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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re TECHNOLOGY PROPERTIES LIMITED, LLC, Debtor.	Case No. 13-51589 SLJ Chapter 11 FUJITSU'S RESERVATION OF RIGHTS AND OBJECTION TO DISCLOSURE STATEMENT FOR OFFICIAL COMMITTEE OF UNSECURED CREDITORS' PLAN OF REORGANIZATION Date: January 23, 2014 Time: 10:00 a.m. Place: Courtroom 3099 280 South First Street San Jose, California

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Fujitsu Limited ("Fujitsu") submits this reservation of rights and objection (the "Objection") to the Disclosure Statement dated December 17, 2013 (the "Disclosure Statement" or "DS") [Dkt. No. 322] offered by the Official Committee of Unsecured Creditors (the "Committee" or the "OCC") of Technology Properties Limited (the "Debtor" or "TPL") in connection with the Committee's Plan of Reorganization (the "Plan" or the "OCC Plan") [Dkt. No. 321].[1] As set forth in more detail herein, Fujitsu is party to certain patent-litigation settlement licenses issued by the Debtor and certain pending litigation, and in such capacity Fujitsu seeks to retain its full rights, interests, claims, and defenses in connection with such licenses and otherwise. Fujitsu objects to the Disclosure Statement because, among other deficiencies, it fails to provide full or fair disclosure regarding the impact of the OCC Plan on Fujitsu, including as to treatment of such licensees under the Plan and further presents many concerns regarding due process for mistreated licensees. Moreover, the Plan is not confirmable in its current state because it ignores major risks associated with licensee-related litigation that the Plan provokes.[2]

I. PRELIMINARY STATEMENT

The OCC Disclosure Statement and associated Plan are virtually silent as to their impact on, and treatment of, the Debtor's approximately 175 fully-paid up, non-exclusive licenses (the licensees thereto are collectively referred to herein as "Licensee Defenders"). What little information there is on such licenses, when considered in the context of the proposed Plan, sets up what could be a worst-case-scenario for licensees like Fujitsu, potentially depriving licensees of their bargained-for rights and defenses, as well as fundamental due process under applicable

[1] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Plan.

[2] Fujitsu, for itself and any party joining in this Objection, does not consent to jurisdiction of the Bankruptcy Court with respect to any patent dispute or any other pending litigation. This Objection shall not be deemed or construed to be a waiver of the rights of Fujitsu under applicable law or in equity, including but not limited to, the right (i) to have final orders entered only after de novo review by a district judge in applicable matters, (ii) to trial by jury in any proceeding so triable in this case or any case, controversy, or proceeding related to this case, (iii) to have the District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal, or (iv) to assert or exercise any other rights, claims, actions, defenses, setoffs or recoupments to which Fujitsu is or may be entitled, all of which are expressly reserved.

law. If the Committee Plan is confirmed in its current form, licensees like Fujitsu may be surprised to find (1) that their fully paid-up licenses, which were reached through settlement with the Debtor at significant expense and which have been classified as non-executory by the Debtors, have been rejected post-confirmation, (2) that the licensees are now vulnerable to litigation once more, on what had been previously fully and finally settled matters, (3) that licensee rights, claims and defenses are improperly prejudiced in insufficiently disclosed ways, such as by an exaggerated misapplication of Section 1141, and (4) that no significant reserves exist for licensee-related rejection and other damages claims. This outcome will be especially surprising to licensees who have not been served with notice of the Plan or Disclosure Statement, although a casual reading would not alert anyone to such covert threats to licenses.

For example, the Plan allows for *post-Effective Date* rejection of "Excluded Contracts," and suggests that the Debtor's "worldwide non-exclusive patent licenses" would fall within the definition of Excluded Contracts. DS at 38. Such post-Effective Date rejection would be effective "without further order of the Bankruptcy Court," thereby denying the licensee due process to litigate the executory or non-executory nature of the license, as well as related issues and the impact, if any, of Section 1141. *Id*. The relevant counterparty would then have 30 days within which to file a Rejection Claim; however, the funds available for such claim seem to be woefully insufficient to cover license rejection or other damages.[3] To compound the potential post-Effective Date harm to licensees, the Plan sets up a remarkable, new management structure that grants the Reorganized Company (perpetually controlled by a Board chosen by the Committee) "all powers granted by the Bankruptcy Code," but none of the associated duties or court oversight. DS at 43.[4]

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[3] Class 6A, which includes Rejection Claims, is estimated to be $8 million. Rejection of or other harms to even a fraction of the 175 licenses could result in damages dozens of times that class amount.

[4] Fujitsu's Motion for Appointment of § 1102(a)(2) Committee And Related Relief For Licensee Defenders (the "Licensee Defender Committee Motion"), filed concurrently herewith, explains the patent-troll aspects of the Debtor's business and that of some members of its OCC.

Finally, all of this may happen to licensees who have been given no opportunity to vote on the Plan. In this scenario, the Plan unfairly turns licensees into creditors only AFTER the Effective Date, thereby depriving such creditors of the opportunity to vote on the Plan or, as the supermajority of the ultimate allowed claims, to control the management of the Reorganized Company. At that point, the holders of the rejected licenses would be left to litigate the impacts or meanings of Sections 365(n) and 1141, and related law as to disputed post-Effective Date rejections, vesting free and clear under Section 1141, and other threats. Such licensees would also have been deprived of the opportunity to litigate whether the licenses are executory (as the Committee apparently asserts) or non-executory (as the Debtor asserts). To make matters worse, it is unclear whether the other approximately 175 licensees even have notice of the Plan, because such licensees have not been disclosed, let alone, apparently, served.

Apart from the possible related rejection of downstream settlement licenses, the Plan presents other notable risks to licensees. Specifically, the Plan contemplates the rejection of certain upstream commercialization agreements (DS Art. VII A (2) at 37), thereby exposing settlement licensees like Fujitsu to potential litigation on the disputed theory that its license rights were derivative of the upstream rejected commercialization contracts. As noted, the Plan preserves the option of post-Effective Date rejection of contracts, which means that other commercialization or license agreements also may be rejected at some future date. Beyond upstream or downstream rejection-related risks, Fujitsu is concerned that the Plan inappropriately seeks to strip away other licensee rights and defenses under Section 1141 of the Plan.

Fujitsu has invited Committee counsel to address these issues. The Licensee Defenders need to know *before* Plan confirmation the extent to which the OCC Plan disturbs licenses, rights or defenses of Licensee Defenders. Indeed, it would be relatively straightforward to modify the Disclosure Statement in a way that dispels the worst-case-scenario concerns described here and in the Licensee Defender Committee Motion,[5] and provides transparency as to how the Plan would

[5] The Motion for Appointment of Section 1102(a)(2) Committee ("Licensee Defender Committee Motion") is attached hereto as Exhibit A.

impact any right, interest or defense of any licensees. However, the Committee has failed to provide a satisfactory response to Fujitsu or, as far as Fujitsu knows, to any other Licensee Defenders.[6] Unless the Committee promptly provides comprehensive licensee protections, the Committee will face a massive confirmation problem, including trial relating to the executory nature and survival of the licenses and other licensee rights and defenses. The Plan fails to disclose this litigation risk, as well as the risk associated with potential licensee Rejection Claims. That is, if the Plan is confirmed and the Committee-controlled Reorganized Company proceeds to reject licenses, the associated Rejection Claims could be enormous, rendering the Plan economically unfeasible.

II. FACTUAL BACKGROUND

Fujitsu is a party to two separate licenses[7] issued by the Debtor. First, Fujitsu Limited entered into a license agreement for the portfolio of patents known as the Moore microprocessor patents (the "MMP Portfolio"). This license agreement (the "MMP License") was entered into on February 24, 2006. Second, on December 25, 2012, Fujitsu Limited entered into a license agreement (the "CORE Flash License") for the portfolio of patents known as the CORE Flash portfolio (the "CORE Flash Portfolio").[8] The Debtor takes the position that both of these agreements are non-exclusive, fully paid-up licenses, which are not executory and, therefore, cannot be assumed or rejected in bankruptcy. Fujitsu is concerned—but does not concede or waive any arguments to the contrary—that the Committee takes a different position as to the

[6] Shortly before the objection deadline, counsel for the OCC indicated in an email to another party a willingness to address the dispute over whether the settlement licenses were executory contracts that could be rejected. While a satisfactorily documented solution to that concern would help narrow the disputes, other disputes remain unaddressed by the OCC. In any event, such a last-minute OCC communication comes too late to preempt this Objection.

[7] As a licensee, Fujitsu is a party-in-interest under Section 1109(b) with standing to object to the Disclosure Statement. *See Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 884 (9th Cir. Cal. 2012) (noting that "party-in-interest" standard is construed broadly and on a case by case basis where party has a sufficient stake in the proceedings).

[8] Both the MMP License and the CORE Flash License contain confidential and sensitive information and, therefore, are not attached to this Objection. The Debtor has access to such licenses, and Fujitsu will provide copies to the Court and the Committee, under seal, upon request.

executory nature of Fujitsu's licenses. The Committee's Plan potentially exploits Section 1141 to impair vested rights and defenses under the licenses. Excessive exculpations now and in the future for the Committee, its members and related parties further complicates these disputes. Fujitsu's counsel has reached out to Committee counsel in person, via email, and by phone, many times since the Committee filed its Plan. However, as of the filing of this Objection, the Committee has not yet accepted Fujitsu's meet-and-confer invitations and has not provided Fujitsu with a satisfactory response on any of these critical issues, although Fujitsu was copied on a recent Committee counsel email to another party that may imply some willingness for partial reforms by the Committee.

III. STANDARD FOR APPROVAL OF DISCLOSURE STATEMENT

Code Section 1125(b) provides that an acceptance or rejection of a plan may not be solicited, unless, at the time of or before such solicitation, the court approves a written disclosure statement, after notice and a hearing, as containing "adequate information." 11 U.S.C. § 1125(b). "Disclosure is the 'pivotal' concept of a . . . reorganization." *Kunica v. St. Jean Fin. Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the code standard of 'adequate information.'") (internal citation omitted). The disclosure must be "full and fair." *Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994). Indeed, "the importance of full and honest disclosure is critical and cannot be overstated." *In re Radco Props., Inc.*, 402 B.R. 666, 682 (Bankr. E.D.N.C. 2009). These disclosure requirements do not diminish in cases where, as here, the plan proponent is not the debtor. As the Committee is a fiduciary for Fujitsu and other Licensee Defenders, the OCC disclosure duty is far higher (*see Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983) and broader (*see* 11 U.S.C. § 1102(b)(3)).

The Court has substantial discretion in determining whether a disclosure statement provides "adequate information" as required by Code Section 1125(a). *See, e.g., Tex. Extrusions Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1157 (5th Cir. 1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court.") (internal citations omitted); *In re 3DFX Interactive, Inc.*, No. 02-55795 JRG, 2006 Bankr. LEXIS 1498, at *20 (Bankr. N.D. Cal. June 29, 2006) ("Section 1125 affords the Bankruptcy Court substantial discretion in considering the adequacy of a disclosure statement.") (internal citations omitted). "[A]dequate information will be determined [based upon] the facts and circumstances of each case." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) (citations omitted).

Note that, even if a disclosure statement does contain "adequate information," as such term is defined in Section 1125(a), it should not be approved if the underlying plan is incapable of confirmation. *See, e.g., In re 266 Washington Assoc.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992), *aff'd In re Washington Assoc.*, 147 B.R. 827 (E.D.N.Y. 1992). "Only those plans which have been proposed in good faith and patently comply with the applicable provisions of the Bankruptcy Code will pass muster for disclosure purposes." *In re Filex*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990). Although consideration of whether a plan satisfies the conditions of Section 1129 of the Bankruptcy Code is generally addressed at the confirmation hearing, a court may refuse to approve a disclosure statement if it is apparent that the plan is not confirmable. *See, e.g., In re Allied Gaming Mgmt., Inc.*, 209 B.R. 201, 202 (Bankr. W.D. La. 1997) ("[N]otwithstanding adequate disclosure of information required by Section 1125(b), a disclosure statement should not be approved if the proposed plan, as a matter of law, cannot be confirmed.").[9]

[9] It makes little sense to mail a disclosure statement to solicit votes on a plan that is not confirmable on its face. *See, e.g., In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("If the disclosure statement describes a plan that is so 'fatally flawed' that confirmation is 'impossible', the court should exercise its discretion to refuse to consider the adequacy of disclosures."), *citing In re E. Me. Elec. Coop.*, 125 B.R. 329, 333 (Bankr. D. Me. 1991); *see also In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987) (appropriate to disapprove a disclosure statement when the plan could not possibly be confirmed); *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) (incumbent upon court to disapprove disclosure statement if plan cannot be confirmed).

