Eric Winston
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
Email: ericwinston@quinnemanuel.com

Hearing Date: March 3, 2017 at 10:00 a.m. ET
Objection Deadline: February 24, 2017 at 4:00 p.m. ET
Reply Deadline: February 28, 2017 at 4:00 p.m. ET

Kevin P.B. Johnson
Victoria F. Maroulis
QUINN EMANUEL URQUHART & SULLIVAN LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
Email: kevinjohnson@quinnemanuel.com
victoriamaroulis@quinnemanuel.com

Kate Scherling
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
Email: katescherling@quinnemanuel.com

Attorneys for BlackBerry Limited and BlackBerry Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
AVAYA, INC., *et al.*[1]	Chapter 11
	Case No. 17-10089 (SMB)
Debtors.	(Jointly Administered)

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Avaya Inc. (3430); Avaya Cala Inc. (9365); Avaya EMEA Ltd. (9361); Avaya Federal Solutions, Inc. (4392); Avaya Holdings Corp. (9726); Avaya Holdings LLC (6959); Avaya Holdings Two, LLC (3240); Avaya Integrated Cabinet Solutions Inc. (9449); Avaya Management Services Inc. (9358); Avaya Services Inc. (9687); Avaya World Services Inc. (9364); Octel Communications LLC (5700); Sierra Asia Pacific Inc. (9362); Technology Corporation of America, Inc. (9022); Ubiquity Software Corporation (6232); VPNet Technologies, Inc. (1193); and Zang, Inc. (7229). The location of Debtor Avaya Inc.'s corporate headquarters and the Debtors' service address is: 4655 Great America Parkway, Santa Clara, CA 95054.

NOTICE OF HEARING OF MOTION OF BLACKBERRY LIMITED AND BLACKBERRY CORPORATION PURSUANT TO 11 U.S.C. § 362(d) FOR RELIEF FROM THE AUTOMATIC STAY

PLEASE TAKE NOTICE that a hearing (the "Hearing") on Motion of BlackBerry Limited and BlackBerry Corporation Pursuant to 11 U.S.C. § 362(d) for Relief from the Automatic Stay (the "Motion"), will be held before the Honorable Stuart M. Bernstein of the United States Bankruptcy Court for the Southern District of New York (the "Court"), in Room 723, One Bowling Green, New York, New York 10004, on **March 3, 2017 at 10:00 a.m. (Eastern Time)**.

PLEASE TAKE FURTHER NOTICE that responses or objections to the Motion and the relief requested therein, if any, shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, shall set forth the basis for the response or objection and the specific grounds therefore, and shall be filed with the Court electronically in accordance with General Order M-3999 by registered users of the Court's case filing system (the User's Manual for the Electronic Case Filing System can be found at https://www.nysb.uscourts.gov, the official website for the Court), with two hard copies delivered directly to Chambers pursuant to Local Bankruptcy Rule 9028-1 and served so as to be actually received no later than **February 24, 2017 at 4:00 p.m. (Eastern Time)** (the "Objection Deadline"), by: (a) counsel for BlackBerry Limited and BlackBerry Corporation, Quinn Emanuel Urquhart & Sullivan, LLP, 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543, Attn: Eric Winston; (b) counsel to the Debtors, Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: James H.M. Sprayregan, P.C. and Jonathan S. Henes, P.C.; (c) counsel to the Official Committee of Unsecured Creditors, Morrison & Foerster LLP, 250 West 55th Street, New York, New York, 10019, Attn: Lorenzo Marinuzzi;

and (d) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014, Attn: Susan Golden, Esq.

PLEASE TAKE FURTHER NOTICE that the Hearing may be continued or adjourned thereafter from time to time without further notice other than an announcement of the adjourned date or dates at the Hearing or at a later hearing.

PLEASE TAKE FURTHER NOTICE that if no objections or other responses are timely filed and served with respect to the Motion, BlackBerry Limited and BlackBerry Corporation may, on or after the Objection Deadline, submit to the Court an order substantially in the form annexed as Exhibit A to the Motion, which order the Court may enter with no further notice or opportunity to be heard.

