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UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

San Jose Division

In re TECHNOLOGY PROPERTIES LIMITED LLC Debtor	Case No. 13-51589 SLJ Chapter 11 DATE: December 9, 2015 TIME: 10:30 a.m. JUDGE: Honorable Stephen L. Johnson

SUR-REPLY IN OPPOSITION TO PLAN IMPLEMENTATION MOTION

I. INTRODUCTION

This Sur-Reply is presented to respond to significant new issues raised for the first time in Movant's Reply papers. Alliacense asks the Court's indulgence in considering it. Failure to respond to other contentions in the Reply papers does not reflect acquiescence in those contentions, but only a desire not to unduly burden the Court.

II. FACTUAL ISSUES

A. Searching for a Turnover Rationale

In its moving papers, Movant argued that in the 2014 Amendment the 50% Work Product which Alliacense agreed to deliver to Patriot, arguably for the benefit of PDS, was "really" owned by TPL and could be the subject of a Turnover Motion. In its Opposition, Alliacense pointed out that TPL was not a party to the 2014 Amendment, the 2014 Amendment expressly disclaimed the existence of **any** third party beneficiaries and PDS was a separate legal entity, distinct from TPL.

Rather than attempt to explain how TPL could exercise rights under the 2014 Amendment or become an owner of the 50% Work Product, the Movant's Reply argues for the first time that **TPL owns all** of Alliacense' work product created between 2005 and 2012 under the then-effective agreement(s) between TPL and Alliacense (the "2005-2012 Work Product Contention"). Reply Brief, 4:6-5:6. Still preferring to argue factual matters as abstract principles, Movant declines to provide the Court with a copy of any relevant agreement, relying instead on hearsay.[1]

In fact, the final iteration[2] of the agreement between TPL and Allilacense with respect to the

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[1] **All** of the factual support for the 2005-2012 Work Product Contention is contained in Supp. Flowers Dec., ¶6 ("I understand that TPL, the debtor herein, has different and broader arguments for ownership of the Alliacense 'work' by virtue of having hired Alliacense to create the 'work' during 2005-2012 while they had a direct contractor-subcontractor relationship.") The Declarant is interim CEO of Patriot.

[2] The 2012 Agreement was entered into between TPL and Alliacense on March 14, 2012. Thereafter, as related in the prior Declaration of Mac Leckrone, TPL severely reduced its responsibilities with respect to the

MMP Portfolio, a copy of which is attached to the Supplemental Declaration filed herewith, expressly **rejects** the 2005-2012 Work Product Contention, confirming that all work product ever produced under the agreement with TPL was owned exclusively by Alliacense:

> 7.8. All copies of all information and materials obtained or generated by or for TPL in connection with this SvcAg [the 2012 Agreement], the Predecessor [the prior agreements], and/or the FeeAgs as well as all inventions, developments, and discoveries conceived or reduced to practice in the course of work by or for TPL in connection therewith **shall be and remain the confidential proprietary property of Alliacense**. No element of any such information or material shall be made available to any person or used for any purpose without the prior written consent of Alliacense.

(emphasis supplied) Far from agreeing that Alliacense' work product is "work for hire" owned by TPL, the 2012 Agreement expressly confirmed that TPL had no rights in the work product Alliacense created.

Movant has failed to advance any viable theory on which TPL owns **any** of the Work or can present a turnover demand.

B. Forum Shopping Is Acknowledged

In the Reply Brief, Movant expresses relief that the JAMS arbitration is proceeding apace, but encourages the Court to demonstrate that it is the preferable forum by summarily granting it relief. See, Reply, 9:6-7 ("Notwithstanding the apparent resumption of the arbitration, the Committee believes that this Court should not abstain…")

This Court is not and should not be in competition with JAMS or any other tribunal to offer the fastest, most stripped-down justice; justice least encumbered by procedural due process delays.

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commercialization of the MMP Portfolio and PDS and Alliance entered into a direct contract through the Alliacense Services Agreement, signed on July 7, 2012 (and attached to the prior Declaration).

II. LEGAL ISSUES

A. Breathtaking Vistas of "Consent"

Under the Bankruptcy Act, *Katchen v. Landy* was interpreted as providing for "jurisdiction by ambush:" if a creditor filed a proof of claim, it consented to anything the bankruptcy referee thereafter did to it. *Stern v. Marshall* explicitly rejected that jurisdiction by ambush, holding that even though Pierce Marshall had filed a proof of claim in Vickie Marshall's bankruptcy case, the Bankruptcy Court could not constitutionally exercise jurisdiction over Vickie's unrelated claims against him.