IV. THE COMMITTEE FAILS TO DISCLOSE HOW SETTLEMENT LICENSEES WILL BE IMPACTED BY THE PLAN

A. The Disclosure Statement Lacks Transparency Regarding Committee's Position On Executory Nature of Debtor's Licenses

In contrast to the Debtor's plan, which acknowledged that the downstream licenses were non-executory and would ride through the bankruptcy,[10] the Committee Plan is vague or ambiguous about this very important issue. The Committee's Plan and Disclosure Statement do not squarely address whether the Committee considers the downstream licenses to be executory or non-executory, and the recent counsel email to another party is not a satisfactory resolution of the concern. Instead, subject to a recent email implying some possible reform, the Committee obliquely suggests in its filings that the licenses should be considered executory and, therefore, vulnerable to possible rejection. To be clear, Fujitsu believes that its licenses, rights and defenses should not be harmed in any manner by the OCC Plan, whether that involves Section 365 rejection disputes (*e.g.*, Fujitsu's arguments based on *Exide*, *Sunbeam*, and Section 365(n), as described in Fujitsu's Licensee Defender Committee Motion), Section 1141 vesting free and clear disputes, or other improper harms by operation of the Committee Plan. If Fujitsu's rights will be undermined by the OCC Plan, the Committee must disclose how and why and to what alleged effect under Section 1125, rather than forcing Fujitsu or other Licensee Defenders to compel disclosure through discovery. Nevertheless, in order to have an informed and reasoned debate about each such potential threat, Fujitsu expects that it is essential to every one of the Licensee Defenders that they address whatever risks underlie the Committee Plan now, rather than after confirmation. *See* Licensee Committee Motion (discussing collective concerns and the wisdom

[10] The Debtor's first disclosure statement noted as follows: "TPL has also entered into approximately 175 non-exclusive licenses of patent portfolios. TPL does not believe that such licenses are executory contracts and subject to either assumption or rejection under the Plan. Inasmuch as rejection would simply trigger the right of the licensees to continue to use the licensed patent under Bankruptcy Code Section 365(n), all such licenses will be deemed to have "ridden through" the Bankruptcy Case and emerge unaffected following Confirmation." Dkt. No. 277, p. 45 at footnote 9. The Debtor has maintained this position and has only strengthened the license-related disclosures in subsequent drafts of the document.

of organizing the approximately 175 licensees so that they do not have to prepare overlapping objections, declaratory relief and other suits, discovery and other defensive litigation).

The Committee notes that, "Excluded Contracts which have not previously and expressly been assumed or rejected by TPL by final Order of the Court, ***such as its worldwide non-exclusive patent licenses***, are deemed under such circumstances to have 'passed through' the bankruptcy and will remain in effect without modification." (emphasis added). While this sentence may initially seem reassuring to licensees– it is not. It apparently lumps the licenses into the "Excluded Contracts" definition, therefore characterizing the licenses as executory.[11] Furthermore, the OCC Plan does not promise that such licenses will indeed "pass through" the bankruptcy. Rather, the Disclosure Statement provides that the Plan may be amended at any time prior to confirmation to add or remove executory contracts to the list of contracts to be assumed or rejected. Beyond this, the Plan provides that even after confirmation, the "Reorganized Company" shall retain the right to reject any "Excluded Contract." *Id*. In other words, the Plan sets up a potential scenario in which the post-confirmation entity could reject Fujitsu's licenses or those of the other Licensee Defenders, thereby exposing Fujitsu to relitigation of the very infringement matters settled by the licenses. This is improper under Section 365(d)(2) and otherwise. *See, e.g., Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.)*, 371 B.R. 412, 420 (B.A.P. 9th Cir. 2007).

In addition, the Plan seeks to reject the upstream commercialization agreement relating to the CORE Flash portfolio. This rejection has the potential to expose Fujitsu to unnecessary

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[11] That is satisfactory only if the Court follows *Exide* (*In re Exide Techs.*, 607 F.3d 957 (3rd Cir 2010) ("Exide")) and rejects the Committee's effort to continue its bankruptcy powers post-Effective Date without corresponding duties (D.S. Art. XII G at 43), vesting free and clear of and discharging indestructible licenses, rights and defenses (DS Art. XII B at 41-42 and C at 42), excessive and improper future exculpations for the perpetual OCC and Reorganized Company Board members and related parties (DS Art. XII D at 42-43), and other objectionable provisions. Fujitsu contends that the OCC Plan cannot harm Fujitsu, or, if it does, despite Fujitsu's arsenal of legal defenses (Exide, Sunbeam, § 365(n) and nonexecutory rights, licenses and defenses vested beyond Section 1141 or Plan harm), then the Licensee Defender-allowed claims will aggregate so large that they become the supermajority claims in the Debtor's estate, whose holders should then be allowed to defeat the OCC Plan and control the management of any Reorganized Company and, if Fujitsu and other similarly situated licensees are given the opportunity, offer a better and more consensual competing plan. *See* Licensee Defender Committee Motion.

litigation regarding Fujitsu's right to use patents in the CORE Flash Portfolio. While Fujitsu does not believe its rights under its CORE Flash License are derivative of the Debtor's upstream commercialization agreements, Fujitsu seeks written assurance from all parties as to that matter to avoid unnecessary and meritless litigation on the issue. Fujitsu should not be forced to relitigate settled litigation with the Committee-controlled Reorganized Company as a result of the Committee's inadequate disclosure.

B. The Committee Neglects Licensees' Rights Under 365(n) and Related Law

While the Disclosure Statement describes a Plan that seemingly sets licensees up for possible rejection, nowhere does the Committee acknowledge the attendant rights of Section 365(n) of the Bankruptcy Code and related law available to licensees under those circumstances.[12] Notwithstanding the Committee's silence on the subject, licensees must receive the full benefit of Section 365(n) protection, as well as the more expansive rights available under the *Sunbeam* decision, to the extent any Committee rejection attack is successful. *See Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012). In the event of rejection, licensees are entitled to a broad host of rights, licenses and defenses under *Sunbeam* (consistent with Judge Ambro's commentary in *Exide*).[13] The Committee should not be permitted to undermine these rights by forcing licensees to litigate the impact of post-Effective Date license rejection on Section 365(n) and related rights. The time to resolve all such disputes under the Plan is *before* confirmation.

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[12] Fujitsu does not need to rely on Section 365(n) or related case law to preserve rights to use the licensed patents, since its licenses may not be executory and, if not, would not be subject to rejection. Nevertheless, Fujitsu reserves all Section 365(n) and related rights, as well as all objections to and defenses against the Committee's alternative Section 1141 theory.

[13] *Exide*, *supra*, 607 F.3d at 965-67. *Sunbeam* rejected the holding of the Fourth Circuit in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043 (4th Cir. 1985) and similar decisions, regarding the effect of rejection on a licensee's rights and defenses to use the licensed intellectual property going forward. *Sunbeam* provided that rejection of a license agreement does not terminate the underlying license, but merely relieves the debtor of future affirmative contractual obligations. This recent interpretation of Section 365 makes clear that a rejected licensee can have rights and defenses that significantly exceed those provided under Section 365(n).

C. The Disclosure Statement Is Vague And Ambiguous As To Impact Of "Free and Clear" Vesting Of Property

The Plan provides for the exaggerated vesting of property "free and clear of any and all liens, encumbrances, Claims and Interests of Creditors and Interest Holders…" DS at 41. This ambiguous and overbroad language must be clarified to confirm that the Plan does not purport to strip Fujitsu or other licensees of their broad range of rights, interests, and defenses that include license and other rights, whether or not executory. Particularly because the Plan goes far beyond the power granted by Section 1141, the Bankruptcy Code requires greater disclosure from the Committee to clarify that, among other things, Fujitsu's licenses and related defenses are not among the "liens, encumbrances, Claims and Interests" being stripped away at confirmation. This lack of disclosure puts Fujitsu and other parties-in-interest at considerable burden and risk.

For example, assume that Fujitsu is sued post-confirmation outside of the Bankruptcy Court by the Reorganized Company for patent infringement, even without rejection of the licenses. If Fujitsu attempts to defend itself from that suit using the rights, interests, and defenses under its licenses, the plaintiff could assert the retained jurisdiction provision in the Plan, and incorrectly claim (a) that Section 1141 resulted in stripping Fujitsu of any or all of its relevant rights, interests, and defenses under its licenses, and (b) that Fujitsu is enjoined, by the Plan and Confirmation Order, from protecting or asserting some or all of those rights, interests, and defenses, or asserting some or all of its counterclaims. Fujitsu could then be exposed to the Reorganized Company invoking the Plan's injunctions, the vesting of assets free and clear under Section 1141, and the discharge.

Fujitsu would then be compelled to relitigate in the Bankruptcy Court the meaning and effect of the Plan and Section 1141 (as well as potentially litigating the relevant effect of *Stern v. Marshall*, 131 S. Ct. 2594 (2011)). The Reorganized Company could also attempt to argue (incorrectly) that mootness prevented any meaningful appeal on the merits. Yet, nowhere does the Disclosure Statement identify (or dispel) these considerable risks to Fujitsu and other parties-in-interest or the economic consequences to all other parties-in-interest. If the Committee does (or does not) intend this to be the Plan's impact, it must state that before confirmation, particularly as a fiduciary (*see infra*).

D. Licensees Are Entitled to Transparency and Due Process

If the Committee's position is that the licenses are executory, creating the possibility that they could be rejected, licensees like Fujitsu are entitled to due process to litigate this critical legal matter as well as the impact of the Committee's Section 1141 and discharge fallback arguments. Whether the licenses are executory in nature or not is a threshold issue with potentially grave consequences for Fujitsu and other licensees. The Debtor's position is that Fujitsu's licenses are non-executory and ride through. If the Committee wishes to challenge this characterization, it must do so in a manner that affords parties-in-interest with the opportunity to fully litigate the factual and legal issues involved and obtain a judicial ruling on the subject for appeals. The Committee may not subtly embed an executory classification into its Plan, then solicit votes on the subject (notably excluding the licensees), and consider the matter decided. Similarly, if the Committee seeks to strip rights and defenses from licensees through Section 1141 or a discharge, it must disclose this intention and allow for litigation on the proper scope and impact of Section 1141 and discharge.

In order to ensure fundamental due process, however, all impacted licensees must first have notice of the Disclosure Statement and Plan in order to be aware of how their rights might be in jeopardy. According to the docket, the Committee has not served many, if any, settlement licensees besides Fujitsu with its filings. The Committee must provide comprehensive disclosure regarding its intended treatment of the licenses to all Licensee Defenders. In addition, the licensees should be given an opportunity to participate in the process that could so severely jeopardize their licenses, rights and defenses. The Committee has failed to include licensees in the Plan formulation process, failed to consider licensee rights and defenses throughout, and has failed to engage Fujitsu in substantive discussions on these issues. Furthermore, if the Plan seeks to reject the licenses at any stage, rendering the licensees creditors with rejection damages claims, it must provide such creditors the opportunity to vote on the Plan and, given the supermajority size of the Licensee Defender potential claims, to control the Reorganized Company.

If the Committee fails to fully disclose the impact of the Plan on Fujitsu and other parties-in-interest, Fujitsu and the approximately 174 other Licensee Defenders will be compelled to pursue discovery to protect their rights and defenses. Licensees must have an adequate opportunity for discovery regarding the potential harm that the Plan would have on licensee rights, interests, and defenses in advance of any confirmation hearing, whether through Plan objections, adversary proceedings or both. Moreover, unless the confirmation hearing is structured to provide for a full evidentiary hearing on these issues, Fujitsu and other parties-in-interest will be compelled to take additional steps to create a record, both as to their disputes with the Committee and to the lack of a fair opportunity to defend their rights, interests, and defenses in the Plan process. Fujitsu, therefore, objects to any open disputes being deemed resolved through confirmation of the Plan, whether under Section 1141, in setting up debates regarding mootness principles upon confirmation, or otherwise.

V. AS A FIDUCIARY AND UNDER § 1102(b)(3), THE COMMITTEE MUST PROVIDE FULL AND FAIR DISCLOSURE TO LICENSEES

The Committee's disclosure duties go beyond the requirements of Section 1125. *See* 11 U.S.C. § 1102(b)(3). The Committee has fiduciary obligations to Fujitsu and other parties-in-interest that include special duties to warn, so that they can properly defend their rights, interests, and defenses. *See, e.g., Hall v. Perry (In re Cochise College Park, Inc.)* ("*Cochise*"), 703 F.2d 1339 (9th Cir. 1983) (defining the nature and scope of the trustee's fiduciary duty to individual contract counterparties like Fujitsu, as well as setting forth the consequences of the breach of fiduciary duty); *Heritage Hotel Ltd. P'ship I v. Valley Bank of Nev. (In re Heritage Hotel P'ship I)*, 160 B.R. 374 (B.A.P. 9th Cir. 1993), and related cases discussed below.

