EXHIBIT B

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re Site Technologies, Inc.,

A Chapter 11 reorganized debtor under a consummated, liquidating plan.

Case No. 99-50736 RLE

CHAPTER 11

MOTION (I) TO REOPEN CLOSED CASE PURSUANT TO 11 U.S.C. § 350(b) AND RULE 5010 IN ORDER TO PROTECT AND AUCTION PATENTS HELD *IN CUSTODIA LEGIS*, (II) TO APPOINT A TRUSTEE, (III) FOR A STATUS CONFERENCE PURSUANT TO § 105(d) TO ARRANGE FOR PROTECTIVE ORDERS AND CONFIRMATION OF THE CONTINUING STAY, AND (IV) FOR OTHER RELIEF

Date: December 17, 2008
Time: 10:30 a.m.
Place: 280 South First Street,
Courtroom 3099
San Jose, California 95113

Objection Deadline: December 12, 2008

Honorable Roger Efremsky

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I. INTRODUCTION

A. Reopening the Bankruptcy Case Is Necessary to Administer and Protect Estate Assets.

Sherwood Finance (Delaware), LLC ("Sherwood"), a party in interest and a major beneficiary of the confirmed and effective Chapter 11 "Plan" described below,[1] hereby moves this Court by this motion (this "Motion") to reopen the above-captioned closed Chapter 11 Case (this "Chapter 11 Case" or this "Case") "for cause" pursuant to 11 U.S.C. §§ 105 and 350(b)[2] and Rule 5010.[3] This Motion is supported by the *Request for Judicial Notice in Support of Motion (i) to Reopen Closed Case Pursuant to 11 U.S.C. § 350(b) and Rule 5010 in Order to Protect and Auction Patents Held* In Custodia Legis, *(ii) to Appoint a Trustee, (iii) for a Status Conference Pursuant to § 105(d) to Arrange for Protective Orders and Confirmation of the Continuing Stay, and (iv) for Other Relief* (the "RJN") filed concurrently herewith, which attaches key pleadings not only from the Chapter 11 Case, but also from the early-stage litigations involving certain "Patents" pending in the "Texas Action" and the "California Action" (as such terms are defined in the Appendix attached hereto). This Motion is further supported by the *Declaration of Vincent J. Novak in Support of Motion (i) to Reopen Closed Case Pursuant to 11 U.S.C. § 350(b) and Rule 5010 in Order to Protect and Auction Patents Held* In Custodia Legis, *(ii) to Appoint a Trustee, (iii) for a Status Conference Pursuant to § 105(d) to Arrange for Protective Orders and Confirmation of the Continuing Stay, and (iv) for Other Relief* filed concurrently herewith (the "Novak Declaration"). Terms used herein, but not otherwise defined, have the meanings set forth in the Appendix attached hereto.

The patents (the "Patents") at issue in each of this Chapter 11 Case, the Texas Action,[4] and

[1] Because the allowed claims of creditors were paid in full by the Debtor prior to the Final Decree closing this Chapter 11 Case in January 2004, the remaining beneficiaries of the confirmed and effective Plan are only the former equityholders of the Debtor. Such "Plan beneficiaries" are measured by their shares of stock, although their shares were cancelled by the Plan in favor of contract rights to payment under the Plan. Thus, Plan beneficiaries who were formerly equityholders or their successors-in-interest are now creditors, with standing and right to challenge the relevant purported transfers of the patents at issue, such as those repeatedly attempted by Ait, Egger, and SRA. On that former equity measure, Plan beneficiary Sherwood holds the rights derived from at least 762,615 former shares of the dissolved Debtor, consisting of approximately 9 percent (9%) of the Debtor's issued and outstanding former shares.

[2] All code section references herein are to Title 11 of the United States Code, as amended (the "Bankruptcy Code"), unless otherwise defined.

[3] All references to "Rules" herein are to the Federal Rules of Bankruptcy Procedure.

[4] Because it is anticipated that a protective order will soon be entered in the Texas Action but is not yet entered, one such pleading from the Texas Action—Docket No. 102—has been attached in redacted format in an abundance of caution. *See* RJN Exhibit 15.

the California Action[5] have come under scrutiny because Daniel Egger ("Egger"), a former insider of the subsidiary of the above-captioned Debtor (the "Debtor"), and his related entity, Software Rights Archive, LLC ("SRA"), have claimed title to such Patents in the underlying actions. SRA has sued Google Inc., Yahoo! Inc., IAC Search & Media, Inc., AOL, LLC, and Lycos, Inc. (collectively, the "Co-Defendants") in the Texas Action seeking damages for alleged patent infringement. In fact, however, the Patents are property of the bankruptcy estate of this Chapter 11 Case (the "Estate") because the Patents were not administered or dealt with prior to the closing of this Chapter 11 Case and, thus, have remained in the Estate *in custodia legis* (literally, "in the custody of the law")[6] for the benefit of the beneficiaries of the confirmed plan of reorganization (the "Plan")[7] in this Case. Jeffrey Ait, another former insider and the former plan administrator under the Plan, further has violated his fiduciary duties and the provisions of the Plan on numerous occasions by assisting Egger and SRA in their repeated efforts to convert the Patents from the Estate. *See* Section II.B, *infra*. The Co-Defendants in the Texas Action, each of whom is also a plaintiff in the California Action, already have disputed the wrongful conduct of Egger and SRA. Although the Estate is the real party in interest in any dispute about ownership of the Patents, the Co-Defendants have disputed Egger's and SRA's allegations of Patent ownership and standing in a manner that would directly benefit the Estate and its Plan beneficiaries, such as Sherwood.[8]

Reopening a bankruptcy is necessary in order to administer a neglected asset that is discovered after the case has been closed, particularly where (as here) attempts are made to convert or harm such asset. *See Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982). According to the court in *Stein*:

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[5] The Patents at issue are U.S. Patent Nos. 5,544,352, 5,832,494, and 6,233,571, each entitled "Method and Apparatus for Indexing, Searching, and Displaying Data."

[6] BLACK'S LAW DICTIONARY 771 (7th ed. 1999).

[7] The Debtor's *First Amended Plan of Reorganization*, dated April 25, 2000, was confirmed by this Court in its *Order Confirming Debtor's First Amended Plan of Reorganization* entered on June 15, 2000 (the "Confirmation Order"). *See* Exhibits 4 and 5 to RJN, respectively.

[8] Sherwood has entered into an alliance with Yahoo!, Inc., including by executing a joint defense agreement and option arrangement. Upon information and belief, Google Inc. and IAC Search & Media, Inc., are also beneficiaries of the Plan.

> The proper procedure to enforce any newly discovered asset neither listed nor abandoned by the debtor in possession is to petition the bankruptcy court to *reopen* the proceedings . . . . If the claim is to be enforced for the estate, a trustee will be appointed for its enforcement.

