EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

LIGHT TRANSFORMATION TECHNOLOGIES LLC v. ANDERSON CUSTOM ELECTRONICS, INC., ET AL.	NO. 2:09-cv-00354-TJW-CE JURY

JOINT SUBMISSION OF COMPETING PROPOSED PROTECTIVE ORDERS

Pursuant to the paragraph 2 of the Court's Discovery Order, the parties respectfully submit their competing proposed protective orders and request that the Court enter one of them.

The parties have diligently met and conferred regarding an appropriate protective order and have agreed to the vast majority of terms. Unfortunately, agreement could not be reached with regard to paragraphs 9 and 11. Plaintiff's proposed protective order is attached as Exhibit A. Defendants' proposed protective order is attached as Exhibit B. For the Court's convenience, the parties' competing versions of paragraphs 9 and 11 are shown in Exhibit C.

The parties' disagreement regarding paragraph 9 relates to whether in-house counsel will be screened from all RESTRICTED -- ATTORNEYS' EYES ONLY information (defendants' position), or rather only from RESTRICTED -- ATTORNEYS' EYES ONLY information of a technical nature and not financial information relating to the Accused Instrumentalities (plaintiff's position).

The parties' disagreement regarding paragraph 11 relates to the scope of the patent prosecution bar. Plaintiff submits that the prosecution bar should apply to the counsel and experts for both plaintiff and defendants. Defendants submit that the prosecution bar should apply to only plaintiff's counsel and experts.

The parties' respective positions are set forth below:

Paragraph 9

Plaintiff's Position Statement:

Plaintiff's proposed provision is more appropriate because it would allow plaintiff to disclose financial information to its in-house counsel. Plaintiff's in-house counsel has responsibility for making decisions dealing directly with this litigation, and in-house counsel assists outside counsel with the case. Disclosure of financial information relating to the Accused Instrumentalities is necessary and proper to allow plaintiff to make decisions and engage in meaningful settlement negotiations. Defendants' proposed provision would significantly hamper such efforts, as it would allow defendants to shield their financial information regarding the Accused Instrumentalities from plaintiffs' in-house attorneys.

Further, defendants' position represents a substantial and unwarranted departure from this Court's standard protective order. Under the Court's standard order, Protected Material designated RESTRICTED -- ATTORNEYS' EYES ONLY is generally accessible to a party's in-house counsel (so long as the in-house counsel "exercise[s] no competitive decision-making authority on behalf of the client"). In this case, defendants request to exclude plaintiff's in-house counsel from accessing all RESTRICTED -- ATTORNEYS' EYES ONLY material. Defendants provide no reasonable justification for such a significant departure from the Court's standard order.

As the Court is already aware, the "competitive decision-making" test is the standard for determining whether in-house counsel should see sensitive or confidential information. *See, e.g., U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984). However, it is not a matter of dispute that plaintiff is a non-practicing entity. As such, plaintiff does not compete with

defendants, and there could be no possible competitive harm from plaintiff's in-house counsel seeing financial information for purposes of case supervision and settlement.

Defendants cite to *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, LLC, 2008 WL 5634214, *5 (E.D. Tex. Mar. 14, 2008) for the proposition that plaintiff's in-house counsel are competitive decisionmakers. However, *ST Sales* involved an outside counsel who had worked so closely with the Plaintiff and its affiliates on patent acquisitions that he was deemed to a competitive decisionmaker. The court in that case barred that counsel from seeing the other side's sensitive information, due to the perceived risk of inadvertent use of the defendants' technical information during that counsel assistance with his client's patent acquisition activities. The disclosure of financial information was not an issue in *ST Sales*.

It is inconceivable how plaintiff's in-house counsel in this case could possibly use defendants' protected *financial* information outside of the context of supervising and potentially settling this litigation. Further, although technical information may serve as the basis for company's products for many years, financial information is much more fleeting, and its utility decreased as time passes. Finally, since plaintiff and defendants do not compete, there is simply no basis for barring Plaintiff's in-house counsel from financial information which has no usefulness outside of this case.

Defendants' Statement:

Plaintiff LTT and its parent, Acacia Research Corporation, are in the business of building patent portfolios and conducting patent litigation to enforce those patents. LTT/Acacia's in-house counsel are competitive decision makers, e.g., they are directing this litigation and also are prosecuting patent applications that later could be used against the Defendants. The Eastern District of Texas recognizes that even allegedly ***outside*** counsel to numerous related patent

licensing companies—none of which made or sold any products—were competitive decision makers to defendants whose products are subject to related patent infringement claims. *ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, LLC, 2008 WL 5634214, *5 (E.D. Tex. Mar. 14, 2008). When a company's "entire business model with [its] patent-holding companies … revolves around the acquisition, enforcement (through litigation), and licensing of patents…, it is difficult to argue that someone such as [a consistent outside counsel], who is so heavily involved in these aspects of the business, is somehow not a competitive decisionmaker." *Id.*

This Court, therefore, requires that disclosure of outside counsel only information "be limited to in-house counsel who exercise no competitive decision-making authority on behalf of the client." LTT/Acacia's business model means that all of its in-house counsel are competitive decisionmakers under this standard. Accordingly, there is potential harm to Defendants in disclosing their confidential financial information to LTT/Acacia's counsel. Further, there is no need for LTT/Acacia's counsel to view such financial information because their outside counsel will have access, as will their damages expert.