Cochise and related cases impose obligations specifically for the benefit of individual contract counterparties—not only for creditors generally. While the Committee may argue that the context of *Cochise* and other cases is distinguishable from these facts,[14] the key principles nevertheless apply. Individual contract parties are entitled to enforce their rights against both the Debtor and other fiduciaries with respect to any breaches of such duty.

A fiduciary like the Committee must be clear and specific when pursuing an adversarial course against a contract counterparty target, and such a fiduciary cannot create and then exploit information gaps—*i.e.*, no "sandbagging" is allowed. That is true not only for communications *to a creditor*, but also those *concerning a creditor*. As the *Cochise* court explained:

> A bankruptcy or reorganization trustee is a fiduciary of each creditor of the estate, including anyone who is a party to an executory contract with the bankrupt. As such, he has a duty to treat all creditors fairly and to exercise that measure of care and diligence that an ordinarily prudent person under similar circumstances would exercise. Although a trustee is not liable in any manner for mistakes in judgment where discretion is allowed, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law.
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> *Id*. at 1357 (internal citations omitted).

Heritage Hotel, 160 B.R. 374, also imposes disclosure obligations on the Committee, such that failure to disclose the full impact of the Plan will bar the Reorganized Company from later asserting that counterparties' rights have been diminished under principles of res judicata and estoppel. In *Heritage Hotel*, after confirmation of a debtor's Chapter 11 plan, the debtor brought a complaint against various lenders asserting lender liability causes of action arising out of a prepetition lending arrangement. Neither the plan nor the disclosure statement specifically mentioned the possibility of these particular causes of action. The Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's dismissal of the complaint as being barred by the doctrines of res judicata and equitable estoppel. *See id.* at 374; *see also Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132 (2d Cir. 1994) (estopping the debtor from amending its schedules after plan confirmation to object to certain claims); *Hay v.*

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[14] In *Cochise* the bankruptcy trustee had land sale contract buyers continue to make post-petition installment payments on obligations the trustee knew he had to reject, thereby profiting from the contract parties' performance.

First Interstate Bank of Kalispell, 978 F.2d 555, 557 (9th Cir. 1992); *Oneida Motor Freight Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988); *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993) (following *Oneida*); *Lil v. Bricker*, 116 B.R. 543 (Bankr. N.D. Ohio 1990) (barring recovery on a preference claim where creditor withdrew the objection to confirmation of the plan upon a settlement between the parties).

If the Committee is not clear and candid as to the full impact of the Plan on Fujitsu (and other similarly situated parties), then Fujitsu and other parties-in-interest can hold them accountable and will be entitled to assert their rights to prevent the Reorganized Company from profiting improperly from their errors and omissions. This Court should, thus, compel proper disclosure by the Committee up front, so as to ensure a fair, efficient and transparent process for the resolution of any disputes, and permit Fujitsu and other parties-in-interest to adequately protect themselves prior to confirmation. The Committee should not be permitted to evade the combined impact of cases like *Cochise* and *Heritage Hotel*, particularly when the disclosure issues are raised well in advance of plan confirmation, as here.

VI. THE DISCLOSURE STATEMENT FAILS TO DISCLOSE MAJOR RISKS ASSOCIATED WITH LICENSEE LITIGATION AND CLAIMS

The Disclosure Statement purports to address "Risk Factors" related to implementation of its Plan. DS at 43. However, the Committee entirely ignores the very licensee-related risks and litigation that the Committee is provoking and that could derail confirmation and implementation of its Plan, as well as create massive Licensee Defender claims that change the economics of the Plan and make the Disclosure Statement misleading. First, the Committee must disclose the significant cost the estate will incur if forced to litigate the executory nature of the licenses. Given the number of litigants, and the fact that, as of now, there is no unified committee of licensees, litigating with potentially 175 licensees would require substantial expense and burdens, as well as an entirely different timetable. If even a fraction of the licensees decide to litigate the issues, the entire confirmation process will likely be stalled indefinitely.

In the event that the Committee prevails in such litigation, licensees like Fujitsu may pursue additional litigation regarding application of Section 365(n), *Sunbeam* and other rights and defenses, particularly given the uncertainty of a potential post-confirmation rejection and Fujitsu's disputes about the enforceability or validity of various Plan provisions. Finally, should the Plan proceed to confirmation and become effective, if the licenses are rejected, licensees would have sizeable rejection damages claims. It does not seem that the Committee has provided for sufficient reserves to cover such licensee claims. The rejection claims are classified in Class 6A of the Plan, which is estimated to be at $8 million only. If even a portion the 175 licenses are rejected, or harmed by upstream commercialization agreement rejections, the licensee damages associated with such rejections would easily exceed by many multiples that entire amount. Therefore, it seems the disputed claim reserves are insufficient to pay such Licensee Defender damages in the event of such rejections. This economic risk has not been disclosed at all by the Committee, much less the other adverse consequences of provoking these battles with approximately 175 Licensee Defenders.

While the Committee downplays the risks associated with its Plan, is also ignores the alternatives for creditors, suggesting that there is no option for creditors other than to vote for the OCC Plan. Plan at 1 and 4 ("In sum, Creditors can either vote to accept the Plan and receive payment in full on their Claims or vote to reject the Plan and possibly receive nothing."). This is simply not true. For example, as set forth in more detail in the Licensee Defender Committee Motion, the OCC Plan is not the only option. A Licensee Defender Committee could facilitate and propose a viable and confirmable alternative plan.

VII. THE DISCLOSURE STATEMENT FAILS TO PROVIDE A LEGAL BASIS FOR MUCH OF WHAT IS CONTEMPLATED IN THE PLAN

A. The Proposed Post-Confirmation Management Structure is Overreaching and Impermissible

There are several problematic components of the Committee's Plan, including the new management structure. The Plan proposes to remove existing management of the company and replace it with a Board selected by the Committee. That Board, as set up in the Plan, would have expansive and largely unchecked power perpetually, with future exculpations. Remarkably, under the Plan, the Reorganized Company "shall retain all powers granted by the Bankruptcy Code, the Bankruptcy Rules and the Local Rules to a trustee or a debtor in possession, including those with respect to the recovery of property and objection to, and/or subordination of, Claims and Interests." DS at 43. This improper retention of power has no temporal limit or court oversight and is not balanced by any reciprocal obligations or duties. The Plan provides no terms of service for or mechanism to replace the Board members, even when under the Committee's Plan theory after the Effectiveness Date the Licensee Defenders could hold the supermajority of all claims. Furthermore, the Committee proposes a bold "double dipping" in post-Effective Date management: the Committee selects and appoints the Board, and the Committee itself still "shall remain in full force and effect" for the duration of the Plan process (five years or more). DS at 26.

The new management and related parties would be granted an overbroad past and future exculpations and release under the Plan. DS at 42. The expansive exculpation provisions protect management from all liability, including future liability, except in cases of willful misconduct or gross negligence (with a further qualification regarding right to rely on advice of counsel so as to escape the consequences of any misconduct or negligence). Such exculpation undermines the fiduciary accountability management owes to creditors. Fujitsu is concerned about the tremendous power granted to the Reorganized Company's management under the Plan. The Plan sets up that potential windfall with too much power and too few duties and insufficient judicial oversight and protections for creditors.

B. The Plan Attempts To Overreach Established Legal Bounds

At several points, the Plan apparently seeks to overreach legal bounds and norms; the Disclosure Statement provides no explanation or foundation for such maneuvers. For example, the Disclosure Statement fails to offer a legal basis or explanation for the following unconventional aspects of the Plan: (i) the post-Effective Date rejection of contracts (DS at 38); (ii) the bar on Claims transfers post Effective Date (DS at 38); (iii) restrictions on amendments to Claims (DS at 39); (iv) the attempt to expand the effect of confirmation and discharge beyond what is provided in Section 1141 of the Code (DS at 41); (v) the apparent effort to strip licensees of available legal defenses by vesting all property free and clear of "any and all liens, encumbrances, Claims and Interests of Creditors and Interest Holders…" (DS at 41);

(vi) complete and final discharge of all Claims without language to limit discharge to the extent permitted by applicable law (DS at 42); (vii) as discussed, overbroad past and future exculpation for the Debtor and Reorganized Company, beyond the bounds of established law (DS at 42); (viii) overbroad injunction language that does not expressly preserve licensee defenses and counterclaims (DS at 43); and (ix) retention of bankruptcy powers by the Reorganized Company for apparently perpetual duration, without reciprocal obligations for these fiduciaries or even court oversight (DS at 43).

VIII. THE DISCLOSURE STATEMENT CANNOT BE APPROVED UNLESS AND UNTIL THE COMMITTEE ADDRESSES THESE DEFICIENCIES

As a plan proponent, the Committee must provide full and fair disclosure regarding all key aspects of its proposed Plan. In its current form, the Disclosure Statement is patently inadequate, because, among other things, it neglects to provide any substantive disclosure relating to the treatment of the Debtor's approximately 175 licensees, which together could represent tens of millions of dollars of claims or more. Furthermore, the Disclosure Statement fails to disclose to creditors the very significant litigation threats, risks and costs associated with its current Plan and the counter-defensive actions it will provoke. As noted, the proposed Plan invokes the need for comprehensive litigation, such as regarding the executory nature of the licenses, as well as potential subsequent litigation concerning Section 365(n) and *Sunbeam* rights, followed by post-Effective Date rejection claims litigation. In the event that the Plan is confirmed and the Reorganized Company succeeds at rejecting any licenses or commercialization agreements at or post-Effective Date, the resulting Rejection Claims may derail feasibility of the Plan altogether. This risk has not been addressed at all in the Disclosure Statement.

The Committee must remedy all of these issues, as the Plan proponent, to meet its legal disclosure obligations. Furthermore, as a fiduciary to Fujitsu and other licensees, the Committee owes licensees the duty of disclosure and fair dealing. *See*, *e.g.*, *Cochise*, *supra*, 703 F.2d at 1357-59. Therefore, the Disclosure Statement cannot be approved, because the disclosure is inadequate and the Plan, in its current form, is incapable of confirmation in light of the multiple license-related obstacles its presents.

IX. CONCLUSION AND RESERVATION OF RIGHTS

For the reasons explained herein, the Disclosure Statement does not provide sufficient information for Fujitsu, or the licensees under the Debtor's other licenses,[15] to understand how the Committee intends to deal with the Debtor's licenses. Reading between the lines of the cryptic Disclosure Statement, Fujitsu is deeply concerned that the Plan improperly contemplates post-Effective Date rejection of licenses, destructive rejection of upstream commercialization agreements, and other harms. As detailed herein, the Disclosure Statement evidences multiple procedural and substantive deficiencies. To address these deficiencies, Fujitsu requests that the Committee provide comprehensive disclosure, including access to all relevant documents, and express, binding assurance in the Plan itself and in the form of confirmation order findings of fact and conclusions of law providing that Fujitsu's licenses will not be adversely impacted by the Plan. Fujitsu further reserves its rights to object to the Plan and to obtain further clarification as to any impact of the Plan on Fujitsu's license rights, interests, claims, or defenses in connection with these issues.

Dated: January 16, 2014

MORRISON & FOERSTER LLP

By: /s/ G. Larry Engel
G. Larry Engel
Kristin A. Hiensch

Attorneys for Fujitsu Limited

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[15] While Fujitsu is not speaking for these other licensees, once other similarly situated licensees focus on these issues, such licensees may join in these concerns, either now or in connection with the Plan-confirmation process.

Exhibit A

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re TECHNOLOGY PROPERTIES LIMITED, LLC, Debtor.	Case No. 13-51589 SLJ Chapter 11 MOTION FOR APPOINTMENT OF § 1102(a)(2) COMMITTEE AND RELATED RELIEF FOR LICENSEE DEFENDERS Date: February 26, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

TO DEBTOR AND ITS COUNSEL OF RECORD AND ALL PARTIES IN INTEREST:

PLEASE TAKE NOTICE THAT on February 26, 2014, at 2:00 p.m. in the Courtroom of the Honorable Stephen L. Johnson, located in room 3099 of the above-captioned Court, Fujitsu Limited ("Fujitsu" or, generally, a "Licensee Defender") by and through its counsel, will and hereby does move for: (1) an order appointing a statutory "Licensee Defender Committee" under 11 U.S.C. § 1102(a)(2) and other relief under § 1102; (2) in the alternative, the replacement of the OCC members pursuant to § 1102(a)(4) with members more sensitive to their fiduciary duties and the need to represent all creditors; and (3) an order mandating the sharing and report of the requested OCC information pursuant to § 1102(b)(3), including to facilitate coordination and cooperation among the 175 Licensee Defenders for fair joint defense.