Seeking a return to the good old days of jurisdiction by ambush, Movant argues that by voting in favor of TPL's Plan of Reorganization, Alliacense submitted to this Court exercising jurisdiction over PDS's efforts to seize Alliacense' property. It is difficult to understand how Alliacense' ballot submitted to jurisdiction if Pierce's proof of claim did not.

In its efforts to infuse *Wellness* consent into Alliacense' ballot, Movant notes that subparagraph (h) of the retention of jurisdiction provisions in the Plan includes "resolution of controversies and disputes… regarding… any agreements referred to in the Plan…" Reply Brief, 7:4-7. In that regard, it is worth noting that the **only** reference to the 2014 Amendment in the Plan states that the following "executory contracts shall be assumed by the Reorganized Company on the Effective Date to the extent each such contract is executory…" Since TPL was not a party to the 2014 Amendment and thus could not assume it, Movant's contention is that the bare reference to the 2014 Amendment in the text of the Plan **alone** is sufficient to convey constitutional jurisdiction. If a restaurant plan of reorganization included a reference to the formula for Coca-Cola, would that confer constitutional jurisdiction on the bankruptcy court over disputes relating to that formula?

At fault is Movant's expansive view of the subject matter of consent. Movant contends that consent to a Plan of Reorganization constitutes consent to any proceeding that might possibly arise out of it. But a fair reading of *Wellness* requires consent over the specific proceeding at hand. Since

consent requires that "the parties knowingly and voluntarily waive their right to an Article III judge":

> [T]he key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator.

Wellness Int'l Network, Ltd. v. Sharif, 135 S.Ct. 1932, 1948 (2015).

Clearly, Alliacense could not have knowingly and voluntarily consented to the adjudication of its rights in its own Work by this Court until after this proceeding was commenced. The moment the instant proceeding was commenced, Alliacense asserted its constitutional right to a non-Article I adjudicator. Burying broad language in a 60+ page Plan of Reorganization did not strip Alliacense of its constitutional rights, because there could not have been a "knowing and voluntary waiver" when it submitted a ballot on the Plan.

B. Movant Demonstrates the Need for an Adversary Proceeding

In a peculiar bit of circularity, Movant also argues that the 2005-2012 Work Product Contention, **unveiled for the first time in the Reply Brief** – without any evidentiary support – is beyond the scope of the JAMS arbitration and hence represents a reason this Court should not abstain but rather should grant the Motion.[3]

Procedurally, this stretches due process beyond the breaking point – entirely new relief sought for the first time in a Reply Brief is to be summarily granted. Substantively, it also stretches due process beyond the breaking point – supposed rights under a contract are to be enforced, not by reference to the contract itself, but only on the basis of a hearsay allegation about what the contract might contemplate.

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[3] Movant explains, impenetrably:

> The arbitration, therefore, to the extent, if any, is not comprehensive in covering the issues raised in the Motion which must be addressed and resolved for creditors and parties in interest to receive the benefits of the Plan for which they voted in favor.

Reply Brief, 9:24-26.

This is certainly an object lesson about the importance of framing the issues and relief sought through a complaint.

After demonstrating by its conduct the need for an adversary proceeding in order to safeguard Alliacense' due process rights, Movant announces that Section 1142(b) exempts it from that requirement and authorizes it to proceed by way of motion instead.[4] One may scour Section 1142 in vain for any reference to the procedural requirements associated with seeking relief under that Section, let alone uncover an exemption from otherwise applicable procedural requirements. The argument is constructed out of whole cloth.[5]

More fundamentally, it is entirely unclear what Movant believes is at stake on this procedural issue. Does Movant expect the Court to resolve the multitude of disputed issues of material fact without an evidentiary hearing? Compare, Fed. R. Bankr. P. 9014(d) ("Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner [in contested matters] as testimony in an adversary proceeding.") Does Movant expect factual issues to be resolved on the basis of hearsay and in the absence of cognizable evidence? Compare, Fed. R. Bankr. P. 9017 (applying the Federal Rules of Evidence to matters arising in bankruptcy cases).

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[4] Confusingly, Movant asserts:

> The Motion does seek relief under 11 U.S.C. § 542, as was the case in *In re Riding*, 44 B.R. 846 (Bankr. D. Utah 1984), the case quoted and relied on by the Opposition.

Reply Brief, 10:5-7. Perhaps there is a missing "not"?

[5] Movant also argues that since Alliacense does not concede TPL's asserted ownership interest, the Motion does not represent a turnover proceeding. The argument is nonsensical: if this is a valid turnover proceeding, the respondent is entitled to an adversary proceeding; if this is not a valid turnover proceeding, it is "a proceeding to recover… property"; Fed. R. Bankr. P. 7001(1); and respondent is entitled to an adversary proceeding.

It seems difficult to believe that Movant expects the Motion to be determined based on oral argument on December 9th.