Id. at 893 (emphasis added). *Accord Pako Corp. v. Citytrust*, 109 B.R. 368, 375-76 (D. Minn. 1989) (quoting and approving of *Stein*, and finding that an antitrust claim was not "dealt with" in the Chapter 11 plan and, therefore, was not freed from the claims of creditors, so that reorganized debtor could not sue on the claim, which still belonged to creditor beneficiaries of the plan and was held after the closing of the case by the bankruptcy court *in custodia legis* for such creditor beneficiaries). *See also* 11 U.S.C. § 350 and Rule 5010.[9]

"Cause" exists to reopen this Chapter 11 Case. The Patents need to be protected from Egger's and SRA's efforts to convert them from the Estate and otherwise cloud their title, and the Patents should be auctioned by this Court, because they were not properly "dealt with" by the confirmed and consummated Plan and, therefore, are currently held *in custodia legis* by this Court. The Patents also are protected by the automatic stay under § 362, in accordance with *Stein*, 159 B.R. 890 (9th Cir. BAP 1993), *aff'g in relevant respects* the Appellate Panel's decision in *Havelock v. Taxel (In re Pace)*, 159 B.R. at 890 (9th Cir. BAP 1993), *aff'd*, 67 F.3d 187 (9th Cir. 1995), (discussed below) (referred to herein as "*In re Pace*" or "*Pace*"); and other authorities addressed below. *See also* 11 U.S.C. § 1141(c) (addressing property of the estate "dealt with" by a plan). Various former insiders and Plan fiduciaries, including Egger and Ait, have engaged in a pattern of unauthorized and wrongful conduct in violation of the automatic stay; their conduct threatens to convert or to impair the value, title, and marketability of such Patents, giving rise to a need for this Court's intervention. *See, e.g.*, Section II.B, *infra*, and Novak Declaration ¶¶ 14, 15, 20-22, 25-26, 28; *see also* Exhibit C attached hereto, setting forth certain key events. Absent the relief sought here, the Plan beneficiaries will suffer irreparable harm, as discussed in greater detail below.[10]

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[9] Rule 5010 provides that "[a] case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code." Section 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or *for other cause*" (emphasis added).

[10] For example, Ait, as former CEO of the Debtor and former Plan administrator, submitted a Declaration in August 2008 in the Texas action purporting to "approve of and ratify the previous 1998 Assignments and the 2005

(Footnote continues on next page.)

Sherwood also moves this Court for a status conference pursuant to § 105(d)(1) in order to discuss the terms of related relief that should be provided in connection with the reopening of this Case, including the appointment of a trustee, protective orders against further conversion maneuvers, reaffirmation of the § 362 stay, and related relief. It may also be appropriate to address at the status conference whether to appoint an examiner to review any or all of: (i) the wrongful conduct of Ait as former "Responsible Person" under the Plan, both before and after the closing of the Chapter 11 Case, including his repeatedly purporting to act in the name of the Estate after the Case had closed, and including the purported fraudulent transfer of the Patents in 2008 to Egger and the unauthorized retention of SRA's counsel to represent the Debtor; (ii) the violations of the automatic stay by Ait, Egger, SRA, and others; and/or (iii) the merits of alternatives to quieting title to Patents owned by the Estate (or by the debtor's wholly owned subsidiary, "Slash," described below),[11] so that the Patents can be auctioned for the benefit of the Plan beneficiaries, including Sherwood.

Sherwood further moves this Court for the issuance of such protective orders, injunctions, and other relief as may be necessary in order to prevent Ait, Egger, and SRA from further attempting to convert or harm the Patents in violation of the § 362 automatic stay or from purporting to use their counsel to represent the Debtor. *See* Novak Declaration ¶¶ 14, 15, 20-22, 25-26, 28; RJN Exhibits 14-15 of Exhibit 13, Exhibit 7 of Exhibit 14, Exhibits 7-8 of Exhibit 16; Exhibit D hereto (describing the recent fraudulent transfer by Ait to Egger of the Patents).

(Footnote continued from previous page.)

Assignment to Daniel Egger" on behalf of "the Site Entities." Ait also attempted to fraudulently transfer the Patents to Egger in August 2008. *See* Exhibit D hereto.

[11] As described in greater detail below, former insider Daniel Egger purported to purchase these Patents for $100,000 from the Debtor. Now, Egger's SRA affiliate is suing Google, Yahoo!, AOL, IAC, and Lycos for alleged infringement of these Patents. However, at the filing of the Chapter 11 Case, those Patents were owned *not* by the Debtor, but rather by its wholly owned subsidiary, "Slash," whose stock was the asset ignored during the Chapter 11 Case through confirmation of the Plan, despite ownership of Patents on which SRA is suing for presumed substantial sums. After confirmation, Ait, the Plan's "Responsible Person" and plan administrator, *merged Slash into the Debtor*. The Plan beneficiaries' representative can, therefore, either proceed in the name of the Debtor's Estate or in the name of Slash, if the Court chooses to unwind that merger. That choice depends on what other, subsequent Wrongs are corrected in this process and other developments. The point here is that the Plan beneficiaries are the beneficial owners of the Patents, either directly through the Debtor's Estate or through the Estate's wholly owned subsidiary, Slash. *See* RJN Exhibit 12, the Co-Defendants' Declaratory Judgment Action Complaint to confirm ownership of the Patents in this Chapter 11 Estate.

B. A Special Trustee Should Be Appointed for the Estate to Administer the Patents.

Appointment of a qualified Estate trustee and manager of the Patents is critical in order to recover any benefit for the Plan beneficiaries. Accordingly, this Court should carefully evaluate, at the § 105 status conference or at the hearing on this Motion, the best means of installing the most qualified trustee-manager—whether by electing a new Responsible Person under the Plan, by selecting a trustee with special qualifications, or by other suitable means, each as described in further detail below. Such a trustee would, at minimum, require substantial intellectual property litigation experience and familiarity with bankruptcy law and procedure in order to effectively address the needs of the Estate. The panel of trustees typically employed for such purposes may not have the necessary qualifications. As a result, careful consideration of the issue is needed.

C. Brief Timeline.

The Debtor filed its petition under Chapter 11 of the Bankruptcy Code in this Court before Judge James R. Grube on February 2, 1999, commencing a series of events described in the Court's *Order Confirming Debtor's First Amended Plan of Reorganization* entered on July 5, 2000 (the "Confirmation Order"), a copy of which is attached as Exhibit A hereto and attached as Exhibit 5 to the RJN. The Plan (like the "Disclosure Statement" filed by the Debtor in connection with the Plan and the Debtor's bankruptcy schedules) failed to address the existence of Site/Technologies/Inc. ("Slash"), a wholly owned subsidiary of the Debtor and owner of the Patents, on which Patents SRA has sought damages for purported infringement (despite its lack of standing, and despite the ineffective, purported sale from Debtor to Egger for $100,000 shortly before the Debtor's bankruptcy petition). *See generally* the chronology set forth on Exhibit C attached hereto, the Appendix hereto, and the RJN.

Ait repeatedly acted without authority after Plan confirmation and before and after entry of the Final Decree on January 7, 2004 (attached as Exhibit B hereto) closing the case and discharging Ait of his duties as the Responsible Person under the Plan. For instance, Ait, purporting to act as an officer of Debtor/Slash, purported to transfer the Patents to Egger in 2008 for $1,000 (*see* Exhibit D). Such unauthorized actions wrongfully helped Egger and SRA advance their adverse goals of converting the Patents or further clouding title, contrary to Ait's fiduciary duty, and contrary to the

best interest of the Plan beneficiaries and the Estate. *See* Novak Declaration ¶¶ 20-22, 26, and Exhibit D (describing the most recent fraudulent transfer in 2008 and other wrongful conduct by Ait, SRA, and their agents after entry of the Confirmation Order and before and after entry of the Final Decree, including purporting to retain, as counsel to the Debtor, the attorneys representing SRA and Egger in their attempts to convert the Patents).