Fujitsu will base this Motion on the memorandum of points and authorities filed in support of this Motion, the notice of motion and exhibits filed in connection herewith, all other pleadings and matters of record, and such other written or oral argument and other materials as may be presented before this Court takes the Motion under submission.

Dated: January 16, 2014

MORRISON & FOERSTER LLP

By: /s/ G. Larry Engel
G. Larry Engel
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re TECHNOLOGY PROPERTIES LIMITED, LLC, Debtor.	Case No. 13-51589 SLJ Chapter 11 MEMORANDUM OF POINTS AND AUTHORITIES TO MOTION FOR APPOINTMENT OF § 1102(a)(2) COMMITTEE AND RELATED RELIEF FOR LICENSEE DEFENDERS Date: February 26, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

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I. INTRODUCTION

Fujitsu Limited, a licensee of the Debtor ("Fujitsu" or, generally, a "Licensee Defender") is one of approximately 175 § 1109(b) parties-in-interest that the Debtor has identified as settlement licensees (collectively the "Licensee Defenders").[1] Such licensees could collectively become a super majority of the allowed creditor claims in this case if the Official Unsecured Creditors Committee (the "OCC") succeeds with confirmation of its plan of reorganization (the "OCC Plan") [Dkt. No. 321]. As set forth in Fujitsu's Reservation Of Rights And Objection To Disclosure Statement For Official Committee Of Unsecured Creditors' Plan Of Reorganization (the "Fujitsu DS Objection"), the OCC Plan could also provoke massive litigation (and potential appeals) based on aspects of the OCC Plan that threaten to undermine Licensee Defenders' rights and defenses. Despite the potential harm to such parties-in-interest and the potential size of licensee claims, the majority of the Licensee Defenders have not been properly noticed and, therefore, are not adequately represented in this Case. Licensees have not been involved in the OCC plan process or in negotiations with the OCC at all, and most have not even been served with the key pleadings potentially impacting their rights.

Therefore, Fujitsu[2] moves this Court for the appointment of a statutory "Licensee Defender Committee" under 11 U.S.C. § 1102(a)(2) and for other relief under § 1102, because it is necessary to assure adequate representation of licensee creditors under these circumstances. In the alternative, Fujitsu requests a rebalancing of the existing OCC pursuant to 11 U.S.C

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[1] Debtor's Disclosure Statement (December 23, 2013) Dkt. 340-1 ("Debtor's DS") at 49, n.10, related to Debtor's Plan of Reorganization (December 23, 2013) at 5, Dkt. 340 ("Debtor's Plan"). Counsel to Fujitsu attempted to identify these 175 Licensee Defenders through public searches. Such investigation revealed approximately 134 other parties who may have licenses with the Debtor. The burden should be on the Debtor and the OCC to ensure all 175 parties are properly alerted to any developments in this case that may impact Licensee Defender rights.

[2] As a settlement licensee, Fujitsu is a § 1109(b) party in interest with standing to object to the Disclosure Statement. *See Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 884 (9th Cir. Cal. 2012) (noting that "party in interest" standard is construed broadly and on a case-by-case basis where party has a sufficient stake in the proceedings). There are also many other similarly situated target defendants sued or threatened by the Debtor, including Licensee Defenders on other unsettled patent disputes.

§ 1102(a)(4) to assure better communication and protection for the Licensee Defender constituents.[3]

II. PRELIMINARY STATEMENT

A. Overview of Key Parties and Settlement Licenses

Fujitsu and the other Licensee Defenders are legitimate operating businesses (most of whom are manufacturers or distributors of real products) who were sued or threatened with IP-infringement suits by the Debtor. By contrast, the Debtor and most of the Committee members are "trolls" or troll affiliates or investors or supporters. A so-called "troll" is the term commonly used to describe a "nonpracticing" entity that "commercializes" patents. That is, patent trolls acquire patent rights with the primary goal of coercing ransom payments for settlement "licenses" by the threat of (1) launching of patent infringement litigation, and (2) leveraging the huge cost and burden of defending against even exaggerated or meritless troll claims. Trolls and troll litigation have been the subject of many public policy debates calling for patent reforms to stop or limit troll abuses. Even the President has added his support for reform.[4] *See* Exhibits A through G (documenting the controversial and political nature of troll practices).

Fujitsu is informed and believes that all or substantially all of the Licensee Defenders were targets of such troll claims or litigation and obtained their licenses through related settlements (as opposed to obtaining licenses through business negotiations in traditional technology collaborations). That is, the Licensee Defenders have already paid to settle disputed

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[3] Fujitsu, for itself and any party joining in this motion, does not consent to jurisdiction of the Bankruptcy Court with respect to any patent dispute or any other pending litigation. This motion shall not be deemed or construed to be a waiver of the rights of Fujitsu under applicable law or in equity, including but not limited to, the right (i) to have final orders entered only after de novo review by a district judge in applicable matters, (ii) to trial by jury in any proceeding so triable in this case or any case, controversy, or proceeding related to this case, (iii) to have the District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal, or (iv) to assert or exercise any other rights, claims, actions, defenses, setoffs or recoupments to which Fujitsu is or may be entitled, all of which are expressly reserved.

[4] By failing to be candid about the troll nature of Debtor's business and the OCC managed Reorganized Company's business, the OCC Disclosure Statement fails to address the real feasibility, legal and risk factors that will be at issue in the OCC Plan confirmation battles. *See* Fujitsu DS Objection. Among those risks is that law reforms will make troll litigation less threatening and less feasible and, therefore, less profitable.

claims of the Debtor, most of which they regarded as meritless or exaggerated, because of the disproportionately huge cost of defense and burden to fully litigate such claims to judgment on the merits. Some Licensee Defenders are still litigating with the Debtor on other patent portfolios outside the Debtor's scope of existing settlements.

B. The OCC Plan Threatens to Undermine Settlement Licenses

The Licensee Defenders are entitled to the benefit of such settlement licenses and the OCC Plan cannot be used as a mechanism to relitigate previously settled litigation. In light of certain troubling aspects of the OCC Plan (detailed in the Fujitsu DS Objection) and because such controversial troll litigation is the primary business of Debtor and the OCC proposed Reorganized Company, Fujitsu and other Licensee Defenders are very concerned that the OCC Plan threatens to destroy or impair the settlement license benefits for which the Licensee Defenders have already paid. *See* Fujitsu DS Objection.

The Licensee Defenders are particularly focused on understanding the OCC Plan threats, some or all of which may be addressed in future adversary proceedings for declaratory or other relief. Licensee Defenders assert that: (i) settlement licenses must survive, regardless of what OCC or others attempt to do in order to harm them, because either (A) they are not the kind of executory contracts that can be rejected (*e.g.*, *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010),[5] and are rights and defenses vested beyond harm under the OCC's exaggerated version of Section 1141, (B) even if they are found to be executory, as would be the result if OCC is permitted to exaggerate the effect of Section 1141 under its OCC Plan, *Sunbeam*[6] is right, and *Lubrizol*[7] and *Interstate Bakeries*[8] are wrong,[9] (C) even if those arguments fail, Section 365(n)

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[5] As in *Exide*, Licensee Defenders dispute that their licenses can be rejected under Section 365(n), and, in any event, their contract rights and defenses cannot be rejected or harmed, at least without creating consequential damage claims for Licensee Defenders. The character of such settlement licenses is not an appropriate issue to be resolved at plan confirmation, but requires an adversary proceeding under Bankruptcy Rule 7001, although considering the Patent Act and Federal IP issues in that and related litigation, it may be more appropriate for withdrawal of reference of such disputes pursuant to 28 U.S.C. § 157(d).

[6] *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

[7] *In re Richmond Metal Finishers, Inc.* ("*Lubrizol*"), 756 F.2d 1043, *cert denied*, 475 U.S. 1057 (1986).

still protects Licensee Defenders (despite being entirely ignored in the OCC Plan),[10] and (D) the objectionable OCC Plan is not confirmable and, if confirmed, will be invalidated, in whole or as to relevant parts, on appeals, despite OCC mootness arguments.[11]

C. General Basis for and Benefits of a Licensee Defenders Committee

Because the OCC fiduciaries[12] have proposed a plan that harms Licensee Defenders and has generally shut licensees out of plan-related discussions, it is clear that the OCC does not adequately represent or reasonably consider licensee rights and defenses—rather, it seems to be at odds with them. Appointment of a Licensee Defender Committee will enable similarly-situated licensees with an interest in this case to participate fairly in the process and protect their licenses, rights and defenses in an efficient manner.

The OCC Plan, unless promptly and comprehensively revised to reflect licensee considerations, will likely trigger litigation by multiple Licensee Defenders. Without

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(Footnote continued from previous page.)

[8] *Interstate Bakeries Corp.*, 690 F.3d 1069 (8th Cir. 2012).

[9] *Sunbeam* correctly explains why § 365 rejection of an IP license is a breach — not a termination — and that defenses must survive, because the debtor licensor cannot profit from its own breach. Contrary precedent springing from the erroneous *Lubrizol* decision and its progeny are simply incorrect. If the Supreme Court has to resolve that Circuit split, that would be a good thing for IP licensees, because *Lubrizol* is intellectually indefensible on the merits. Since no other kind of executory contract is terminated by rejection, there can be no principled basis for treating IP licenses as terminated by rejection.

[10] Licensee Defenders' worst case result is the survival of their licenses under § 365(n), which would still defeat even the OCC's exaggeration of Section 1141 in the OCC Plan. For a public policy discussion of the importance of that § 365(n) defense for licenses, *see, e.g., In re Qimonda, AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), defending § 365(n) under 11 U.S.C. § 1506 in Chapter 15. Note that the OCC Disclosure Statement and Plan entirely ignore § 365(n).

[11] The OCC and its members apparently intend to attempt to use their OCC Plan as a basis for the Reorganized Company to attack the Licensee Defenders' rights, claims and defenses. Thus, the Licensee Defenders may as well defend by challenging the standing and rights of the Reorganized Company by disputing the OCC Plan, and to the extent that the Plan survives, challenging also objectionable features, such as the exculpations of the OCC and its members and OCC member Board of the Reorganized Company, who must remain fully accountable fiduciaries in a way that cannot ever be exculpated or mooted on appeals.

[12] The OCC owes fiduciary duties to the Licensee Defenders. *See, e.g., In re Cochise College Park*, 703 F.2d 1339 (9th Cir. 1983), imposing on a trustee a specific fiduciary duty of disclosure and fair dealing in favor of each individual contract counterparty, which the trustee breached by sandbagging those contract counterparties with improper rejection tactics. *See* Fujitsu DS Objection.

coordination, such as through a statutory committee, litigation will proceed in a piecemeal manner. Appointment of a Licensee Defender Committee will enable licensees to cooperate and participate in the case in a streamlined, cost-effective, and coordinated manner. It will make any plan-related litigation more efficient by consolidating scores of licensees into a more unified process.

In addition, a Licensee Defender Committee could advance the restructuring of the Debtor by offering a better plan of reorganization. Unlike the troll Debtor or troll-aligned OCC, a Licensee Defender Committee could rally sufficient cost-of-defense settlements from licensee defendants as a way to fund a prompt resolution of the OCC's estimated $8 million in unsecured claims. Therefore, in addition to ensuring adequate representation of Licensee Defenders, a Licensee Defender Committee could facilitate a fair and reasonable competing plan, thereby avoiding the counterproductive expenses and burdens of litigation provoked by the OCC Plan.

III. ARGUMENT

A. Appointment of a Licensee Defender Committee Is Necessary and Appropriate Here To Ensure Adequate Representation of Licensees

While the U.S. Trustee considers whether to appoint a Licensee Defender Committee under 11 U.S.C. § 1102(a)(1),[13] Fujitsu requests that the Court appoint such a committee pursuant to Section 1102(a)(2) because that is "necessary to assure adequate representation of creditors" under these circumstances.[14] Furthermore, in order to reduce discovery expense and to

[13] The Court reviews the U.S. Trustee's decision not to appoint an official committee *de novo*. *See, e.g.*, *In re Oneida Ltd.*, 2006 Bankr. LEXIS 780, at *3 (Bankr. S.D.N.Y. May 4, 2006) (the Court reviewed U.S. Trustee's decision *de novo*); *Enron*, 279 B.R. at 684 (same), aff'd, 2003 U.S. Dist. LEXIS 18149 (S.D.N.Y. Oct. 9, 2003); *In re Texaco, Inc.*, 79 B.R. 560, 566 (Bankr. S.D.N.Y. 1987) (whether or not request for additional committee is made to the U.S. Trustee, Court must exercise its own judgment); *McLean*, 70 B.R. at 856-57 (an abuse of discretion standard does not apply with respect to U.S. Trustee's initial exercise of discretion); *see also In re Value Merchants*, 202 B.R. 280, 284 (E.D. Wis. 1996) (reviewing U.S. Trustee decision *de novo*); *In re Dow Corning Corp.*, 194 B.R. 121 (Bankr. E.D. Mich. 1996) (court has *de novo* authority to alter an existing committee), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997); *In re First RepublicBank Corp.*, 95 B.R. 58, 59 (Bankr. N.D. Tex. 1998) (applying *de novo* standard of review to determine adequacy of representation).