DATED: December 4, 2015

Respectfully submitted,

ST. JAMES LAW, P.C.

By: /s/ *Michael St. James* .
Michael St. James
Counsel for Alliacense LLC

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SUPPLEMENTAL DECLARATION OF MAC LECKRONE IN OPPOSITION TO PLAN IMPLEMENTATION MOTION

I, Daniel McNary Leckrone, declare under penalty of perjury:

1. I am the President of Alliacense, and have been at all relevant times. Terms used in this Declaration have the meanings supplied in the accompanying Opposition.

2. In 2005, PDS contracted with TPL to commercialize the MMP patent portfolio and TPL subcontracted with Alliacense to provide engineering, marketing, and litigation support, including conducting continuous market research and engineering studies, and to manage all the licensing activities relating to that portfolio. These activities have been a significant focus of Alliacense's efforts over the past decade.

3. It is my understanding that substantially every significant document prepared by Alliacense under the foregoing agreement bore a legend "©Alliacense."

4. On March 14, 2012, TPL and Alliacense entered into an agreement (the "2012 Agreement"), a true and correct copy of which is attached hereto.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed in San Jose, California on December 4, 2015.

/s/ *Daniel McNary Leckrone* .
Daniel McNary Leckrone

SERVICES AGREEMENT

Between

TECHNOLOGY PROPERTIES LIMITED LLC

And

ALLIACENSE LIMITED LLC

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SERVICES AGREEMENT

This Services Agreement ("SvcAg") is entered into by and between Technology Properties Limited LLC hereinafter sometimes "TPL" on the one hand, and Alliacense Limited hereinafter sometimes "Alliacense" on the other hand.

WHEREAS, TPL has entered into the several agreements identified at the Schedule of Technology Portfolios agreements attached as Exhibit A ("TechPort Ags") pursuant to which TPL has undertaken the obligation to commercialize the Technology Portfolios ("TechPorts") described therein; and,

WHEREAS, the core business of Alliacense is developing, marketing, licensing, and otherwise commercializing proprietary product technology;

WHEREAS, TPL and Alliacense have historically operated under an Agreement ("Predecessor") conforming generally to the Services Agreement attached hereto as Exhibit B pursuant to which Alliacense was to be compensated for its services on the basis of a percentage of the proceeds from the commercialization of the TechPorts ("Recoveries");

WHEREAS, as the primary objects of Alliacense services became the subject of overwhelming litigation and re-examination activity, recoveries were drastically diminished and both the nature and magnitude of the services Alliacense was called upon to provide expanded dramatically requiring the payment of additional fees by TPL under a series of fee structures ("FeeAgs") to secure and assure the continued support of TPL by Alliacense;

WHEREAS, it is the intention of the parties to document the nature of their relationship to date and to provide a basis for the continuation thereof which supersedes the Predecessor and FeeAgs.

NOW THEREFORE, for and in consideration of the mutual covenants herein contained as well as of other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, it is covenanted and agreed by and between the parties hereto that:

1. Commercialize

1.1. Pursuant to the terms of the TechPort Ags, TPL is required to exert commercially reasonable efforts to design, structure, and implement a plan for the commercialization of the TechPorts, including specifically the following:

1.1.1. Oversee the identification, protection, and enhancement of the TechPorts;

1.1.2. Encourage the implementation and use of the TechPorts pursuant to sub-licenses or other agreements or relationships with TPL;

1.1.3. Discourage the unauthorized use of the TechPorts; and,

1.1.4. Turn the TechPorts into income-producing, commercially valuable property;

hereinafter collectively referred to as "Commercializing" or "Commercialization".

1.2. Alliacense shall continue to design, structure, and implement those elements of the TPL Commercialization efforts which are related to the marketing and sales of licenses and other similar relationships ("M&S Elements").

1.3. In addition to the activities described in section 1.2 above as M&S Elements, Alliacense shall continue to provide the sort of litigation and re-examination ("Lit/Re-X") support services it has provided to date, as well as such other related services as may be required from time to time in the future in accordance with the Compensation provisions of section 2 below.

1.4. No provision or element of this SvcAg shall for any purpose be deemed to give rise to a relationship of principal and agent or co-venturer between TPL and Alliacense.

2. Compensation

[redacted]

[redacted]

3. Term.

3.1. This SvcAg shall continue for the useful life of the TechPorts. That is, the greater of the period of time over which the TechPorts either (i) produces income, (ii) is susceptible to legal protection, or (iii) is reasonably perceived to have commercial value.

3.2. In the event that facts or events are discovered or occur which materially alter the evaluation of the useful life or commercial value of the TechPorts, by either party, that party may reduce the term of this SvcAg accordingly by providing 90 days written notice.