Acting jointly with SRA, Egger planned and carried out various schemes that were hostile to the Estate by appropriating the Patents to advance their litigation against the Co-Defendants. For instance, Egger executed an assignment in which he purported to be an officer of Debtor/Slash and which purported to transfer the Patents *to himself* in 2005 for $1. *See* Novak Declaration ¶ 14. Contrary to Egger, SRA, and their counsel who now purports to represent the Debtor, the Plan beneficiaries and Co-Defendants share a common goal of auctioning the Patents in this Chapter 11 Case.

II. STATEMENT OF FACTS

A. Overview of Key Facts.

The Plan failed to administer or otherwise deal with the Patents, which were, as of the Confirmation Date, assets of Slash, the Debtor's wholly owned subsidiary. The Plan also failed to address the equity interests in Slash itself, which were assets of the Estate as well, and were valuable because they represented the ownership of the Patents. Thus, because the Patents (or the Slash stock, which held the value of the Patents) were not "dealt with by the plan," they remain *in custodia legis* under the jurisdiction of this Court and, thus, continue to be subject to the automatic stay under § 362. *See Stein*, 691 F.2d 885; § 1141(c).

Since the confirmation of the Plan and the subsequent closure of the Chapter 11 Case, Ait, Egger, and SRA have engaged in various forms of wrongful conduct (such instances of conduct referred to herein collectively as the "Wrongs") against the Estate, many of which constituted violations of the automatic stay. *See, e.g.*, Novak Declaration ¶¶ 14, 15, 20-22, 25-26, 28; RJN Exhibits 14-15 of Exhibit 13, Exhibit 7 of Exhibit 14, Exhibits 7-8 of Exhibit 16; Exhibit D hereto (describing the recent fraudulent transfer by Ait to Egger of the Patents). Indeed, the Disclosure Statement (RJN Exhibit 3) itself recited that the purported transfer of the Patents to Egger for

$100,000 occurred several months before the Chapter 11 filing. Moreover, Ait, Egger, and SRA have made numerous efforts to transfer the Estate's Patents to SRA, but they have failed. Admitting, by his conduct, the failure of the original attempted purchase, Egger (or his affiliate, SRA) purported to purchase the Patents at least two more times *after this Case was closed* in 2004, once from *himself* (purporting to be an officer of Debtor/Slash) in 2005 for $1 (Exhibit 14 of RJN Exhibit 13) and once from Ait (purporting to be an officer of Debtor/Slash) in August 2008 for $1,000 (Exhibit D).

Other Wrongs that have occurred since the Confirmation Order was entered further demonstrate that Egger, Ait, and others were aware that the original attempted transfer by Debtor to Egger was ineffective. *See* chronology set forth on Exhibit C. For example, (i) Ait purported to transfer to Egger the Patents in August 2008, which, if successful, would have been a fraudulent transfer, in order to advance Egger's and SRA's Texas Action maneuvers and in an effort to correct Ait's past Wrongs, and (ii) Ait attempted to revive the Debtor, contrary to the terms of the Plan which required the Debtor's dissolution in 2004, and to engage counsel for Egger and SRA to purport also to act for the Debtor, contrary to its best interest. *See* Section II.B, *infra*. Contrary to the post-confirmation reports delivered to this Court by Ait as the Responsible Person under the Plan, the Patents owned either directly or indirectly by the Estate were *not* liquidated before the Final Decree as required in the Plan.[12]

Counsel for Egger and SRA in both the Texas Action and the California Action has asserted that it has been retained by Ait to represent both Ait and the purportedly revived Debtor in the California Action, and to represent Ait for the purpose of quieting title in favor of Egger and SRA *against the Debtor* he purports to represent (and, thereby, against the Plan beneficiaries, such as Sherwood). *See* Novak Declaration ¶¶ 25-26. Egger and SRA are directly and irreconcilably adverse

[12] The Plan originally required the Chapter 11 Case to be closed by December 2000. Ait delayed this repeatedly, however, by seeking extensions for various tax and accounting reasons. *See* RJN Exhibits 6-8. *Ait never once revealed the continued existence of the Patents in the Estate*, despite reviving Slash in December 2000 to merge it into Site. Novak Declaration at ¶ 10. The application for the Final Decree closing the Chapter 11 Case in January 2004 also revealed nothing relevant about the Patents. RJN Exhibit 9. Apparently feeling that the Estate's ownership of the Patents was safely concealed, Egger subsequently purported to act as an officer of Slash to transfer the Patents to himself for $1 (Exhibit 14 of RJN Exhibit 13)—ignoring Slash's merger with Debtor in December 2000 and his lack of authority to act on Slash's behalf.

to the Estate with respect to their competing interests in the Patents, as is Ait, who assisted Egger and SRA in the underlying litigation to the detriment of this Estate. *See* footnote 19, *infra*.

The Novak Declaration and the documents referenced therein, as well as the documents referred to in the RJN, demonstrate continuing Wrongs that must be addressed by this Court, such as the following:

(i) Efforts by Egger, SRA, and others to convert Estate property in violation of the stay, in which Egger purported (A) in 2005, to assign the Patents to himself for $1, in his purported capacity as an officer and fiduciary of Slash, after its merger into the Estate, and (B) in 2008, to purchase the same Patents for $1,000 from Ait, who purported to act for the Estate, but who had no authority to do so. *See* Exhibit 14 of RJN Exhibit 13, and Novak Declaration ¶ 14.

(ii) Efforts by Ait, as former insider and Plan administrator, to deprive the Estate of its ownership of the Patents and to transfer them to Egger. *See* Exhibits C and D (describing a continuing pattern of Wrongs, including a description of how Ait first ignored Slash and its Patents and attempted to transfer the Patents to Egger directly from the Debtor for $100,000, to the detriment of Plan beneficiaries, and again in 2008 for $1,000). The Estate, on behalf of the Plan beneficiaries, became the direct owner of the Patents by virtue of the post-confirmation merger of Slash into the Debtor in 2000.[13]

(iii) Efforts by counsel for Egger and SRA in purporting to represent both the Estate and Ait at Ait's request. Even if Ait had such authority, it is improper for counsel for Egger and SRA to represent the Estate (as a fiduciary for the benefit of Plan beneficiaries, such as Sherwood) when it is also representing Egger and SRA in attempting to convert the Patents in the Texas Action by litigation and in the California Action by attacking the Chapter 11 defenses (all to the detriment of Plan beneficiaries). *See California Canners & Growers v. Bank of Am., N.T. and S.A.* (*In re California Canners & Growers*), 74 B.R. 336 (Bankr. N.D. Cal. 1987) *(.*

[13] Egger and SRA allege that the merger of Slash and Debtor corrects, post-confirmation, the pre-bankruptcy transfer from Site in 1998, when Slash still owned the Patents that its parent had attempted to sell to Egger. In the opposition by SRA to the motion to dismiss in the Texas Action filed by the Co-Defendants, SRA erroneously argues that there is an "after-acquired property doctrine" that would cure the failure of Site to own the Patents sold to Egger in 1998, when Site later acquired the Patents through the merger with Slash later arranged by Ait after he closed this Chapter 11 Case by application for a Final Decree. *See* RJN Exhibit 14.

(iv) Efforts by Lynch to assist Egger in his attempts to purport to act as a Slash officer in order to convert the Patents by a sale of the Patents to himself, in 2005, for $1. *See* Novak Declaration ¶¶ 14 and 23.

