in SanDisk's favor will be very difficult for Plaintiffs to reverse on appeal.

case and damages limitations, SanDisk and the other Defendants anticipate seeking their attorneys' fees and costs from Plaintiffs, and there is a substantial likelihood that Defendants will be able to recover their fees and costs. Those collective fees and costs sought amongst the Defendants likely will be in the millions of dollars. Thus, in addition to the legal fees and costs incurred by the Plaintiffs in pursuing the Litigation, and the substantial risk that Plaintiffs will be unsuccessful proving any liability by SanDisk or have a very limited damages recovery, Plaintiffs also risk millions of dollars in fee shifting from Defendants in the Litigation.

The Disclosure Statement fails to provide any discussion of this potential fee shifting in the Litigation, and that Plaintiffs may ultimately be ordered to pay Defendants' substantial attorneys' fees and costs which will directly reduce money available to pay creditor recoveries.

II. LEGAL STANDARD

The purpose of a disclosure statement is to provide "adequate information" for those voting on a plan. As defined in Section 1125 of the Bankruptcy Code, "adequate information" includes "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor." "[I]n determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information ..." 11 U.S.C. § 1125(a)(1). The information in the disclosure statement must enable impaired classes and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that plan." *Id.*, *see also In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001).

Courts determine what constitutes "adequate information" on a case-by-case basis and should take a practical approach as to what is necessary under the unique circumstances of each case. *In re Brotby*, 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003).

In assessing the adequacy of information contained within a disclosure statement courts will look generally for the specific categories and types of information. For purposes of the Disclosure Statement at hand, the following types of information that courts consider are lacking: (a) information regarding claims against the estate; (b) an estimate of all administrative expenses,

including attorneys' fees and accountants' fees; (c) any financial information, valuations or pro forma projections that would be relevant to creditors' determinations of whether to accept or reject the plan; (d) information relevant to the risks being taken by the creditors and interest holders; and (e) the existence, likelihood and possible success of non-bankruptcy litigation. *See e.g., In re Metrocraft Pub. Services. Inc.*, 39 B.R. 567, 568 (Bankr. N.D.Ga. 1984); *In re Reilly*, 71 B.R. 132, 134 (Bankr. D.Mont. 1987); *see also In re Pacific Shores Dev., Inc.*, 2011 WL 778205, 4–6 (Bankr. S.D.Cal. 2011)(citing *Metrocraft* and *Reilly* with approval); *In re Phoenix Petroleum Co.*, 278 B.R. at 393 n. 6; *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 170–71 (Bankr. S.D.Ohio 1988).

III. OBJECTIONS

As indicated in the *Metrocraft* and *Pacific Shores* decisions, financial information and projections concerning those assets and potential litigation risks and recoveries are critical information that should be provided to creditors in a disclosure statement to assist creditors and other interested parties in evaluating any proposed plan and its potential impact on that creditor or interested party. Without such critical information, creditors will be unable to submit an informed vote in favor of or against the Plan.

The Disclosure Statement fails to provide any details concerning the: (i) status of the Fast Logic Litigation; (ii) the occurrence and effect of the Markman claim construction ruling; (iii) the potential or projected recoveries from the Fast Logic Litigation; (iv) the projected costs of the Fast Logic Litigation; and (v) the risk of potential fee shifting in the Fast Logic Litigation and the classification and impact that the award of fees could have on the Disclosure Statement. The risk section of the Disclosure Statement is less than a page long and only states that "litigation outcomes are inherently unpredictable." Disclosure Statement at p.85. As such, the Disclosure Statement is materially misleading by omission and fails to provide creditors and parties in interest with enough information about the Disclosure Statement to make an informed decision about the potential impact of that Litigation on the Disclosure Statement and the potential recoveries and substantial claims that may arise from such litigation.

CONCLUSION

For all of the foregoing reasons, the Disclosure Statement fails to provide adequate information, within the meaning 11 U.S.C. §1125(a)(1), and should not be approved without further disclosure about the Markman claim construction decision, projections on the costs and expected recoveries and risk of potential fee shifting concerning the Fast Logic Litigation.

Dated: October 1, 2014

Respectfully submitted,

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