[14] We have just begun the discussions with the U.S. Trustee, but in the interest of time we need to proceed on parallel tracks. If we are able to persuade the U.S. Trustee of the merit of our request, the motion becomes moot.

compensate for inadequate disclosure so far in this case, the Court should order a comprehensive OCC report to all Licensee Defenders pursuant to §§ 1125 and 1102(b)(3), among other things: (i) identifying every possible prejudice that the OCC Plan could inflict on any Licensee Defender, and (ii) explaining how the OCC and its controlled Board intend to exercise their discretion under the OCC Plan with respect to Licensee Defenders, as well as (iii) identifying each OCC member's conflicts of interest relative to the Licensee Defenders.[15]

A statutory special committee comprised of Licensee Defenders is necessary and appropriate here. Courts have appointed special committees under § 1102(a)(2) in cases where, as here, there is a large number of specialized creditors with unique concerns creating adversity with the main creditors committee. For example: (i) in the Orange County Chapter 9 case,[16] where there were both (a) a special committee appointed for the investor creditors in the Orange County Investment Pool, and (b) an official subcommittee for those located outside the County and beyond insider control and Orange County political conflicts; (ii) in the *Pizza Time Theater Inc.* (Chuck E. Cheese) Chapter 11 case,[17] the franchisee committee was appointed, because (as here) there were many franchisees with huge potential rejection claims not respected by the

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[15] In order fairly and cost-effectively to calculate that damage claim exposure from the OCC Plan, we need either or both (1) OCC compliance with their disclosure obligations under 11 U.S.C. §§ 1125 and 1102(b)(3), including by correcting the flaws described in the Fujitsu DS Objection, and (2) discovery in one or more of the coming litigations triggered by the OCC, including in opposition at the long trial expected at the OCC Plan confirmation hearing. What we need includes:

(a) transparency as to the intent and effects of the OCC Plan on all the issues raised in the Fujitsu DS Objection, plus the better concealed others that are revealed in that required further disclosure, as well as those later discovered by the other Licensee Defenders who have been awakened to these covert OCC threats to their core businesses, whether by opposition of Fujitsu or others, or by the OCC beginning to make the adequate disclosure required by Section 1125 or 1102(b)(3) and by the Committee's fiduciary duties to these Licensee Defenders;

(b) data about the other Licensee Defenders previously hidden as "confidential," so that they can cost-effectively coordinate their common defense and the potential for them co-sponsoring a competing plan of reorganization; and

(c) data about the pending troll litigation, so as to enable the Licensee Defenders and their Committee to develop a far superior competing plan of reorganization with those defendants.

[16] *In re County of Orange*, No. 8:94-bk-22272-ES (Bankr. C.D. Cal. 1994).

[17] *In re Pizza Time Theatre Inc.* ("*Chuck E. Cheese*"). No. CV-89-20633-SW (Bankr. N.D. Cal 1984).

creditors committee; and (iii) other more common committees for retirees (*e.g.*, Detroit, Kodak, etc.), for equity holders (see below), for mass tort victims, etc. All those precedents apply here.[18]

Whether the appointment of a specific committee is appropriate under section 1102(a)(2) depends on the facts and circumstances of the case. *See In re Beker Indus. Corp.*, 55 B.R. 945, 948 (Bankr. S.D.N.Y. 1985) ("The statute affords no test of adequate representation, leaving the bankruptcy Courts with discretion to examine the facts of each case to determine if additional committees are warranted."). *See also In re Dow Corning Corp.*, 194 B.R. 121, 141 (Bankr. E.D. Mich. 1996) ("Most Courts confronted with a motion for the appointment of a separate committee recognize that there is no bright line test for determining whether an additional committee should be appointed. Instead, the decision must be made on a case-by-case basis."), *rev'd on other grounds*, 212 B.R. 258 (E.D. Mich. 1997). In determining whether to appoint a committee under section 1102(a)(2) of the Bankruptcy Code, "the following non-exclusive factors are the most pertinent: (a) the nature of the case; (b) identification of the various groups of creditors and their interests; (c) the composition of the committee; and (d) the ability of the committee to properly function." *Dow Corning*, 194 B.R. at 142. As demonstrated herein, the case for appointment of a Licensee Defender Committee satisfies each of these requirements.

Section 1102(a)(2) of the Bankruptcy Code provides that the Court may order the appointment of a statutory equity committee "if necessary to assure adequate representation of . . . equity security holders." 11 U.S.C. § 1102(a)(2). Courts have developed a number of criteria to consider in determining whether to appoint such a statutory committee: (i) whether the interest of those constituents are adequately represented absent the appointment of a statutory committee; (ii) whether there is a likelihood of constituents receiving a distribution; (iii) the timing of the motion relative to the case; and (iv) whether the administrative costs of the statutory committee

[18] Those cases apply here because the OCC Plan admits there is value in excess of what it required to pay all the OCC recognized $8 million creditors, because their OCC Plan is to restore the Reorganized Company to the equity holders when those creditors' allowed claims are paid in full. Moreover, we address those equity precedents in order to rebut the predicable attempt by the OCC to distinguish special creditor precedents on the disputed theory that Licensee Defenders do not become creditors until after they are wrongly rejected by the OCC's Reorganized Company after the Effective Date of the OCC Plan.

outweigh the benefits of adequate representation. *See, e.g.*, *In re Kalvar Microfilm, Inc.*, 195 B.R. 599, 600 (Bankr. Del. 1996); *In re Williams Commc'ns Group*, 281 BR. 216, 220 (Bankr. S.D.N.Y. 2002); *In re Johns-Manville Corp.*, 68 B.R. 155, 160 (S.D.N.Y. 1986); *Wang Labs.*, 149 B.R. at 1-2. In addition to other factors, Courts also weigh the size and complexity of the case. *See, e.g.*, *Beker*, 55 B.R. at 949. As set forth below, each of these factors, when applied to the instant facts, also strongly supports the appointment of a statutory Licensee Defender Committee.

1. Licensee Defenders Cannot Rely On Any Other Constituency For Adequate Representation.

Absent a statutory committee, Licensee Defenders clearly lack adequate representation in this case, because the OCC has not only ignored them and their interests, but has also designed its OCC Plan in a way that could harm the Licensee Defenders. *See Pilgrim's Pride Corp.*, 407 B.R. 211, 217 n. 17 (Bankr. N.D. Tex. 2009) ("[W]hen it comes to valuation and determination of future capital structure for plan purposes, their agendas are likely to be very much at odds."); *In re Saxon Indus.*, 29 B.R. 320, 321 (Bankr. S.D.N.Y. 1983) (stating that "the two committees are separate and distinct entities with the members of the unsecured creditors and equity creditors possessing variant priorities and interests with respect to their relationship with the debtor").

Thus, there are no other parties in the case currently working to protect the rights of Licensee Defenders. Congress clearly noted the importance of safeguarding against this divergence of interests when it emphasized: "[a]s public investors are likely to be junior or subordinated creditors or stockholders, it is essential for them to have legislative assurance that their interests will be protected. Such assurance should not be left to a plan negotiated by a debtor in distress and senior or institutional creditors who will have their own best interest to look after."[19] S. Rep. No. 989, 95th Cong., 2d Sess. 10 (1978). A statutory committee offers such

[19] As stated in the legislative history to section 1102, appointment of a statutory shareholders' committee offers shareholders necessary protection against "the natural tendency of a debtor in distress to pacify large creditors, with whom the debtor would expect to do business, at the expense of small and scattered investors." S. Rep. No. 989, 95th Cong., 2d Sess. 10 (1978). While Congress may not have anticipated this unique situation, the same logic applies. Because the OCC works to favor some creditors over others, by delaying when parties in interest like

(Footnote continues on next page.)

assurance by facilitating a unified voice against the myriad competing interests. *See In re Finley Kumble*, 85 B.R. 13, 16 (Bankr. S.D.N.Y. 1988) ("The committee structure provided for in Chapter 11 cases offers substantial benefits to the Court and the Debtor in the form of a centralized body to be heard and met with.").

2. The Debtor Has The Capacity To Compensate Licensee Defenders For At Least Some Of The Harm Caused By The OCC Plan

The second element to which Courts look in determining whether to appoint such a committee is whether that constituency has an economic interest to protect. Despite the OCC Plan's apparent effort to deprive the Licensee Defenders of a recovery by wrongful manipulation of timing for triggering their rejection or other claim damages, the Licensee Defenders clearly have a right to be paid that is equal to the right of any of the unsecured creditors, whom the OCC expects to pay in full.

3. A Statutory Committee Appointment Will Not Delay This Case

The appointment of a statutory committee will not delay this case but will instead facilitate a swifter resolution of this case, since the OCC Plan is not confirmable. The Court should appoint the committee as a way to facilitate plan negotiations and discussions among competing stakeholders regarding formulation of a better and less divisive plan of reorganization. The appointment of a statutory committee will ensure that the 175 Licensee Defenders have a seat at the negotiating table, rather than limiting their options to litigation against plans and plan proponents on a piecemeal basis. This is not a case where stakeholders have moved for the appointment of a statutory committee merely to extract some hold-out value from the Debtor. Rather, the appointment of a statutory committee is a constructive solution to ensure adequate representation of an otherwise unrepresented but critical group and to hopefully advance a consensual plan that satisfies all stakeholders.

(Footnote continued from previous page.)

Licensee Defenders become creditors under the OCC Plan, such Licensee Defenders need a committee now that does protect their interests before those interests are lost.

4. The Incremental Administrative Costs Of A Statutory Committee Will Not Outweigh the Clear Benefits That Committee Representation Will Yield

While Fujitsu recognizes the expense associated with the appointment of a Committee, courts agree that "[c]ost alone cannot, and should not, deprive . . . [constituents] of representation." *In re McLean Indus, Inc.*, 70 B.R. 852, 860 (S.D.N.Y. 1987). *See also In re Enron Corp.*, 279 B.R. 671, 694 (Bankr. S.D.N.Y. 2002) ("[a]dded cost alone does not justify the denial of appointment of an additional committee where it is warranted."). Additional cost must be weighed against the need for adequate representation. *See In re Wang Labs., Inc.*, 149 B.R. 3-4 (Bankr. D. Mass. 1992); *Beker*, 55 B.R. at 949-51. Once the need for adequate representation is established, "the burden shifts to the opponent of the motion [to appoint an official committee] to show that the cost of the additional committee sought significantly outweighs the concern for adequate representation and cannot be alleviated in other ways." *Id.* at 949; 4 NORTON BANKR. L. & PRAC. 2d § 78:5 (2d ed. 2005) ("Should the moving party be successful in showing that an additional committee is required, the burden then shifts to the opponent to demonstrate that the cost of such an additional committee notably outweighs the interest in adequate representation.").

Courts have made abundantly clear that the administrative costs of a statutory committee alone must not bar statutory committee recognition. *See McLean*, 70 B.R. at 860 ("Cost alone cannot, and should not, deprive . . . security holders of representation."; *Enron*, 279 B.R. at 684 ("Added cost alone does not justify the denial of appointment of an additional committee where it is warranted."). Appointment of a statutory committee will level the playing field for Licensee Defenders as they seek to vindicate their rights, and preserve their defenses, against constituencies with adverse economic interests and unlimited budgets. Indeed, when viewed in comparison to the alternative cost of uncoordinated litigation with 175 sorely aggrieved Licensee Defenders, the committee appointment should be the preferred solution for *containing* costs.

B. A Licensee Defender Committee Could Propose a Feasible, Confirmable Plan for the Benefit of all Parties

Given a modest amount of time and some Court required cooperation for information from the estate in organizing, a Licensee Defender Committee could propose a better alternative plan.[20] Because the OCC estimates only $8 million in real, net unsecured claims it should not be difficult for a Licensee Defender Committee to organize a competing plan, even using cost of defense amounts in settlements. Note, however, that neither the Debtor nor the troll sponsor OCC could ever itself accomplish that kind of plan designed by the Licensee Defender Committee, because no legitimate business targeted by trolls would ever want to revive a failing troll so that it could harass them again in the future.