The Co-Defendants have filed a motion to dismiss the Texas Action. SRA has filed an objection thereto, in an effort to explain why the defective efforts by Ait to transfer the Patents to Egger were somehow effective, but the Co-Defendants have further exposed those errors in their recent reply. *See* RJN Exhibit 15. Such arguments by SRA lack merit for a variety of reasons, including that such efforts involved violations of bankruptcy law and breaches of the automatic stay and provisions of the Plan, as the Co-Defendants demonstrate in their reply in the Texas Action. The Co-Defendants' motion to dismiss the Texas Action, their reply in support of the motion to dismiss, and the complaint for declaratory relief in the California Action (RJN Exhibits 13, 15, and 12, respectively) are collectively referred to herein as the "Co-Defendant Litigation Pleadings."

B. Ait's Purported Transfer of the Patents, if Effective, Constituted an Actual and Knowing Fraudulent and Otherwise Wrongful Transfer.

1. The Bankruptcy Case Must Be Reopened, Because Ait, as Former Responsible Person, Continues to Attempt to Act to the Detriment of the Estate.

The August 2008 attempted fraudulent transfer of the Patents by Ait is attached as Exhibit D. The evidence demonstrates that no legitimate explanation for this wrongful transfer exists. *See* Novak Declaration ¶ 21. The only conceivable motivation for the transfer is a coordinated attempt to deprive the Estate and its Plan beneficiaries of the Patents and to strip this Court of its jurisdiction under 28 U.S.C. § 1334. As a result, this Court should act immediately to maintain the status quo, by preserving the Patents as property of the Estate by virtue of this Court's jurisdiction over the issues addressed in this Motion. If this Court does not reopen the Case, then Ait, Egger, SRA, and their counsel (also purporting to act for the Estate) will continue to infringe upon the rights of the Estate and its Plan beneficiaries in violation of the § 362 stay protecting the *in custodia legis* Patents. *See* Section III.A, *infra*.

2. Ait, Egger, and SRA Are Attempting to Circumvent This Court's Jurisdiction and Deprive the Estate and Its Plan Beneficiaries of the Patents Without Giving Them Their Day in Court.

Perhaps the most blatant of Ait's wrongful and unauthorized acts is his August 13, 2008 "Assignment of Patents," purporting to transfer the Patents from the closed Estate to its adversary, Egger, for the ultimate benefit of the Estate's adversary, SRA, for $1,000 consideration. *See* Exhibit D. When Ait signed the fraudulent and unauthorized transfer, he acted without authority. *See* Novak Declaration ¶ 21. He purported to abandon to Egger, and ultimately to SRA, for a token sum, Patents on which Egger and SRA now are suing for alleged damages, which are presumed to be in the millions of dollars. *See id.* ¶ 21. Ait's sole fiduciary duty, however, was to the Plan beneficiaries, with whose interests the harmful transfer was in direct conflict.

Furthermore, on August 18, 2008, Ait signed a Declaration to assist SRA with its lawsuit against the Co-Defendants. *See* Novak Declaration ¶ 22. When Ait executed that Declaration, the Co-Defendants had already moved to dismiss the Texas Action in light of the Estate's interests in the Patents. As a result, Ait knew, or should have known, that the Co-Defendants were then litigating to preserve the Patents *for the Estate and its beneficiaries*, and as a result, a fair auction was feasible at which the Co-Defendants could bid and the Plan beneficiaries could receive the proceeds. As noted above, in 2008 Ait also knew, or should have known, that he had long ceased to be the Responsible Person for the estate and that he had not been an officer of the Debtor for over eight years.

Ait clearly acted against the interests of the Estate in executing the August 13, 2008 Assignment and his August 18, 2008 Declaration. For example, in his August 18, 2008 Declaration, he stated, "To the extent that there is any question as to whether the Patents were assigned to Daniel Egger, the Site Tech entities [Debtor and Slash] *do not claim any title to the Patents and have long disclaimed any ownership in favor of Daniel Egger*" (emphasis added). *See* Exhibit 7 of RJN Exhibit 14. Ait purportedly retained Egger's and SRA's attorneys for himself and on behalf of both the Estate of the Debtor and Slash, despite the clear and irreconcilable conflict. *See* Novak Declaration ¶¶ 25-26.

Egger also committed unauthorized acts to try to circumvent this Court's jurisdiction over the Patents. Feigning to be an officer of Slash, Egger executed an assignment purporting to transfer the

Patents to *himself* in 2005. *See* Novak Declaration ¶ 14. Slash, however, no longer existed, as it had merged into the Estate during the bankruptcy in 2000, and Egger had ceased being an officer of Slash well before then.

C. The Debtor Failed to Transfer Its Subsidiary's Patents Before the Commencement of the Chapter 11 Case.

Months before the petition was filed commencing the Chapter 11 Case, the Debtor purportedly sold the Patents to Egger for $100,000. But the Patents were not owned by the Debtor when this sale occurred in 1998. In addition, the continuing Wrongs provide the Estate and Plan beneficiaries with, at minimum, a comprehensive *defense* (including under the doctrine of unclean hands) to any equitable relief that Egger and SRA may seek in their efforts to convert the Patents in the Texas Action.

The Patents were not owned by the Debtor in 1998. Rather, the Patents were owned by the Debtor's subsidiary, Slash, as public records at the United States Patent and Trademark Office (the "USPTO") indicate. *See* Assignments of Patents to Slash, as filed with the USPTO, attached as Exhibits 3 and 4 of RJN Exhibit 13; Co-Defendants' Reply in the Texas Action (RJN Exhibit 15); *see generally* Co-Defendant Litigation Pleadings. Therefore, the transfer was not effective. As noted above, in Exhibits C and D, and in the Novak Declaration, the continuing Wrongs by Ait, Egger, and others, at least since entry of the Confirmation Order, demonstrate their awareness that the original Patent sale was ineffective. The extraordinary attempts to "fix" the original, failed sale have become increasingly less subtle, culminating in Ait's August 2008 fraudulent attempts to transfer the Patents and to execute a Declaration purporting to act on the Estate's behalf. *See* Exhibit D. These efforts demonstrate that Egger and SRA have long known that the initial sale in 1998 had failed and that the Estate owned the Patents. Nonetheless, on each occasion on which they might have sought lawful remedies to obtain title (for example, by appearing before this Court), they instead chose a course of wrongful conduct.

III. CAUSE EXISTS FOR REOPENING THE CHAPTER 11 CASE PURSUANT TO 11 U.S.C. § 350(b) AND RULE 5010, AS WELL AS FOR APPOINTING A TRUSTEE TO ADMINISTER THE PATENTS, WHICH ARE PROPERTY OF THE ESTATE *IN CUSTODIA LEGIS*

A. The Controlling Ninth Circuit Decision in *Stein* Preserves the Rights to the Patents for Administration by a New Trustee in a Reopened Chapter 11 Case, and the Automatic Stay of § 362 Continues to Protect the Unscheduled and Unadministered Patents for Plan Beneficiaries.