Third parties may also object to disclosure of their confidential information to LTT/Acacia's competitive decisionmakers, especially if they are potential targets of LTT/Acacia's "acquisition, enforcement (through litigation), and licensing of patents." *ST Sales*, 2008 WL 5634214, *5. Under analogous circumstances, the Eastern District has barred in-house competitive decisionmakers from participating in licensing discussions with third parties. *Microsoft Corp. v. Commonwealth Scientific and Indus. Research Organisation*, 2009 WL 440608, *3-4 (E.D. Tex. Feb. 23, 2009). Defendants' proposal eliminates the risk of seriatim motions for supplemental protective orders from third parties, which would substantially impede the progress of this action.

Imposing these reasonable restrictions on LTT/Acacia's in-house counsel will have no effect of LTT/Acacia's ability to engage in settlement discussions. The parties expect that any information LTT/Acacia requires to assess settlement proposals will be provided to LTT/Acacia pursuant to an agreement among the parties and including Acacia.

Paragraph 11

Plaintiff's Statement:

There is no justification for the defendants to insist upon the imposition of a patent prosecution bar upon plaintiff, while at the same time refusing to accept a similar prosecution bar upon themselves. First, general principals of equity support plaintiff's position—what is good for the goose is good for the gander.

Second, to the extent that there may be a real need for a prosecution bar to be applied to plaintiff,[1] that same need would exist with respect to defendants. Third-party Farlight LLC, the original patent owner from whom plaintiff acquired all substantial rights to the patents-in-suit, is a manufacturer of LED lighting fixtures. Farlight likely will be required to produce protected technical information relating to its designs and products. At least several defendants also design and/or manufacture optical components for LED lighting fixtures, and/or LED lighting fixtures themselves. In fact, for one example, Farlight and at least one defendant, Dialight Corporation, are believed to be direct competitors in the field of LED obstruction light fixtures. In another example, Farlight at one time designed LED light fixtures for airport applications, in direct competition with defendant ADB Airfield Solutions. Thus, there exists the real potential for a defendant to misuse Farlight's protected technical material (intentionally or otherwise) with

[1] Plaintiff is not objecting to the application of a prosecution bar against its attorneys and experts who receive defendants' HIGHLY SENSITIVE MATERIAL which is of a technical nature.

respect to the defendant's patent prosecution efforts. In addition, there is also a risk that counsel for defendants could inadvertently misuse the information of a co-defendant, when engaging in patent prosecution.

Further, the experts in this case will be subject to a prosecution bar, which makes it more difficult to find experts willing to work on the case. Defendants improperly seek to exempt their own experts from a prosecution bar while seeking to impose one on Plaintiff's experts. Again, there is no possible justification for such one-sided discriminatory treatment against plaintiffs.

Further still, defendants' proposal for a one-way prosecution bar represents a significant and unjustified departure from the two-way bar contained in the Court's standard protective order. Defendants should have the burden to show some good reason to depart from a two-way bar, and defendants have not done so.

Finally, to the extent that defendants' position may implicitly suggest that lawyers who represent defendants can be trusted not to misuse otherwise protected confidential technical information in patent prosecution, but lawyers who represent plaintiffs cannot be so trusted, counsel for plaintiff would take great exception to such an implication.

Defendants' Statement:

Plaintiff LTT and its parent, Acacia Research Corporation, are in the business of building patent portfolios and conducting patent litigation to enforce those patents. Accordingly, there is good cause for a prosecution bar against LTT/Acacia because (a) their counsel are competitive decision makers, e.g., they are directing this litigation and also are prosecuting patent applications that later could be used against defendants, and (b) there is potential harm to defendants in disclosing its confidential information to LTT/Acacia's counsel, e.g., that information could later be used to expand the scope of LTT/Acacia's patent portfolio to cover

the defendants' products. See *In re Deutsche Bank Trust Company Americas and Total Bank Solutions, LLC*, 2010 WL 2106957 (Fed. Cir. 2010); *Wi-Lan, Inc. v. Acer, Inc.*, 2009 WL 1766143 (E.D. Tex., June 23, 2009).

By contrast, for example, VWGoA is in the business of distributing and selling Volkswagen brand vehicles in the United States. VWGoA's counsel are not competitive decision makers with respect to LTT/Acacia, nor is there any potential harm to LTT/Acacia in VWGoA's counsel viewing any confidential materials. The other defendants are similarly situated. Plaintiff LTT has not met its burden of showing "the requisite clearly defined, particular, and specific demonstration of the risk of harm" necessary for a prosecution bar against VWGoA's counsel. *Wi-Lan*, 2009 WL 1766143 at *4. LTT's desire for reciprocity is insufficient grounds. See *id*. (denying plaintiff's request for a reciprocal bar and instead entering a unilateral prosecution bar against plaintiff's counsel where no good cause for a bar was shown against defendants' counsel).

CONCLUSION

The parties respectfully request that the Court enter an appropriate protective order.

June 21, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

June 21, 2010

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