As the Supreme Court has noted, albeit in a different context, parties in interest must be protected *before plan confirmation* from unfair manipulation by plan proponents. *E.g., Bank of Am. v. 203 North La Salle Street P'ship*, 526 U.S. 434, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) (equity holders cannot divert the upside opportunity from a secured creditor's deficiency claim by retaining equity control without a market value test under a plan of reorganization, because there is value in controlling the debtor's assets.) Just as the "new value" plan in *203 North LaSalle* could not be manipulated by equity to retain control of the Reorganized Company, such control should rightfully belong to all of the unsecured creditors. Here, the troll sponsoring OCC creditors cannot retain control that should belong to the majority of the allowed claim holders: *i.e.*, Licensee Defender creditors created by their OCC Plan. *See id.*

The precedent of *203 North La Salle* is relevant here, because the OCC has created an even more improper version of a new value plan by the manipulation of OCC control over the claim and contract assets and the section 365 rejection power. That is, the moment before the OCC Plan becomes effective, the OCC troll-sponsor creditors would control the case. However,

[20] So, what kind of a competing Plan would the Licensee Defenders Committee advocate? One goal would be to pay off the required priority and administrative claims allowed by the Court, plus the allowed unsecured claims, and cram down the rest at the nothing they deserve under applicable law, all without disturbing the existing license settlements with the Licensee Defenders. That would, (a) avoid the nonproductive and unnecessary defensive litigation that the OCC Plan would otherwise compel from Licensee Defenders, and (b) pay the OCC-favored creditors their estimated $8 million in allowed claims and end any need—or excuse—from them to manage and continue a troll business through the Reorganized Company. How would that be accomplished? By having the Licensee Defender Committee organize and control a *business* (not troll) settlement process that (1) expressly assures all Licensee Defenders of perpetual peace and the continuing benefit of their bargains under their settlement licenses, and (2) promptly settles all the pending or threatened troll litigation on a fair and reasonable basis sufficient to close out this case.

upon rejection after the OCC Plan Effective Date, the Licensee Defenders could become the super-majority creditors (*i.e.*, with claims potentially totally many times the claim amounts under the OCC Plan). Yet, just as with the controlling equity in a new value plan barred in *203 North La Salle*, the OCC is abusing its control to unfairly harm the Licensee Defender creditors that its OCC Plan is creating after the Effective Date, at which point it could be too late for the Licensee Defenders to defend themselves effectively. Clearly, the Courts need to fashion rules to stop this kind of divisive plan from OCC fiduciaries. Therefore, this Court should follow the Supreme Court's suggestion that *allowing competing plans is one means of addressing the abuse of control by the initial plan proponent*. *See id.*, 119 S.Ct. at 1424.

If the chief goal in formulating a plan is to pay the priority administrative and allegedly allowable $8 million unsecured claims in this case, neither the Debtor's Plan nor the OCC Plan is a cost-effective solution. Indeed, both Plans are counterproductive and infeasible, and have the potential to create larger claims and expenses than could ever be paid. *See* Fujitsu DS Objection.

Clearly, the OCC troll-supporter creditors don't trust the Debtor's management or insiders to run a continuing troll business or fairly and timely to pay them in full. Thus, the OCC Plan theory is to replace the Debtor's management with perpetual, unchangeable management by OCC member troll sponsors with their own agenda (as well as the duplicative/perpetual OCC and their professionals). *See* Fujitsu DS Objection. Whenever the net proceeds from the Reorganized Company's continuing troll litigation business are sufficient to pay off the allowed claims, then, apparently the insiders can resume control of their troll business. None of this is attractive or tolerable to Licensee Defenders or, indeed, even feasible. Moreover, the OCC Plan will create expensive test-case litigation and likely appeals.

A Licensee Defender Committee would be better able to resolve or entirely avoid such litigation by proposing an alternative plan at a sufficient price for a win-win result, properly paying the allowable claims.[21] In the event that the Court does not allow a Licensee Defender

[21] For example, one of many defensive strategies of legitimate businesses resisting the objectionable conduct of trolls is illustrated by RPX, where the legitimate target defendants use a "white knight" patent buyer to acquire patents in competition with the trolls for defenses and reasonable license fees. See Exhibits D, F and G. The Licensee Defenders Committee idea is not

(Footnote continues on next page.)

Committee, Fujitsu requests that the Court promptly schedule a §105(d) status conference to discuss how best and most cost-effectively to obtain the data needed to fashion an ad-hoc Committee of like-minded Licensee Defenders to coordinate the coming litigation or a competing plan. Allowing the Licensee Defenders to have common interest privileged discussions, especially without debates with plan proponents over the boundary of joint defense versus the solicitation of opposition to plans, is in the best interests of all stakeholders.

IV. CONCLUSION

For the foregoing reasons, Fujitsu requests the Court to order:

1. The appointment of a Licensee Defender Committee pursuant to § 1102(a)(2);

2. In the alternative, the replacement of the OCC members pursuant to § 1102(a)(4) with members more sensitive to their fiduciary duties and the need to represent all creditors;

3. The sharing and report of the requested OCC information pursuant to § 1102(b)(3)(C), including to facilitate coordination and cooperation among the 175 Licensee Defenders for fair joint defense; and

4. Such other relief as is just and proper.

Dated: January 16, 2014

MORRISON & FOERSTER LLP

By: /s/ G. Larry Engel
G. Larry Engel
Kristin A. Hiensch

Attorneys for Fujitsu Limited

(Footnote continued from previous page.)

exactly the same, but the point is to illustrate that target defendants can deal with recognized “good guys” on a business like basis, whereas litigation is the only typical tool of trolls like the Debtor or the Reorganized Company. A better plan could offer a quasi-RPX type of solution, whereby settling legitimate businesses can achieve a fair license defense in a reasonable settlement without “feeding the beast” (i.e., paying ransom to the troll, whether as the Debtor or the OCC’s imagined Reorganized Company).

TABLE OF EXHIBITS

A	Obama Takes Aim at Patent-Holding Firms (WALL STREET JOURNAL, June 4, 2013)
B	"Cisco Calls Patent Trolls Racketeers" (WALL STREET JOURNAL, November 11, 2012)
C	"Former Intuit Lawyer Plays Offense Against NPEs" (THE RECORDER, September 20, 2013)
D	"Patent Trolls Face Harsh Criticism at Senate Hearing" (MANAGING INTELLECTUAL PROPERTY, November 8, 2013)
E	"Start-Up Takes on 'Patent Trolls' Firm Plans to Defensively Buy Patents and Charge Fixed Membership-License Fees" (Wall Street Journal, November 24, 2008)
F	"IP trolling firms make more waves" (EE TIMES 12/31/10 discussing TPL and OCC member Patriot Scientific Corp.)
G	Illustration (THE RECORDER, January 13, 2014)

EXHIBIT A
(WALL STREET JOURNAL, November 11, 2012)

THE WALL STREET JOURNAL.
WSJ.com

BUSINESS | Updated June 4, 2013, 1:44 p.m. ET

Obama Takes Aim at Patent-Holding Firms

By JARED A. FAVOLE and BRENT KENDALL

WASHINGTON—The White House announced a set of executive actions and policy recommendations Tuesday aimed at preventing certain patent-holding firms, known as "patent trolls" to their detractors, from abusing the patent system.

The Obama administration's actions are intended to target firms that have forced technology companies, financial institutions and others into costly litigation to protect their products. These patent-holding firms amass portfolios of patents and focus on pursuing licensing fees rather than using the patents to build new products.

More

Experts Weigh In on President's Plan

Fact Sheet: White House actions

Regulators Take Look at Patent Firms' Impact (11/18/2012)

Cisco Calls Patent Trolls Racketeers (11/11/2012)

Patent Troll Tactics Spread (7/8/2012)

When Lawyers Become 'Trolls' (1/23/2012)

The firms say they are doing nothing wrong, just defending patents that were legally granted by the U.S. Patent and Trademark Office. They say they promote a fair market by protecting smaller inventors.

To help deter questionable patent-infringement lawsuits, the Obama administration is, among other things, directing the Patent and Trademark Office to issue rules that require the owner of a patent to be clearly identified, the White House said. Businesses are sometimes sued by shell companies and don't always know who actually owns the patent they are being accused of infringing or whether the firm holds other relevant patents.

In addition, President Barack Obama is asking Congress to pass legislation that would give courts broader discretion to impose sanctions on litigants who file lawsuits deemed abusive by judges.

In all, the Obama administration initiated five executive actions and made seven recommendations to lawmakers. The administration's announcement came in conjunction with the release of a White House report on patent-holding firms. The report cites estimates that companies and individuals paid patent-holding firms $29 billion in 2011, up sharply in recent years.

The president's unilateral moves might make an incremental difference in the patent system, but the White House will need help from Congress to make more substantial changes, said Edward Reines, a patent lawyer with Weil, Gotshal & Manges LLP.

"The legislative recommendations are the core of this initiative," Mr. Reines said.

Congress is already considering proposals that are similar to those made by the White House. Lawmakers spent many years debating patent legislation before passing a law in 2011 that overhauled the patent system for the first time in nearly six decades.

House Judiciary Committee Chairman Bob Goodlatte (R., Va.) said that Tuesday's White House announcement "is a good indicator that momentum is building behind efforts to enact meaningful legislation to address abusive patent litigation."

Tech companies that have faced infringement lawsuits threw support behind the administration's efforts. The Coalition for Patent Fairness, a trade group whose members include Google Inc., Intel Corp. and Oracle Corp., said it particularly supports efforts to impose monetary sanctions on aggressive litigants that file frivolous lawsuits.

Among the administration's other actions, Mr. Obama is directing the Patent Office to train examiners to scrutinize applications for overly broad patent claims.

He is also looking to rein in the growing use of the International Trade Commission to settle patent disputes. In recent years, patent-holding firms have increasingly filed infringement claims at the ITC, which has jurisdiction over certain unfair trade practices and can bar the importation of products that infringe patents. The ITC process usually moves more quickly than a patent-infringement case in federal court.

Earlier

The White House is set to announce a set of executive actions aimed at reining in so-called "patent trolls" amid concerns that the patent firms are abusing the system. Brent Kendall joins MoneyBeat.

The Obama administration would like Congress to change certain ITC legal standards and ensure that the agency has flexibility in hiring its judges. The president is also ordering a review of existing procedures at the ITC.

The president has taken a dim view of certain patent-holding firms. In February, he said some firms "don't actually produce anything themselves. They're just trying to essentially leverage and hijack somebody else's idea to see if they can extort some money out of them."

The new actions build on other government efforts. The Federal Trade Commission and the Justice Department are examining whether some patent holders are disrupting competition in high-tech markets.

—Ashby Jones contributed to this article.

EXHIBIT B

Cisco Calls Patent Trolls Racketeers

By Ashby Jones

(WALL STREET JOURNAL, November 11, 2012)

Cisco Systems Inc. [CSCO +1.37%] has unveiled a new strategy for dealing with so-called patent trolls: accuse them of breaking the law.

The networking-equipment maker has captured the attention of patent experts and lawyers across the country by filing strongly worded legal claims against two companies that buy up patents and seek to make money from them through licensing and litigation.

'When someone runs a racket, we're going to make them liable for racketeering,' says Cisco's Mark Chandler.

Cisco's attempt to turn the tables on those companies, more formally known as "non-practicing entities," comes as Congress and the federal Courts have largely failed to stem a wave of patent lawsuits that has roiled the technology industry.

Cisco's suit against Chicago-based Innovatio IP Ventures LLC targets a tactic that some NPEs have employed in recent years. Rather than allege that a big technology company has infringed one or more of their patents, Innovatio and other NPEs have gone after the tech company's customers.

Cisco, which is based in San Jose, Calif., and co-plaintiffs Netgear Inc. NTGR -0.36%and Motorola Solutions Inc., [MSI +0.68%] claim that Innovatio has sent 8,000 "threatening" letters to coffee chains, hotels and other retailers using Wi-Fi equipment that includes the three companies' technologies.

Innovatio's tactics, Cisco argues in its lawsuit, are "misleading, fraudulent and unlawful." It says they effectively amount to an extortion scheme, and therefore violate federal antiracketeering laws.

Separately, Cisco claims that Ottawa-based Mosaid Technologies Inc. violated the same laws by allegedly paying witnesses for testimony and documents in order "to overcome fatal shortcomings" in patent-infringement claims it filed against Cisco in 2011 at the U.S. International Trade Commission.

"When someone runs a racket, we're going to make them liable for racketeering," said Mark Chandler, Cisco's general counsel.

Innovatio said it "categorically" denies Cisco's allegations. "Cisco's claims are long on rhetoric and hyperbole and short on the facts and law," said Matthew McAndrews, a lawyer for Innovatio, in a statement. Mr. McAndrews said Innovatio this week will ask James F. Holderman, the federal judge overseeing the case, to dismiss the claims.