Ninth Circuit case law requires that assets of a bankruptcy estate not administered or dealt with by a bankruptcy court remain under the control of the court *in custodia legis* after closure of the bankruptcy case, rather than revesting in the debtor. The Ninth Circuit addressed a situation analogous to the facts of this Case in the leading case of *Stein v. United Artists*, 691 F.2d 885,[14] holding that valuable assets that were not scheduled by the debtor or otherwise resolved by the liquidating plan at issue remained in the custody of the court for the benefit of the plan beneficiaries. There the court considered the following facts, comparable to the Case at hand:

1. A liquidating plan failed to address an unscheduled, valuable asset of the estate (there an antitrust claim, analogous to the Patents or the Slash stock representing the Patents);

2. After the bankruptcy case was closed, the liquidated debtor purported to assign the antitrust claim/asset to an insider. The insider subsequently sued as a purported assignee (analogous to Egger and SRA's efforts to correct Egger's earlier failed purchase); and

3. The defendants on the purportedly assigned claim then disputed the standing of the insider assignee (as do the Co-Defendants here), contending correctly that the asset was not "properly dealt with" in the plan of liquidation and that, therefore, the claim asset remained *in custodia legis* pending the reopening of the bankruptcy case and the appointment of a trustee to administer the asset

[14] The plan of arrangement under Chapter XI of the former Bankruptcy Act was confirmed in 1977, and the liquidation was completed and the case closed in 1978, after the enactment of the Bankruptcy Code. The present decision was rendered long after that change in the law, but there is no difference between the Act and the Code in respect of the issues important to this case. This reality is confirmed by the many Bankruptcy Code cases following or citing *Stein* with approval, despite the Act's role in *Stein*. *See, e.g.*, *In re Emmer Brothers Co.*, 52 B.R. 385, 393-94 (D. Minn. 1985) (following *Stein* despite the Act versus Code argument, holding that assets not disclosed by debtors in possession are not "property dealt with by the plan" under 11 U.S.C. § 1141(c) and, therefore, survive for the benefit of plan beneficiaries, since, "A rule which would bar suits for fraud to recover such undisclosed assets would clearly encourage debtors to hide their assets," and it would reward the debtor's breach of its fiduciary duty under § 1107 as a trustee to disclose and share assets in its plan).

for the benefit of the plan beneficiaries (as here, notwithstanding the tactics of Egger and Ait and their and others' violations of the automatic stay).

Because the unscheduled asset/claim in *Stein* was not "property dealt with" in the liquidating plan or sold thereunder as required under the plan, as here, the *Stein* court did not permit title to the antitrust asset/claim to revest in the debtor. As a result, the debtor in *Stein* could *not* assign the asset/claim to the insider/purported assignee/plaintiff. Instead, the asset/claim remained *in custodia legis* with the bankruptcy court, pending reopening of the case and the appointment of a trustee to administer the asset. As the court in *Stein* explained:

> The proper procedure to enforce any newly discovered asset neither listed nor abandoned by the debtor in possession is to petition the bankruptcy court to reopen the proceedings under Rule 515 [analogous to current § 350] to permit the court to decide whether reopening is desirable and, if so, whether the claim is to be administered for the benefit of creditors or abandoned. If the claim is to be enforced for the estate, a trustee will be appointed for its enforcement. . . .
>
> Stein seeks to sue *in custodia legis* for the benefit of creditors, contending that until a trustee is again appointed, the bankrupt is the only existing entity who may hold title to the asset. This misconceives the nature of the bankruptcy estate. *Property of the bankrupt remains* in custodia legis *in the bankruptcy court during the period in which no trustee has been appointed and after the discharge of the trustee*, *United States v. Ivers*, 512 F.2d 121, 124 (8th Cir. 1975); *Stanolind Oil & Gas Co. v. Logan*, 92 F.2d 28, 31 (5th Cir. 1937), *cert. denied*, 302 U.S. 763, 58 S.Ct. 409, 82 L.Ed. 592 (1938), but *title need not reside in a physical entity. Title may remain dormant, in the estate, until the bankruptcy court again appoints a trustee as enforcing guardian*. *Stanolind Oil & Gas Co.*, 92 F.2d at 31. *Without petitioning the bankruptcy court, Stein cannot resurrect the estate to proceed* in custodia legis. *Similarly, Stein may not proceed for the benefit of creditors.* The creditors themselves could not have proceeded to enforce Century's antitrust claims without having obtained leave of the bankruptcy court, so Stein is in no better position by proceeding in their name. *See Management Investors v. United Mine Workers of America*, 610 F.2d 384, 393 (6th Cir. 1979); *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 868 (5th Cir. 1971); *Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F.2d 89, 94-95 (6th Cir. 1941); *St. Paul Fire & Marine Insurance Co.*, 525 F.Supp. 880, 882 (Ct. Int'l Trade 1981); *Gochenour v. George & Francis Ball Foundation*, 35 F.Supp. 508 (S.D. Ind. 1940), *aff'd*, 117 F.2d 259 (7th Cir. 1941) (per curiam).

691 F.2d at 893 (emphasis added).

The facts in this Case are directly analogous to the facts in *Stein*. As in *Stein*, a liquidating plan failed to address material assets of the estate (here, the Patents and the stock of Slash). After

closure of the Case, as in *Stein*, an attempt was made to assign the asset (here, the attempted assignments of the Patents, including (i) the 2005 assignment by Egger, on behalf of Slash, to himself, and (ii) the 2008 assignment by Ait, on behalf Debtor/Slash, to Egger). And here, as in *Stein*, the Patents remain *in custodia legis* with the bankruptcy court.[15] Egger clearly had no right to act on behalf of Slash, which had merged into the Estate in 2000, when he attempted to transfer the Patents from Slash to himself in 2005. And Ait clearly had no power or right to act on behalf of the Estate after closure of the Case, when he was divested of his powers and duties as Responsible Person. Thus, Ait had no ability to assist Egger and SRA in their failed attempts to strip the Patents from the Plan beneficiaries, such as Sherwood. The Patents were *in custodia legis* in this Court, at least from the time the Case was closed by Final Decree in January 2004, if not as of the entry of the Confirmation Order in 2000. Of course, Ait's prior Wrongs in violation of the Plan and in breach of his fiduciary duties after the Confirmation Order also are voidable by this Court. A trustee appointed by this Court not only can correct such Wrongs, but also may sue Egger, SRA, and others for violation of the automatic stay and enjoin further interference with the Patents.

Reopening the Case in order to preserve the Patents for the Estate and for the Plan beneficiaries is consistent with many other authorities. *See, e.g., In re Auto West, Inc.*, 43 B.R. 761 (D. Utah 1984) (appointing special counsel to pursue a claim asset against a creditor when the asset was not disclosed or administered in a Chapter 11 plan, for the benefit of the plan beneficiaries); *In re Davis*, 2002 WL 33939739 (Bankr. D. Idaho 2002) (reopening Chapter 13 case with facts similar to those of *Stein*, and citing same); *SFC Valve Corp. v. Wright Machine Corp.*, 105 B.R. 720 (S.D. Fla. 1989) (under facts similar to those of *Stein*, in which the court followed *Stein*, stating "we conclude that *Stein* is indistinguishable . . ."); *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990) (comparable facts and theories).

The Ninth Circuit BAP followed *Stein* and the related line of cases in *In re Pace*, 67 F.3d 187,[16] in which Chapter 7 debtors had concealed malpractice claim assets until after their discharge,

[15] It is irrelevant that the purported sale of the Patents to Egger was mentioned in the Debtor's Statement of Financial Affairs, because the Debtor did not own the Patents at the time. *See* Section II.C, *supra*.

[16] The Ninth Circuit BAP approved of and applied the *Stein v. United Artists* analysis expressly and in detail at 159 B.R. 890, 899-900. The Ninth Circuit merely affirmed the relevant portion of the BAP decision, *see* 67 F.3d at 191

(Footnote continues on next page.)

when the Chapter 7 cases were closed. The *Pace* debtors then pursued the malpractice claim for their own account. In the subsequent reopened bankruptcy cases, the court punished the attorneys who assisted the debtors' willful stay violations.[17] *Pace* clarifies that an unscheduled and unadministered asset (in *Pace*, a malpractice claim, comparable to the Patent assets here) that remains *in custodia legis* in the bankruptcy court remains property of the estate, and is subject to the protections of the automatic stay under § 362 (and subject to remedies for violations thereof), even after the bankruptcy case is closed and the debtor is discharged. According to the BAP in *Pace*:

> It is clear then, the automatic stay . . . continues until such property is no longer property of the estate. . . .
>
> . . . [T]he stay of acts against "unscheduled" property of the bankruptcy estate does not terminate upon the closing of the bankruptcy case. Consequently, reinstatement of the stay was unnecessary. . . . Actions to control this property are stayed pursuant to § 362(c)(1).