Dated: February 10, 2017

/s/ Victoria Maroulis

Kevin P.B. Johnson
Victoria F. Maroulis
QUINN EMANUEL URQUHART & SULLIVAN LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
Email: kevinjohnson@quinnemanuel.com
victoriamaroulis@quinnemanuel.com

Eric Winston (*pro hac vice application pending*)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
Email: ericwinston@quinnemanuel.com

Kate Scherling
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
Email: katescherling@quinnemanuel.com

Attorneys for BlackBerry Limited and BlackBerry Corporation

Eric Winston
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
Email: ericwinston@quinnemanuel.com

Hearing Date: March 3, 2017 at 10:00 a.m. ET
Objection Deadline: February 24, 2017 at 4:00 p.m. ET
Reply Deadline: February 28, 2017 at 4:00 p.m. ET

Kevin P.B. Johnson
Victoria F. Maroulis
QUINN EMANUEL URQUHART & SULLIVAN LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
Email: kevinjohnson@quinnemanuel.com
victoriamaroulis@quinnemanuel.com

Kate Scherling
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
Email: katescherling@quinnemanuel.com

Attorneys for BlackBerry Limited and BlackBerry Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
AVAYA, INC., *et al*..	)	
	)	Case No. 17-10089 (SMB)
Debtors.	)	
	)	

MOTION OF BLACKBERRY LIMITED AND BLACKBERRY CORPORATION PURSUANT TO 11 U.S.C. § 362(d) FOR RELIEF FROM THE AUTOMATIC STAY

Creditors BlackBerry Limited and BlackBerry Corporation ("**BlackBerry**") respectfully request that this Court enter an order granting relief from the automatic stay issued pursuant to section 362(d)(1) of the Bankruptcy Code in order to (1) permit BlackBerry to continue with litigation against Avaya Inc. ("Avaya" or "Debtor") pending in the United States District Court, Northern District of Texas, Case No. 3:16-cv-02185 ("**Patent Infringement Action**"), in order to (a) seek an injunction of postpetition (and continuing) violations of the patent laws and (b) liquidate Blackberry's prepetition claims against the Debtor for patent infringement. In the alternative, Blackberry requests an order confirming that the automatic stay does not bar the Patent Infringement Action to the extent of seeking injunctive relief for postpetition violations of the patent laws, The relief requested in this Motion is supported by the evidence contained in the Declaration of Victoria Maroulis (the "**Maroulis Decl.**").

I. PRELIMINARY STATEMENT

1. BlackBerry is the owner of a number of valuable patents that Debtor infringed prior to the commencement of these chapter 11 cases and is continuing to infringe in the course of its daily operations. The infringed patents cover core technologies related to digital data communication, such as enhanced security and cryptographic techniques, mobile device user interfaces, communication servers, and audio and video codecs. These technologies are being used across a substantial portion of Debtor's product range, including networking products such as switches and routers, communication servers and client software, telepresence systems, softphones and deskphones, and software for mobile device communications, which Debtor imports to, and markets and sells in, the United States.

2. By continuing to violate BlackBerry's patents after the filing of its bankruptcy petition, Debtor is engaging in unlawful activity. The law is clear that a debtor cannot hide

behind the automatic stay with respect to claims arising from the debtor's post-petition conduct of its business.[2]

3. Accordingly**,** BlackBerry respectfully submits that "cause" exists to warrant relief from the stay pursuant to 11 U.S.C. § 362(d)(1). The claims asserted by BlackBerry in the Patent Infringement Action are non-core matters involving federal patent infringement claims, and the district court is best situated to determine those matters. Moreover, Debtor's infringement of BlackBerry's patents is continuing unabated following the filing of the bankruptcy petition; as a result, BlackBerry will continue to be harmed by Debtor's ongoing, post-petition infringement with no recourse to stop such harm unless the Court grants relief from the automatic stay.

II. JURISDICTION

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding under 28 U.S.C. § 157(b)(2).

5. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The statutory bases for the relief requested herein are 11 U.S.C. § 362(d) and 28 U.S.C. § 959(b).

III. RELIEF REQUESTED

7. By this Motion, Blackberry respectfully requests an order, substantially in the form attached hereto as Exhibit A, granting Blackberry relief from the automatic stay, or confirming that the automatic stay does not apply to injunctive relief, so that Blackberry may proceed with the Patent Infringement Action.