3.3. After the expiration of the term hereof, the respective interests of the parties in the TechPorts shall continue, but neither party shall have any further obligation hereunder other than administration of outstanding transactions as agreed, and the obligations of confidentiality undertaken by the parties in connection herewith.

4. Representations

4.1. TPL represents and warrants that: (i) TPL is the owner of all rights with respect to the Commercialization of the TechPorts, s[redacted]; and, (ii) TPL has not and will not create any rights or interests which are inconsistent with the provisions of this SvcAg or which could give rise to such rights or interests.

4.2. TPL shall for no purpose be deemed to have made any representation or warranty regarding the validity, infringement, or non-infringement of the TechPorts or any patent related thereto.

5. Default.

5.1. The failure of either party to pay and/or substantially perform any obligation by it to be paid or performed hereunder within ninety (90) days after receipt of written notice of default from an Arbitrator under the expedited rules of the AAA shall constitute an event of default hereunder. Such notice shall detail the non-performance and the acceptable corrective action.

5.2. An event of default under Section 5.1. above shall entitle the non-defaulting party to:

5.2.1. Suspend all or any portion of its performance due hereunder pending completion of such curative or corrective action;

5.2.2. Arrange for appropriate substitute performance; and/or,

5.2.3. Terminate this SvcAg.

6. Indemnification.

6.1. Alliacense shall defend, indemnify, and hold TPL harmless with respect to any liability, loss, or expense arising out of a claim based upon the conduct of Alliacense and asserted by a third party not controlled by TPL. Provided, however, that Alliacense shall have been given prompt notice of the claim.

6.2. TPL shall defend, indemnify, and hold Alliacense harmless with respect to any liability, loss, or expense arising out of a claim based upon the conduct of TPL and asserted by a third party not controlled by Alliacense. Provided, however, that TPL shall have been given prompt notice of the claim.

6.3. For purposes of this Section 6, each party shall be responsible for the acts of its officers, directors, shareholders, employees, attorneys, agents, and persons related thereto or affiliated therewith.

7. General.

7.1. In no event shall any right, duty, or privilege arising hereunder be assigned by either party without the prior written consent of the other party, and any attempted or purported assignment without such consent shall be voidable at the option of the non-consenting party.

7.2. Any covenant requiring a party to perform or provide an act or service shall be construed to impose upon such party the burden of the cost thereof unless otherwise provided for herein.

7.3. Section titles are intended only to aid and assist the reader as an index device and are not intended to be descriptive of the contents of the section or to be used for construction or interpretation.

7.4. The failure of any provision of this Agreement by virtue of its being construed as invalid or otherwise unenforceable shall render the entire Agreement cancelable at the option of the party asserting the enforceability of the said provision.

7.5. All rights and obligations under this Agreement shall

be resolved as if all persons and all transactions related to this Agreement had their legal residence, situs, and employment in Santa Clara County, California.

7.6. All notices shall be in writing and effective upon delivery or upon posting by certified mail, return receipt requested, addressed as follows (or such other address as may be hereafter designated):

If to Alliacense:	If to TPL:
D. Mac Leckrone, Pres	Daniel E. Leckrone, Chmn
20883 Stevens Creek Bld	20883 Stevens Creek Bld
Ste 100	Ste 100
Cupertino CA 95014	Cupertino CA 95014
Telephone: 408-446-4222	Telephone: 408-446-4222
Facsimile: 408-446-5444	Facsimile: 408-446-5444
Email: mac@alliacense.com	Email: sanjose@tplgroup.net

7.7. This Agreement together with its exhibits and attachments contains the entire agreement between the parties and supersedes any and all other agreements between them relating to the subject matter hereof.

7.8. All copies of all information and materials obtained or generated by or for TPL in connection with this SvcAg, the Predecessor, and/or the FeeAgs as well as all inventions, developments, and discoveries conceived or reduced to practice in the course of work by or for TPL in connection therewith shall be and remain the confidential proprietary property of Alliacense. No element of any such information or material shall be made available to any person or used for any purpose without the prior written consent of Alliacense.

7.9. As further consideration to Alliacense for this agreement and as security for all future Claims, including specifically all entitlements of Alliacense under this SvcAg, the Predecessor, and the FeeAgs, TPL grants Alliacense a security interest in all of the assets of TPL of whatsoever kind or nature now existing or hereafter arising and their proceeds, as described generally in Exhibit A. TPL will file the appropriate financing statements with the Office of the California Secretary of State as soon as reasonably practicable.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 14th day of March 2012.

TECHNOLOGY PROPERTIES LIMITED LLC

by _____
Daniel E. Leckrone, Chmn

ALLIACENSE LIMITED LLC

by _____
Daniel M. Leckrone, ~~Pres~~ Chmn