159 B.R. at 900, *aff'd*, 67 F.3d at 191 n.7.

As did the discharged debtors and their lawyers in *Pace*, Egger and Ait each willfully violated the § 362(c)(1) stay by asserting control over the Patents and engaging in repeated Wrongs in an attempt to convert them. *See* Section II.A, *supra*. *Pace* demonstrates that the automatic stay remains in place as to assets that remain in the estate, and speaks to the continued viability of remedies for violations of such stay. On behalf of the Estate, Sherwood reserves the right as a Plan beneficiary to pursue its remedies against Egger, SRA, and any other proper parties for such stay violations, among other causes of action. *See* 11 U.S.C. § 362(h), describing remedies for stay violations.

Furthermore, it is clear that the Patents remained in the Estate notwithstanding any argument by SRA that the doctrine of after-acquired title operated to transfer title to the Patents. SRA has

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(Footnote continued from previous page.)

n.7, where the Court of Appeals recited the appellants abandoning a portion of their challenge to the BAP decision. The court noted that the appellant had *conceded* that the unscheduled assets "remained property of the bankruptcy estates *in custodia legis*," and that appellants' conduct violated the automatic stay, despite the termination and closing of the Chapter 7 cases, including after the cases were reopened. The remaining dispute is not relevant here—i.e., whether a trustee is an "individual" entitled to punitive or other special damages for such willful stay violations under 11 U.S.C. § 362(h). That issue matters less, because the Ninth Circuit agreed that ample punishment remained available under § 105(a).

[17] *See id.* and *In re Pace*, 132 B.R. 644, 647 (Bankr. D. Alaska 1991), *aff'd*, 146 B.R. 562 (9th Cir. BAP 1992).

asserted in connection with the Texas Action that the doctrine of after-acquired title operated to transfer the Patents under the assignment executed by the Debtor in 1998 (the "1998 Assignment"), once the Debtor later acquired title to the Patents by way of its post-petition merger with Slash in 2000. Assuming for the sake of argument that the 1998 Assignment obligated the Debtor to transfer patent rights that it did not own, that unperformed obligation was, at most, an executory obligation under § 365. The Debtor rejected the contract under Sections 8.1 and 8.3 of the Plan (providing that all executory contracts not expressly assumed by the Debtor were rejected). This Court's confirmation of the Plan thus relieved the Debtor of any obligation to specifically perform any alleged obligations it might have had under the rejected 1998 Assignment. Egger's exclusive remedy for non-performance was to timely assert a general unsecured claim for damages under § 365(g)(1)—which he did not do. *See Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 407 (7th Cir. 1995) ("Rejection avoids specific performance, but the debtor assumes a financial obligation equivalent to damages for breach of contract."). As a result, Egger cannot invoke the after-acquired title doctrine now, and the Patents thus remain property of the Estate *in custodia legis*. This Court thus must reopen the Case to administer them.

B. Other Considerations Relevant to § 350 Reopening Support Granting Relief.

Further analysis emphasizes that this Case should be reopened for cause pursuant to § 350 and Rule 5010.

1. Reopening Motions Should Be Liberally Granted. Courts should liberally grant motions to reopen bankruptcy cases, if cause exists. *See, e.g., In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992); *Matter of Rettemnier*, 113 B.R. 757 (Bankr. S.D. Fla. 1990). Reopening a bankruptcy case is within the sound discretion of the bankruptcy court, based upon the facts of each case, and such a decision is reviewed only for abuse of discretion. *See In re Apex Oil Co., Inc.*, 406 F.3d 538 (8th Cir. 2005); *In re Woods*, 173 F.3d 770 (10th Cir. 1999); *Matter of Shondel*, 950 F.2d 1301 (7th Cir. 1991); *Matter of Case*, 937 F.2d 1014 (5th Cir. 1991). Indeed, a court may even reopen a case *sua sponte*. *See In re Searles*, 70 B.R. 266 (D. R.I. 1987); *In re Johnson*, 148 B.R. 532 (Bankr. N.D. Ill. 1992). Creditors need not be given notice of reopening, *see Menk v. Lapaglia (In re Menk)*, 241 B.R. 896 (9th Cir. BAP 1999), although here Sherwood intends to seek

out other Plan beneficiaries in its discretion in order to help protect the Patents. Accordingly, in light of the liberal consideration given motions to reopen bankruptcy cases and the discretionary power given courts to do so, this Court should exercise its discretion to reopen this Chapter 11 Case immediately due to the important need to protect the Patents and deal with the important remaining assets of the Estate.

2. Reopening a Case Is an Equitable Decision, Free from Technical Constraints. Reopening under § 350(b) for cause is an equitable decision in which this Court must focus on "substance," rather than on "technical considerations" that could "prevent substantial justice." *Shondel*, s*upra*, 950 F.2d at 1304. *See also In re Security Servs., Inc.*, 203 B.R. 708 (Bankr. W.D. Mo. 1996); *In re Critical Care Support Servs.*, 236 B.R. 137 (E.D.N.Y. 1999); *In re Emmerling*, 223 B.R. 860 (2d Cir. BAP 1997). Here, justice requires that this Court reopen the Case in order to administer significant assets that were not disclosed to this Court or otherwise addressed or dealt with in the Case, which assets Ait, Egger, and SRA now are attempting to convert. Accordingly, notwithstanding any technical considerations that Ait, Egger, or SRA may assert (though no such considerations would appear to be valid), this Court should act in accordance with the interests of justice and reopen the Case in order to effectively address the Patents for the benefit of the Plan beneficiaries and to prevent the occurrence of further Wrongs.

3. Reopening Requires the Appointment of a New Trustee, and Does Not Operate to Reinstate the Responsible Person Under the Plan. The Final Decree closed this Case in January 2004. *See* RJN Exhibit 10. Both the Final Decree and the Plan discharged Ait as the Responsible Person under the Plan, as well as discharging any other representative or officer of the Debtor's Estate. Reopening the Case would not change this—rather, case law requires that a trustee be appointed to administer the remaining assets. *See In re Menk, supra*; *see also In re Pace, supra*. While former trustees may be parties in interest who can move to reopen a case, such reopening would not reinstate them with any power or rights as a trustee. *See In re Stanke*, 41 B.R. 379 (Bankr. W.D. Mo. 1984). As merely the former Responsible Person under the Plan and former insider of the Debtor, Ait thus becomes, at most, a party in interest, and is subject to the authority of the trustee to

be appointed. In any event, Ait's many Wrongs create conflicts of interest that would prohibit his reappointment.

4. A Demonstration of the Merits Is Unnecessary in Order to Reopen a Case. A party moving to reopen a case needs only to demonstrate that "further administration appears to be warranted" by a trustee. *Menk*, *supra*, 241 B.R. 896. *See also In re Knight*, 349 B.R. 681 (Bankr. D. Idaho 2006); *In re Dewberry*, 266 B.R. 916 (Bankr. S.D. Ga. 2002). It is not necessary to show that Ait or any other relevant party has, in fact, acted wrongly or in bad faith, *see In re Frasier*, 294 B.R. 362 (Bankr. D. Colo. 2003), although Sherwood has done so in order to expedite related relief.