---

[2] *See e.g. Larami Ltd. v. Yes! Entertainment Corp.*, 244 B.R. 56, 59 (D. N.J. 2000) ("If [Section 362(a)(3)] were read to prevent the injunctive relief sought here, bankrupt businesses which operated post-petition could violate patent rights with impunity."); *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F.Supp. 899, 917 (E.D.N.Y.1988) ("The Bankruptcy Act was intended to protect and rehabilitate debtors. It should not be used as a shield behind which a debtor may sustain the misappropriation of a trade name to which he is not rightfully entitled. Nor will this Court permit it to be used as an instrument by which the damages to an innocent party may be increased unnecessarily.").

IV. FACTUAL BACKGROUND

8. BlackBerry is globally recognized as having revolutionized the mobile communications industry. Its innovative products changed the way millions of people around the world connect, converse, and share digital information.

9. BlackBerry's success results from its commitment to innovation, including through its investments in research and development, which have totaled more than $5.5 billion over the past five years.[3] BlackBerry has protected the technical innovations resulting from these investments, including through seeking patent protection, and BlackBerry owns rights to an array of patented technologies in the United States. In the course of developing its ground-breaking mobile communications devices, BlackBerry has invented a broad array of new technologies that cover everything from enhanced security and cryptographic techniques, to mobile device user interfaces, to communication servers, and many other areas.

10. Debtor Avaya imports, markets, and sells products, including unified communications products and software, networking products (such as switches and routers), communication servers and client software, telepresence systems, softphones and deskphones, and software for mobile device communications, which violate BlackBerry's patent rights.

11. On July 28, 2016, BlackBerry commenced the Patent Infringement Action by filing a complaint in the United States District Court for the Northern District of Texas alleging infringement of eight patents by Debtor.[4] In this complaint, BlackBerry sought both damages for historical infringement and a permanent injunction barring Avaya's continuing infringing conduct. On September 21, 2016, Debtor filed a motion to dismiss BlackBerry's indirect and willful infringement Claims (but not BlackBerry's direct infringement claims), and on October 12, 2016, Debtor filed a motion to transfer the action to the Northern District of California. Both motions were fully briefed and under consideration of the court.

---

[3] Maroulis Decl., Ex. A at 14; Ex. B at 15; Ex. C at 15; Ex. D at 74; Ex. E at 67.

[4] Maroulis Decl. Ex. "F."

12. On January 19, 2017, Debtor commenced its chapter 11 bankruptcy case in this Court. The "Declaration of Eric Koza (I) in Support of First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2" (the "**Koza Declaration**") discloses the existence of the Patent Infringement Action as one of 59 litigation matters against the Debtor as of the Petition Date where a "judgment against the Debtors or a seizure of their property may imminent as of the Petition Date." Koza Declaration at Ex. J. However, except for this single disclosure, the Koza Declaration does not mention Blackberry or the Patent Infringement Action. For example, the Koza Declaration does not disclose that the Debtors commenced their chapter 11 cases because of the Patent Infringement Action or that if Debtor was enjoined from continuing to imports, markets, and sells the infringing products its reorganization efforts would be threatened. *See id.* at ¶¶ 53-59. The Koza Declaration does note the importance of the Debtors' own patents to the "Avaya Enterprise." *Id.* at ¶¶ 32-33.

13. Since filing for bankruptcy**,** Debtor has continued to infringe BlackBerry's patent rights. In particular, Avaya has continued to make, use, sell, offer for sale, and import products and/or services that practice the claims of BlackBerry's patents asserted in the Patent Infringement Action. [5]

V. ARGUMENT

A. Cause Exists for Relief From the Automatic Stay Pursuant to § 362(d)(1)

14. Section 362(d)(1) of the Bankruptcy Code provides that this Court shall grant relief from the automatic stay upon a showing of "cause" by a party in interest. 11 U.S.C. § 362(d)(1). The burden of proof on a motion to lift the automatic stay is a shifting one. First, the moving party must make a prima facie showing that "cause" exists; once the movant has satisfied its initial burden, then the burden shifts to the debtor to show that "cause" does not exist. *See* 11 U.S.C. § 362(g)(1); *Sonnax Indus., Inc. v. Tri Component Prods. Corp.*, 907 F.2d 1280, 1285 (2d Cir. 1990)).

[5] Maroulis Decl. Exs. "G" – "I."