Mosaid said in a statement that Cisco's claims were "ridiculous," and accused Cisco of digging up allegations from a case the parties resolved earlier this year in order to raise new claims.

"Cisco is trying to use the racketeering label to create litigation and settlement leverage when its underlying case has no merit. This tactic…will not succeed," Mosaid said.

Patent experts and lawyers are watching the two cases closely. Rather than lodging their own claims, the strategy Cisco and other companies have typically used against NPEs has been to defend themselves when named as defendants or to pre-emptively ask a judge to declare either that a particular patent is invalid or that no infringement took place.

"A win by Cisco isn't necessarily going to stop the NPE industry in its tracks," said Ann Fort, a defense lawyer in Atlanta who isn't involved in the cases. "But it could halt some of the tactics used by NPEs, like going after companies' customers."

Their defenders say NPEs, which buy up troves of patents not to develop products with them, but to pursue licensing and litigation revenue, spur innovation by allowing inventors—ranging from university research labs that aren't interested in developing products to basement tinkerers—to get paid for their creations. They say the firms also help ensure that well-heeled tech companies don't profit unfairly from the work of others.

Either way, such firms are increasingly active in the Courts. The proportion of patent lawsuits filed by NPEs has grown to 40% in 2011 from 22% in 2007, according to Lex Machina, an intellectual-property litigation, data and analytics company.

Some of the more recent suits target technology companies' customers. Patent experts say that approach is aimed at extracting dozens or hundreds of smaller settlements from companies that may lack the legal firepower to fight back.

"If Innovatio sues Cisco, Cisco knows how to handle its defense," said Colleen Chien, a law professor at Santa Clara University and a patent-law expert. "But if you're a coffee shop or hotel and aren't in the business of making Wi-Fi equipment, you're more likely going to settle" to avoid a lawsuit "than you are to fight a big, costly legal battle."

Innovatio argues that its tactics are completely legal: federal law lets a patent holder bring infringement claims against anyone who makes, sells, or uses a patent without permission.

Mr. McAndrews, Innovatio's lawyer, said the company simply "seeks to grant licenses…to those entities that derive the most immediate…benefit from infringing" Innovatio's patents. Those businesses, said Mr. McAndrews, are the hotels, restaurants and retailers that "configure and use" the particular Wi-Fi equipment made and sold by Cisco, Motorola and Netgear. Most of Innovatio's patents were purchased from or once owned by chip maker Broadcom Corp. BRCM +0.39%

Cisco, on the other hand, claims that many of Innovatio's demands to the end users of Cisco's products have been fraudulent for a variety of reasons. In some instances, Cisco argues, the patents Innovatio was asserting had already expired. In others, says Cisco, the products already were covered by the licenses that Innovatio was looking to sell.

"They're well aware that these people don't owe them any money," said Cisco's Mr. Chandler, who said he heard from 400 customers that had gotten notices from Innovatio. "This is nothing other than a shakedown."

Innovatio denies making fraudulent licensing requests or filing sham lawsuits.

To win in Court, Cisco must prove not only that Innovatio's claims were bogus, but that Innovatio knew they were bogus, said Daniel Ravicher, a law professor at Cardozo School of Law in New York. "That's hard to do," he said. "I really don't think this is a tactic that's going to get very far."

But others have higher hopes for Cisco's approach. "Sometimes, lawsuits are about how much damage you can threaten in order to change behavior," said Robin Feldman, a law professor at the University of California's Hastings College of the Law and author of a recent book on patents. "At the very least, Cisco might get that. Or it could get a sympathetic judge or jury that takes Cisco's case and runs with it."

EXHIBIT C

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Former Intuit Lawyer Plays Offense Against NPEs

Chelsea Allison

2013-09-20 04:19:46 PM

As the head of IP litigation at Intuit Inc. a few years ago, Kevin Jakel says he was essentially managing a docket of cases brought by non-practicing entities.

"I wanted to find a way to not just pay off patent trolls or buy our way out of the problem," he said. But none of the existing patent-pooling ventures took the approach Jakel had in mind. So last year, he left the Mountain View software company and founded Unified Patents, which is geared toward taking proactive measures designed to ward off NPEs from circling specific sectors.

The first fruits of his labor are ripening now: On Thursday, Unified petitioned the U.S. Patent and Trademark Office for an *inter partes* review of a patent held by Clouding IP since 2004, which covers file synchronization techniques employed by most cloud storage solutions. Jakel said the firm will file others, too.

The IPR is a revamped proceeding borne out of the America Invents Act, which was passed in 2011, and is meant to make it easier to beat back flimsy patent claims. The option doesn't come cheap, however: estimates of IPR costs range from upwards of $200,000, according to a September 2013 paper, "Patent Assertion and Startup Innovation," by Colleen Chien, associate professor at the Santa Clara University School of Law and new adviser at the White House Office of Science and Technology Policy. Reviews replaced *inter partes* reexaminations, which were similar but more protracted.

As of July, 377 IPR petitions had been registered, according to data compiled by Merchant & Gould, and 11 had been either terminated or dismissed.

Oracle initiated two IPRs against the Clouding IP patent earlier this year, but when the parties settled, the process ended. Before reaching its deal with Oracle, Clouding IP attempted to amend some claims — a step Jakel says concedes invalidity.

All told, Oracle had challenged 13 of Clouding IP's patent claims; Unified added seven more claims to that mix. In taking up where Oracle left off, Unified is even using the same firm, Oblon Spivak, which touts itself as the nation's number one filer of post-grant challenges.

RPX Corp., a patent defense industry leader, sees the IPR as but one arrow in the quiver, noted Robert Heath, the firm's senior vice president for corporate development. RPX has not filed IPRs itself, Heath said.

"Unlike buying patents, which will 100 percent reduce the risk, IPRs are not without risk," he said.

Brian Love, assistant professor at the Santa Clara School of Law, said reexaminations have long been a double-edged sword. "Sometimes it limits or outright eliminates patents, but often it actually makes them stronger."

Under the pre-AIA system, just 42 percent reexaminations succeeded in having claims canceled, according to patent office data. Courts will be naturally less inclined to second-guess a patent that has been twice "blessed" by the PTO, Love said.

IPRs are only one element of Unified's strategy. Headquartered in Los Altos, the firm intends to differentiate itself in the NPE defense market through its focus on particular technologies, dubbed micro-pools, which bring together competitors in sectors targeted by NPEs. Clients like NetApp, which advocate for industry solutions to shared problems, favor such an approach.

Michael Sacksteder, chair of the patent litigation group at Fenwick & West, said Unified's segment approach is smart because its clients pay only for the defense of patents in areas they care about. In addition to cloud computing, Unified says it's working on micro-pools in financial services and streaming media.

When it comes to selecting micro-pools of focus, Jakel and Unified COO Shawn Ambwani "follow the trolls."

"We want to affect their investment decisions," Jakel said, "so when they look at cloud storage they say, 'Why would we try to monetize there?'"

That's a key point for Julie Samuels, a staff attorney at the Electronic Frontier Foundation.

"The problem is that for the most part, what patent trolls do is perfectly legal," she said. "Trying to make life harder for them, and trying to make it a less desirable business model so there will be fewer of them," is the best approach.

Unified tracks NPE activity through demand letters and tries to identify patent areas before they become hot. "I use patent analytics in the same ways NPEs do," Jakel said.

RPX also employs an industry-centric approach, Heath said. RPX has more than 150 members and takes in more than $200 million a year in revenues from companies who subscribe in part to be able to defend themselves with the patent rights RPX has secured. "We have a lot of different micro pools within our macro pool," Heath said.

Moreover, he added, scale is the most important factor in shaping rational behavior, and Unified is a couple orders of magnitude smaller than RPX. He likened the newcomer's entry into the market to David trying to enter Goliath's playground.

Unified is recruiting both large and small companies to join its micro-pools, so they reflect the full ecosystem within a technology focus.

The little guys tend to be easy targets, Jakel notes, and Unified has extended membership to them for free. Unified won't disclose how much bigger players pay to participate.

In some ways, small companies are like canaries in the cave, signaling that NPEs are eyeing a particular technology.

"You're not going to send a demand letter to Google very often," Jakel said. "They can send those demand letters to small companies with relative impunity."

Companies with less than $10 million in revenue make up more than half of the unique defendants sued by NPEs, according to Chien's study.

Jakel hopes to curb such easy target monetization. And when companies fail, Jakel wants them to sell their patents to

Unified, rather than keep feeding the NPE cycle.

It also plans to snap up patents in those areas on the secondary market to reduce the number available to NPEs. But Behrooz Shariati, an IP litigator at Womble Carlyle, speculated that might simply jack up the price for patents.Still, Shariati said Unified's approach struck him as good in theory.

"The only place NPEs are really vulnerable is their patents," he said, "so if you're going after their patents, you're blunting the weapon."

Contact the reporter at callison@alm.com.

EXHIBIT D

Managing Intellectual Property
The Global IP Resource

PATENT TROLLS FACE HARSH CRITICISM AT SENATE HEARING

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08 November 2013 | David Hatch, Washington DC

There was strong rhetoric at a Thursday US Senate hearing on deceptive practices by patent monetisation firms, with trolls accused of extortion and fraud and "whistleblowers" urged to come forward

Attention whistleblowers at patent monetisation firms that threaten the elderly, non-profits and small businesses: the US Senate wants to talk to you.

Democratic Senator Claire McCaskill, head of a Senate consumer protection subcommittee, promised anonymity on Thursday for employees at patent assertion entities that step forward to privately share trade secrets with the panel as it investigates allegations of abusive litigation tactics.

"We would welcome a whistleblower that is inside one of these entities," the senator said at a hearing on "deceptive practices" by patent firms. "We are very used to, in my office, protecting whistleblowers."

McCaskill's request came as both chambers of Congress intensify scrutiny of the patent industry, with a steady stream of hearings and bills aimed at dissuading meritless lawsuits and requiring more transparency by litigants.

The main legislative action is in the judiciary committees, with Senate Judiciary Chairman Patrick Leahy, a Democrat, prepping legislation to be paired with a comprehensive measure introduced on October 23 by House Judiciary Chairman Bob Goodlatte, a Republican.

An FTC registry for demand letters

McCaskill said her subcommittee is targeting the "bottom feeders" and "scam artists" that send hundreds or thousands of "demand" letters to businesses and customers seeking settlement payments for outrageous claims - such as use of common technologies like Wi-Fi and office scanners. Patent holders with legitimate infringement grievances are not a concern, she added.

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LATEST ISSUE

December 2013 / January 2014

While the subcommittee, part of the influential Senate Commerce Committee, does not have broad jurisdiction over patent issues, McCaskill told reporters that she might pursue a narrowly focused patent bill. Such legislation could require parties that send demand letters to share details about their ownership and allegations with a Federal Trade Commission "registry".

The hearing was notable for the blunt criticism leveled at patent asserters that engage in these sorts of practices. "It's a silent extortion," said Nebraska Attorney General Jon Bruning, who accused firms behind demand letter schemes of using Mafia-like tactics and engaging in "fraud".

He urged lawmakers to use their subpoena powers to haul top executives with the most abusive patent companies before Congress to force them to respond to questions about tactics that include sending demand letters to elderly people who live in nursing homes. The attorney general added that he's exploring whether some patent asserters may have engaged in criminal behavior.

The victims bear witness

The costs that small- and mid-sized businesses incur when they're broadsided unexpectedly with threats of patent litigation were underscored by Larry Sinewitz, executive VP at BrandsMart USA, who testified on behalf of the National Retail Federation.

The appliance retailer has received six demand letters over the past decade, forcing it to spend $500,000 on attorney fees and settlements with patent trolls, he said. Most of the claims, Sinewitz added, were frivolous, such as a request that the retailer pay license fees for using widely available technology that processes debit and gift card transactions.

"What do you do? Consult a patent lawyer?" he testified. "BrandsMart does not have in-house patent lawyers, and we did not have a patent lawyer on retainer," he said. Picking up the phone to consult a patent attorney to determine the validity of a claim could cost "tens of thousands of dollars".

Mark Chandler, senior VP, general counsel and chief compliance officer at Cisco, said that his company, which rarely accuses others of violating its extensive patent portfolio, would have no problem complying with an FTC registry.

Also critical of trolls were Jon Potter, president of the App Developers Alliance, which represents creators of apps and coding software, and Julie Samuels, senior staff attorney with the Electronic Frontier Foundation, a non-profit advocacy group that promotes civil liberties. Both groups have teamed together to fight trolls through the court system.

A lone supporter

The hearing's only supporter of patent assertion firms was Adam Mossoff, a law professor at George Mason University just outside Washington, DC, and co-director of the school's Center for the Protection of Intellectual Property.