Some courts in certain other circuits sometimes have required a greater showing of cause than is required in the Ninth Circuit, taking into account (i) the benefit to the Debtor's estate, (ii) whether there is a lack of prejudice to a material party with standing, and (iii) the benefit to creditors. *See, e.g.*, *In re Koch*, 229 B.R. 78 (Bankr. E.D.N.Y. 1999); *In re Phelps*, 329 B.R. 904 (Bankr. M.D. Ga. 2005); *In re Rochester*, 308 B.R. 596 (Bankr. N.D. Ga. 2004). Even under such an expanded analysis, however, cause exists here to reopen the Chapter 11 Case.

a. Benefit to the Debtor's Estate. The benefit to the Estate is clear. Efforts by Sherwood and the other Plan beneficiaries to reopen the Case and to preserve the rights to the Patents will benefit the Estate by permitting the Patents to be auctioned. Such efforts will help to clear title for the Plan beneficiaries, at their own expense. Moreover, reopening the Case will permit the Plan beneficiaries to correct the Wrongs and prevent further abuses of the law by Ait, Egger, and others. SRA is now suing on the Patents for presumably significant damages. Egger, SRA, and others also have violated the automatic stay, the terms of the Plan, the law, and the rights of Plan beneficiaries in a continuing effort to convert the Patents. *See* Exhibits C and D. This loss of value to Plan beneficiaries is the dominant factor in such an analysis, and reopening the Case to address these issues clearly would benefit the Estate. *Accord In re Rochester, supra*.

b. Reopening the Case Would Not Prejudice Any Material Party with Standing to Object. As *Stein* and other cases cited above demonstrate, Ait, Egger, and SRA have no standing to protest the reopening of the Case. To the extent that they may argue that they acquired title to the Patents (and thereby have standing to object), their conduct has been so inequitable that such an argument

would be subject to numerous equitable defenses, including that they have "unclean hands" and cannot benefit from their own wrongful conduct. The only relevant parties in interest in this Case are the Plan beneficiaries, all of whom would benefit from the reopening without any possible prejudice. Nevertheless, even if this Court were to consider the impact of reopening this Chapter 11 Case on Egger or SRA, the reopening of the Case would not unduly prejudice them (except to the extent it prevents any potential windfall resulting from their inequitable conduct).

The fact is that Egger and SRA must litigate the title to the Patents somewhere, and it is improper for the rights of the Plan beneficiaries arising out of the Chapter 11 Case to be determined in the forum chosen by SRA in the Eastern District of Texas, which lacks jurisdiction over the Debtor (Site) and where SRA lacks standing to bring the action. The Estate and the Plan beneficiaries have no need or interest in getting mired in the middle of complex and expensive intellectual property litigation in such a distant court merely to quiet title to Patents that are property of the Estate here. In light of this Court's exclusive jurisdiction over these bankruptcy issues, this Court is best situated to analyze and resolve any disputes over Egger and SRA's claims of ownership over Estate assets such as the Patents. *See* 28 U.S.C. § 1334. It would be improper and unnecessary for the Plan beneficiaries to be compelled to participate in the fight over the merits of the Patent infringement claim, because the Plan beneficiaries can count on a meaningful recovery in this Case from the Patents payable at the auction in this Court in a reopened case. SRA is entitled to due process before this Court, which will carefully guard the interests of the relevant parties and protect the Estate from further stay violations by Ait, Egger, SRA, and others.

It is indisputable that (a) Slash held title to the Patents as of the date of the commencement of the Chapter 11 Case, *see* Novak Declaration ¶ 5, and (b) Site held title to the Patents post-petition after its merger with its wholly owned subsidiary Slash, *see* Novak Declaration ¶ 11. Thus, notwithstanding the disputed claims to Patent ownership by Egger and SRA (as to which the Estate, for the Plan beneficiaries, has many defenses and counterclaims), the Patents are property of the Estate, and, as discussed above, are held *in custodia legis* by this Court. Therefore, it is essential under 28 U.S.C. § 1334 that this Court resolve title to the remaining Estate property sufficiently to allow such an auction.

The more effort that the Co-Defendants must spend in their litigation with SRA, the less it may be sensible for them to bid at an auction of the Patents before this Court. As a result, time is of the essence, and this Court should act quickly to address the issues raised in this Motion, particularly since the Estate (and this Court, acting as the protector of the Patents *in custodia legis* for the benefit of the Plan beneficiaries) is the real party in interest in any ownership dispute regarding the Patents.

c. The Benefit to Creditors (Here, Plan Beneficiaries) Is Clear. Since the creditors of the Debtor already were paid their allowed claims in the Case pursuant to the Plan, which has been confirmed and consummated, the Plan beneficiaries are the sole focus of any cost-benefit analysis hereunder. These Plan beneficiaries (including Sherwood) clearly would benefit by receipt of proceeds of an auction selling the Patents in the Case. Moreover, the Co-Defendants each would benefit the Estate (and, thereby, other Plan beneficiaries) by carrying on the fight at their own expense against Egger and SRA in order to confirm the Estate's ownership of the Patents and to clear the way for an auction of the Patents. There is no downside in this effort—only an upside for the Estate. We are aware of no compelling basis for any party in interest with standing to oppose reopening, either on the merits or procedurally.

IV. THE LIMITED GOALS AND CONSEQUENCES OF REOPENING THE CHAPTER 11 CASE ALLOW THE AUCTION OF THE PATENTS FOR DISTRIBUTION TO PLAN BENEFICIARIES

A. Simple Process Leading to an Auction.

The proposal to reopen the Case is for the limited purpose of preventing further harm to the Patents as assets of the Estate and for administering those assets for the benefit of the Plan beneficiaries. There is no intention for this Case to draw in other unrelated disputes among other parties and professionals. In this Case, the Plan beneficiaries are aware of no dispute, for example, with former counsel for the Debtor, Murray and Murray. The wrongdoers at issue here are limited to Egger, SRA, Ait, and their respective agents. The primary relief sought here vis-à-vis the wrongdoers is to quiet title to the Patents in the Estate, so that the Patents can be auctioned and the sale proceeds can be distributed in accordance with the Plan, free and clear of any alleged interest or Wrongs of Egger or SRA, or any unauthorized or otherwise wrongful acts by Ait.

Specifically, Sherwood contemplates the following process:

1. Reopening the Chapter 11 Case, and appointing a suitable trustee and/or a new Responsible Person under the Plan to complete the liquidation auction of the Patents and related tasks. (Ait's serious conflicts of interest and wrongful conduct clearly disqualify him from any continuing role, and under applicable law, as discussed in greater detail below, Ait's former role would not be resurrected by the reopening of the Case. *See* Section III.B.3, *infra*.[18]);

2. Quieting the title to the Patents, to the extent required for an effective auction of the Patents by the Estate, free of the Wrongs and related clouds on title, including (as needed) by an adversary proceeding pursuant to Rule 7001. While a sale of the Estate's interest in the Patents before the title to the Patents is quieted in this Court is possible, particularly if supported by an examiner's report, that would result in fewer sale proceeds for the Estate. Clearly, if the plaintiffs and defendants have time to bid against each other in this Court after the Estate's ownership of the Patents is resolved, then higher net sale proceeds can be expected; and

3. Liquidating the Patents in an appropriate manner for distribution to the Plan beneficiaries, free and clear of the Wrongs and claims of Egger and SRA.