15. Although the Bankruptcy Code does not define "cause," the Second Circuit has set forth twelve factors –commonly referred to as the *Sonnax* or *Curtis* factors– to guide a court's determination on whether cause is present:

(1) Whether the relief will result in partial or complete resolution of the issues;

(2) The lack of any connection with or interference with the bankruptcy case;

(3) Whether the foreign proceeding involves the debtor as a fiduciary;

(4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;

(5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;

(6) Whether the action essentially involves third parties;

(7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;

(8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);

(9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);

(10) The interests of judicial economy and the expeditious and economical determination of litigation for the parties;

(11) Whether the foreign proceedings have progressed to a point where the parties are prepared for trial; and

(12) The impact of the stay on the parties and the "balance of the hurt."

In re Quigley Co., 361 B.R. 723, 743-44 (Bankr. S.D.N.Y. 2007) (citing *Sonnax*, 907 F.2d at 1286 (2d Cir. 1990)); *see In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)). However, not all of the 12 *Sonnax* factors are relevant for every case. *See id.* Nor is a court required to give each of the factors equal weight in making its determination. *See In re Burger Boys, Inc.*, 183 B.R. 682, 688 (S.D.N.Y. 1994) (holding "only those factors relevant to a particular case

need by considered, ... and the Court need not assign them equal weight.""); *In re N.Y. Med. Group, P.C.*, 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001).

Consideration of the relevant *Sonnax* factors clearly supports granting relief from the automatic stay to permit BlackBerry to proceed against the Debtor in the Patent Infringement Case..

16. Connection with the Bankruptcy Case. Courts examine the "relatedness" of the non-bankruptcy proceeding when determining whether cause exists to lift the automatic stay. See *In re Davis*, 899 F.2d 1136, 1140-41 (11th Cir. 1990) (*quoting In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)); *Burger Boys,* 183 B.R. at 68. If a matter is not "core," bankruptcy courts are less concerned with granting relief from stay. Core proceedings are those "arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b) (defining core proceedings). A proceeding arises under title 11 when the Bankruptcy Code itself creates the cause of action. *In re Eastport Assocs.*, 935 F.2d 1071, 1076-77 (9th Cir. 1991). Similarly, a proceeding "arises in a case under title 11" if it can only arise in a case under the Bankruptcy Code. *Id.*; *see In re Burger Boys, Inc.*, 183 B.R. at 688 (defining core proceeding as "a matter which would have no existence outside the bankruptcy case").

17. The Patent Infringement Action involves non-core matters.[6] Section 157(b)(2) of the Code provides a non-exhaustive list of core proceedings, which includes several broadly-stated catch-all provisions. 11 USC §157(b)(2)(A) - (O) ("Core proceedings include, but are not limited to – (A) matters concerning the administration of the estate . . . and (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship . . . ."). Patent infringement claims are non-core proceedings. *See, e.g.*, *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 974 (N.D. III.

[6] It is true that matters concerning allowance or disallowance of claims are core proceedings, *see* 28 U.S.C. § 157(b), but the relief sought in this Motion is to (a) liquidate prepetition claims for patent infringement and (b) enjoin continuing patent infringement. The ultimate allowance of any of Blackberry's "claims" (within the meaning of 11 U.S.C. § 101(5)) is not before the Court.

1992) (addressing attempt of defendant to stay pending patent litigation by filing bankruptcy case in another district and finding that "multidistrict patent litigation is not a core proceeding by any stretch of the imagination").

18. Granting Relief Will Substantially Resolve Creditors' Prepetition Claims. If this Court grants relief from stay, all issues relating to the merits of Creditors' patent claims against the Debtor will be resolved and there will be no substantive patent law issues to try in this Court. BlackBerry brought its known patent claims against the Debtor in the district court. Once reduced to judgment, all this Court would be required to do is treat it as any other liquidated claim (the merits of which will have been determined).[7]

19. No interference with Bankruptcy Proceedings or Risk of Prejudicing Creditors. It is often more appropriate for a bankruptcy court to lift the stay to "permit proceedings to continue in their place of origin when no great prejudice to the bankruptcy estate will result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere," rather than to adjudicate a dispute which was the subject of prepetition litigation. *In re Wiley*, 288 B.R. 818, 822 (8th Cir. BAP 2003); S. REP. NO. 95-989, at 50 (1978). Courts favor lifting the stay to allow non-bankruptcy litigation to proceed when non-bankruptcy legal issues "predominate over bankruptcy issues." *In re People's Choice Home Loan*, No. 8:07-10765-RK, 2007 Bankr. LEXIS 3811, at *22-23 (Bankr. C.D. Cal. Oct. 29, 2007) (lifting stay in part because litigation was pending in state court and concerned matters of state law).