While there are bad actors and frivolous lawsuits, it's unclear whether there's evidence of a "systemic" problem that warrants the attention of Congress, he argued. A rush to rewrite patent laws, he warned, could have the unintended effect of harming innovation.

But Mossoff's arguments didn't resonate with McCaskill, who told the professor that after listening to his testimony she was more convinced of the need for a demand letter registry to ensure greater transparency.

Photos (c) ***Senator Claire McCaskill***

EXHIBIT E

Start-Up Takes on 'Patent Trolls'

Firm Plans to Defensively Buy Patents and Charge Fixed Membership-License Fees

(Wall Street Journal, November 24, 2008)
By Don Clark

A San Francisco start-up is disclosing details of a new service to address patent risks facing technology companies, and has lined up Cisco Systems Inc. and International Business Machines Corp. as initial members.

The new venture, called RPX Corp., is the latest response to the rise of firms that buy up patents to seek royalties from other companies. Such licensing firms are often called nonpracticing entities-or, more derisively, patent trolls-because they don't make or sell products that use patents.

The patent-licensing firms have figured prominently in costly lawsuits against technology companies. RPX estimates . that those firms have raised more than $6 billion over the past decade to finance patent purchases.

RPX, in response, plans to become what it calls a "defensive patent aggregator," buying patents to keep them from firms that might use them as the basis of lawsuits or to press for licensing payments. Companies that pay a fixed annual fee receive licenses to the patents purchased by RPX, which pledges never to assert them.

John Amster, RPX's co-chief executive, hopes to attract hundreds and eventually thousands of corporate members. "At thousands of members I think it's a game-changing business," Mr. Amster said.

RPX isn't the only organization trying to aid potential patent defendants. Allied Security Trust, which was formed by a group of large technology companies and disclosed its plans in June, also buys patents to keep them from potential plaintiffs.

But there are differences between the two efforts. RPX hopes to earn a profit and is backed by two venture-capital firms, Kleiner Perkins Caufield and Byers and Charles River Ventures. Its revenue comes from membership fees-$35,000 to $4.9 million, depending on a company's operating income but RPX makes the decisions about which patents to buy.

AST, based in Poughkeepsie, N.Y., is a nonprofit entity. Its members put money into an escrow account, and are consulted to see if they want to contribute to the purchase of particular patents, said Daniel McCurdy, the group's chief executive.

AST claims about 15 members and has a goal of 30 to 40. It hasn't disclosed any names, but people familiar with the matter say initial members include Google Inc., Verizon Communications Inc., Hewlett-Packard Co. and Cisco.

Mr. McCurdy said AST and RPX could wind up bidding against each other on patents, but sees them mostly as allies pursuing similar goals. "They are completely complementary," he said.

RPX's Mr. Amster and co-CEO Geoffrey Barker previously worked at Intellectual Ventures LLC, a Seattle firm founded by former Microsoft Corp. executive Nathan Myhrvold. Intellectual Ventures has purchased thousands of patents, and has patented its own inventions. It has recruited big technology companies as investors, but has rankled some of them because it also charges patent-license fees and hasn't ruled out the use of litigation.

Peter Detkin, Intellectual Ventures' founder and vice chairman, said the field can easily absorb more buyers such as RPX. "There are four or five million active patents, and we hold a very, very small percentage of them," he said.

A spokesman for Cisco, which is based in San Jose, Calif., said RPX's "objective of defensively pooling patents is a sensible approach to the continuing problem of litigation by firms that don't produce products or services!'

An IBM spokesman confirmed the company's participation in the effort, but declined to comment further.

RPX says it has acquired rights to 150 patents and 50 patent applications since it was founded in March, in fields such as mobile technology, Internet search and radio-frequency identification.

EXHIBIT F

News & Analysis

IP trolling firms make more waves

Mark LaPedus

12/31/2010 06:57 PM EST

11 comments

NO RATINGS
LOGIN TO RATE

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SAN JOSE, Calif. - It's been a big year for the IP patent--or so-called patent trolling--firms. Acacia, Intellectual Ventures Management, Interval Licensing, Patriot and others made big headlines in 2010.

In August, for example, Interval Licensing LLC, which is backed by Paul Allen, filed a complaint against AOL, Apple, eBay, Facebook, Google, Netflix, Office Depot, OfficeMax, Staples, Yahoo, and YouTube.

The original case was dismissed. The firm did not name the infringing products in the suit. But this week, Interval Licensing re-filed the suit against those companies and listed four infringed patents in the case.

Another firm also made headlines in 2010. Intellectual Ventures Management LLC, a patent holder and administration group founded by Nathan Myhrvold, a former CTO of Microsoft Corp., has recently taken action on multiple fronts alleging patent infringement. In semiconductor industry the firm is pursuing two memory chip makers and three FPGA vendors.

And this week, Acacia Research Corp. said that its subsidiary, DRAM Technologies LLC, entered into a settlement agreement with Etron Technology America Inc. and Taiwan's Etron Technology Inc. covering patents relating to certain DRAM memory chips.

Founded in 1993, Acacia Research and its subsidiaries partner with inventors and patent owners, license the patents to corporate users and share the revenue. In recent times, it has reached patent settlements or licensing agreements with ARM, BMW, Hynix, IBM, NEC, Renesas, Seagate, TI and others.

"We are a leader in licensing patented technologies and have established a proven track record of licensing success with over 920 license agreements executed to date, across 87 of our technology licensing programs," according to a filing by the firm.

Most Recent Comments

junko.yoshida @Bert, I can't agree with you more. You wrote: It should be obvious that touch screens are a no-go. First, because the driver needs to concentrate on the screen, to know...

1/14/2014 5:44:32 PM

Opinion

THE ENGINEERING LIFE - AROUND THE WEB

Stars of Open-Source in China, Says Hacker 'Bunnie' Huang

Caleb Kraft 5 comments

I'm excited about the upcoming keynote at EE Live! This keynote speaker in particular has been an inspiration to me for quite some time. I had a few moments to talk to ...

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BLOG

Business for Engineers: Black Hat Selling

Henry Davis 7 comments

Just as black hat hackers break into secure networks to destroy data or make the network unusable, black hat selling employs unethical manipulation to goad you into buying ...

latest comment henry..12 @mvea75101 Indeed, the whole "subliminal advertising" was a fraud. The original...

BETHESIGNAL

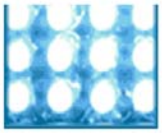
In Praise of Airlines, the 500 Kind

Eric Bogatin 0 comments

"I use airlines every week," said Al Neves, the self-proclaimed SI (signal integrity) Practitioner, at DesignCon 2013. He's also the Chief Technologist with Wild River ...

BLOG

All About Batteries, Part 3: Lead-



"Currently, on a consolidated basis, our operating subsidiaries own or control the rights to over 160 patent portfolios, which include U.S. patents and certain foreign counterparts, covering technologies used in a wide variety of industries."

In August 2010, it formed the Acacia Intellectual Property Fund, L.P., or the Acacia IP Fund. The Acacia IP Fund is authorized to raise up to $250 million. The Acacia IP Fund will acquire, license and enforce intellectual property consisting primarily of patents, patent rights, and patented technologies.

In October, Acacia Research reported results for the three months ended Sept. 30, 2010. It reported record quarterly revenues of $63,949,000 during the third quarter of 2010, as compared to $16,169,000 in the comparable prior year quarter.

Acacia Research reported record quarterly GAAP net income of $24,675,000, or $0.70 per diluted share, for the third quarter 2010, as compared to a quarterly net loss of $3,429,000, or $.11 per diluted share, for the comparable prior year quarter.

"Revenues increased by $47.8 million, or 296 percent, due primarily to an increase in the average revenue per executed agreement," according to the firm.

Another firm, Patriot Scientific Corp., was not so lucky. Headquartered in Carlsbad, Calif. Patriot is the co-owner of the Moore Microprocessor Patent Portfolio licensing partnership with The TPL Group.

In October, the firm reported its first fiscal 2011 quarter ended Aug. 31, 2010. For the three month period ended Aug. 31, 2010, the company's revenues were $0.1 million, with net losses totaling $2.0 million. The company's net loss of $2.0 million during the current quarter included losses of $1.2 million from its equity investment in Phoenix Digital Solutions, the joint venture owned by the company and the privately-held TPL Group.

Patriot Scientific has been in litigation with TPL. In August, Patriot reported that it has withdrawn from discussions aimed at settling its outstanding actions against The Technology Properties Limited Group, LLC (TPL) and Alliacense LLC, the company's joint venture partner in the management of the MMP Portfolio of microprocessor patents, and its licensing division, respectively.

On April 12, 2010, the Company filed suit in the Superior Court of the State of California, County of San Diego against TPL, alleging breach of a $1 million promissory note obligation for which repayment was due Patriot on Feb. 28, 2010. On April 22, 2010 it filed an action in the Superior Court of the State of California, County of Santa Clara, against TPL and Alliacense which was placed under seal provisionally by the court at the defendants' request.

On August 12, 2010, the Court considered defendants' request to seal the file indefinitely and to compel private arbitration of the dispute and denied both Motions. On August 13, 2010 the Court provisionally allowed some file redactions pursuant to a Motion filed by TPL and will decide the appropriateness of those redactions on Sept. 30, 2010.

The complaint makes several allegations against TPL and Alliacense, including breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, contract interference, constructive fraud, and unjust enrichment, while also seeking declaratory relief over specific contractual disagreements.

The complaint further seeks an accounting of revenues and expenses charged to the PDS joint venture, while also engaging in licensing activities designed to profit TPL at the expense of the

Acid Batteries

Ivan Cowie 6 comments

As you may recall, a few weeks ago, Max Maxfield roped me into his ongoing robot project. This led to my writing this series of articles on the various battery ...

latest comment Adam-Taylor A great series of blogs, when it comes to specifying a battery what are the cardinal...

BLOG

Slideshow: NASA's Ball Bots Explore Titan

Ann R. Thryft 1 comments

We've told you about several NASA-sponsored efforts to create new types of robots for exploring planets, moons, and asteroids. Some of them, like the golf-ball-sized ...

latest comment Caleb Kraft this seems like a really cool idea. I'm quite curious how it handles densely packed...

ALL OPINION

interests of PDS and Patriot.

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Comments

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USER RANK
ROOKIE

re: IP trolling firms make more waves
lakehermit 1/4/2011 12:12:58 AM

NO RATINGS
LOGIN TO RATE

Do you have a vacant room in your place? Since you have problems with individual property rights I'll be right over with some homeless people who want to live in your room for a while. I'm sure you won't mind any more than you mind some patent thief infringing someone's patent. By the way, the problem with the lawyers is the average corporation that would rather pay some lawyers $1000 per hour than admit they did something wrong and try to make it right.

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USER RANK
BLOGGER

re: IP trolling firms make more waves
Duane Benson 1/3/2011 10:33:31 PM

NO RATINGS
LOGIN TO RATE

Nathan, I really struggle with this one. I'm in favor of people being able to make a living off of what they own or have created, but it seems like there is something wrong in there mixed in with the right. In your house analogy, I don't have a problem with people buying houses without intention to live in them, but I have discomfort with the practice of turning loan portfolios into traded securities - especially when poorly used and regulated as happened in the recent past. Due to the complexity of the patent system (as well as the real estate financial system), I find it pretty difficult to articulate my concerns in this area. I do believe that the patent system was designed to encourage invention and advancement. It just seems like there is a good amount of the opposite going on as well.

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USER RANK
ROOKIE

re: IP trolling firms make more waves
NathanGrossman 1/3/2011 10:12:27 PM

NO RATINGS
LOGIN TO RATE

Duane, do you have a problem with people buying and selling houses that they have no intention of living in? Do you have a problem with people buying and selling grain that they have intention of eating or using to make food products? Intellectual Property rights are no different from other types of property rights for a reason: For property to be valuable, it must be tradeable on the open market. Otherwise, the creator of that property cannot extract the full value of his/her creation, and the incentive to create things of value suffers. Also, patents often come on the open market when companies go out of business. If others cannot buy and exploit the full value of that intellectual property, then the investors/creditors of the company cannot recoup as much of their investment as possible.

Reply Post Message Messages List Start a Board

USER RANK
BLOGGER

re: IP trolling firms make more waves
Duane Benson 1/3/2011 8:49:31 PM

NO RATINGS
LOGIN TO RATE

I really don't think the patent system was created to fund people that have no interest in developing technology (or other products). I'm a little mixed on the subject though. If someone invents something, they should be able to profit from that invention whether they can afford to build and market it or not. If these organizations help inventors do that, then I support them in that particular activity. On the other hand, companies

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David Ashton on Do You Have a Working ...

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