B. Appointment of the Trustee for the Process, and Disqualification of Ait.

Because of his Wrongs and his conflicts of interest as Egger's and SRA's supporter, Ait is clearly disqualified from being reinstated as the Plan administrator/Responsible Person in the reopened Case. *See* Exhibits C and D (demonstrating various of Ait's breaches of fiduciary duty, his violation of the automatic stay, and other Wrongs); Novak Declaration ¶¶ 14, 15, 20-22, 25-26, 28; RJN Exhibits 14-15 of Exhibit 13, Exhibit 7 of Exhibit 14, Exhibits7-8 of Exhibit 16. Because Ait has demonstrated his willingness to act against the Estate's best interests, his reappointment would add non-productive expenses to the Estate. For example, if Ait were reappointed, the Plan

[18] As explained in this Motion and the Novak Declaration, Ait has repeatedly violated the stay and taken unauthorized actions that assisted Egger and SRA in their repeated efforts to convert the Patents from the Debtor's Estate that Ait was supposed to serve as a fiduciary. *See* Exhibit D, the August 2008 fraudulent transfer to Egger for $1,000. Having breached his fiduciary and Plan duties and gotten caught, Ait's self-interest now directly conflicts with his duty to the Debtor's Estate beneficiaries (including Sherwood) to recover the Patents for sale free of the claims of SRA and would only further help Egger and SRA complete their conversion. *See* Section IV.B, illustrating Ait's conflicts.

beneficiaries would have little choice but to move to intervene and act derivatively or on their own.[19] In view of such past and continuing Wrongs (*see* Section II.A, *supra*), Sherwood also would have to litigate for constant oversight discovery and protective orders. Again, Sherwood's goal is not to enter into unnecessary litigation, but rather simply to clear the title to the Patents, so that they can be auctioned free of Wrongs and the proceeds paid pro rata to Plan beneficiaries. At present, however, Ait, Egger, and SRA must be prevented from engaging in further wrongful acts in violation of the stay.

Sherwood seeks a trustee because, as discussed above, *Stein* and other authorities discussed in Section III.A, *supra*, require a trustee to be appointed to administer assets held *in custodia legis* that have not been administrated by the Plan. *See also* 11 U.S.C. §§ 105 and 1104. Note also that Plan ¶ 7.3(a) contemplates the replacement of the Responsible Person (formerly Ait) by Site's board of directors, which ceased to exist upon the entry of the Final Decree in 2004 and the closing of the Case. Given the prior and continuing misconduct of Ait, the former shareholders/Plan beneficiaries must be permitted to elect a new board of directors, if any important decisions are to be made requiring board approval. However, to so appoint a board likely would be a slow process, and that option may be necessary only if the Estate does not have a competent and trustworthy trustee in place responsible for such decisions. Nevertheless, it also may be necessary to obtain a qualified Responsible Person to replace or displace an insufficient trustee or to displace Ait, and Sherwood prefers to reserve that option.

V. NO PARTIES OTHER THAN THE PLAN BENEFICIARIES HAVE STANDING TO OPPOSE THE PROPOSED REOPENING OF THE CASE

The only parties with standing to respond to this Motion are the other Plan beneficiaries, who are all in a position with everything to gain and nothing to lose from the relief requested here. Egger and SRA, for example, have no standing as litigation adversaries. As the Ninth Circuit explained in

[19] Similarly, counsel for Egger and SRA in the California and Texas actions, Smyser Kaplan & Veselka, and counsel for Egger and SRA in the California Action, Thomas Smegal, Jr., cannot be permitted to continue to purport to act as counsel for the Estate. *See In re California Canners & Growers*, 74 B.R. 336.

In re Abbott, 183 B.R. 198, 200 (9th Cir. BAP 1995), in which the court held that a defendant in a fraudulent transfer action had no standing to dispute the trustee's motion to reopen the case:

> A motion to reopen is simply a mechanical device which can be brought ex parte and without notice. *In re Daniels*, 34 B.R. 782, 784 (9th Cir. BAP 1983). It has no independent legal significance and determines nothing with respect to the merits of the case. *In re Germaine*, 152 B.R. 619, 624 (9th Cir. BAP 1993). The order denying the motion to set aside did not diminish Earlene's property, increase her burdens or detrimentally affect her rights. She was not a "person aggrieved" by that order. The order left Earlene to defend the fraudulent transfer complaint. It did not prevent her from asserting any claims or defenses. Earlene has no standing to appeal the order reopening the case.

Accord In re Valley Bus. Center, 2006 WL 3166479, at *1 (9th Cir. 2006) (following *Abbott* and affirming the lower court decision denying a defendant standing to challenge the reopening motion, adding that "reopening orders are interlocutory and therefore not appealable as of right," citing *In re Wilborn*, 205 B.R. 202, 206 (9th Cir. BAP 1996)); *SFC Valve Corp. v. Wright Machine Corp.*, 105 B.R. 720 (S.D. Fla. 1989) (similar case of unlisted and unadministered claim asset, where defendants expressly following *Stein* as "indistinguishable" had standing to raise the interest of the deprived plan beneficiaries).

Absent a reopening of the Case and the appointment of a trustee as required by *Stein* and other cases, at least the following problems would exist:

1. Multiple parties in interest, such as Ait as disputed former Plan administrator, and former officers/directors of the Debtor or Slash, and Egger, likely would assert conflicting derivative claims and defenses as to the Estate or as to the Patents, forcing many separate battles for control in various courts. Even putting aside these former fiduciaries' various Wrongs and conflicts of interests, actual Plan beneficiaries, such as Sherwood, should prevail in those contests, preventing former, disputed administrators, or officers and directors, such as Ait and Egger, from representing the Plan beneficiaries derivatively. While Ait, Egger, or their allies may allege that they, too, have standing in a state or federal court dispute, they do not have any right to interfere in this Court under *In re Abbott*. Therefore, in order to avoid a multiplicity of cross-actions among Plan beneficiaries and such adversaries, this Court should reopen the Case and appoint a trustee, as directed by *Stein*, applying the stay as directed by *Pace* in order to protect the Patents.

2. Needless expenses could diminish the net recovery of the Plan beneficiaries, if multiple actions are necessary to resolve the ownership of the Patents and to hold Egger, Ait, and others accountable for their continuing Wrongs and harms to the Patents. The Court can quiet the title to the Patents in the Estate most cost-effectively.

3. This Court reserved jurisdiction under Article 13 of the Plan in order to address these issues and to facilitate liquidation of *all* assets of Site, which clearly includes the Patents, whether owned by the Estate *in custodia legis*, whether for the Debtor, or by Slash.

4. This Court retained jurisdiction over these Plan-related matters and wrongdoing by former fiduciaries of the Estate, such as Ait, and by former officers of Slash such as Egger. *See* Confirmation Order §§ 1-5; and Plan Article 13.

VI. CONCLUSION

For the reasons stated above, Sherwood requests that:

1. the Chapter 11 Case be reopened;

2. a suitable trustee be appointed who is acceptable to major Plan beneficiaries, such as Sherwood, and to the Co-Defendants. If that is not possible, then the Plan beneficiaries should be allowed to elect a new Responsible Person responsible for completing the Plan liquidation;

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3. a Section 105 status conference be held to discuss the terms and procedures for protective orders and for enjoining unauthorized attempts to assert control over the Patents, for enjoining and sanctioning stay violations, quieting title to the Patents, auctioning the Patents, and other relief; and

4. for such other relief as may be appropriate or as justice requires.

Dated: November 26, 2008

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