20. The central issue in the Patent Infringement Action is Debtor's infringement of BlackBerry's patents. The Patent Infringement Action will not distract Debtor's management or their bankruptcy counsel from Debtor's reorganization. Patent litigation will not require

[7] Resolving matters in the Patent Infringement Action also will determine any postpetition infringement damages, which Blackberry submits would be entitled to administrative expense priority.

Debtor's management or directors to devote undue attention to the trial; rather, it will require significant involvement from expert witnesses, and will focus on technical analysis regarding Debtor's allegedly infringing products. Such focus on technical issues likely also will not involve significant attention from or testimony of officers or directors who are essential to the day-to-day reorganization efforts of Debtor. Once the monetary claims in the Patent Infringement Action are reduced to judgment, Creditors would then be able to return to this Court to seek to have their claims allowed and determine the treatment of such claims through the chapter 11 process. The Koza Declaration does not suggest in any way that the Patent Infringement Action will be disruptive to the Debtors' reorganization efforts; if anything, resolution of the Blackberry's patent infringement claims will bring clarity to the ability for the Debtors' to import, market and sell infringing products. Accordingly, litigation in the Patent Infringement Action will not affect administration of the Debtor's chapter 11 case or prejudice Debtor's creditors. *See Sonnax*, 907 F.2d at 1286.

21. Right to Jury Trial. A jury trial right undoubtedly attaches to the claims asserted in the Patent Infringement Action. Blackberry has demanded a jury trial as they are entitled. However, denial of relief from stay may prejudice Creditors because they would likely have to forego a jury trial right against Debtor by virtue of the claims allowance process.

22. Specialized Tribunals Exist for Hearing the Patent Infringement Action. The district court in the Northern District of Texas is subject to the jurisdiction of specialized tribunals. Currently, the case is pending before a federal district court, which has jurisdiction over claims brought related to the patents. *See* 28 U.S.C. § 1338. More notably, any appeal from the patent claims in the Patent Infringement Action would be heard by the Federal Circuit. 35 U.S.C. § 1295(a)(1).

23. The interests of judicial economy and the expeditious and economical determination of litigation for the parties. This *Sonnax* factor also favors granting relief from stay. The Debtor is going to have to litigate the patent infringement issues, and the faster that such issues are resolved, the better it will be for Blackberry, the Debtors and their stakeholders

because it will clarify whatever rights the Debtors have to import, market, and sell the products that Blackberry contends violate its patents. *See In re Cicale*, 2007 WL 1893301 *1, *4 (Bankr. S.D.N.Y. 2007) (stay should be lifted because critical issue would need to be addressed regardless of whether stay was lifted). This Court is not the proper forum to litigate specialized patent infringement issues, such as claim construction (or *Markman* hearing) issues that highlight patent infringement cases. Indeed, it is rare for a bankruptcy court to consider the merits of patent infringement claims, especially when a pending patent infringement action exists.[8] This Court need not devote its resources to wading into complex, technical patent issues better suited to the district court in the Patent Infringement Action.

24. The impact on the Parties and the Balance of the Hurt Weighs in Favor of Lifting the Stay. BlackBerry continues to be harmed by Debtor's ongoing, post-petition infringement with no recourse to stop such harm unless the Court grants relief from the automatic stay. Briefing has been completed on the Debtor's motion to dismiss and motion to transfer to the Northern District of California. Granting relief from stay will permit the court in the Patent Infringement Action to resolve these motions and, if Blackberry prevails (which it believes it will) permit the case to move expeditiously on the injunctive relief action. Every day that the Debtor continues to import, market, and sell infringing products is another day the Debtor is violating the patent laws, and the only reason why Blackberry is currently unable to take action

[8] Because of the federal patent law issues, district courts have withdrawn the reference over patent infringement questions. *See The Singer Co. N.V. v. Groz-Beckert KG (In re The Singer Co. B.V.)*, No. 01 Civ. 0165 (WHP), 2002 WL 243779, at *3 (S.D.N.Y. Feb. 20, 2002) (granting a motion to withdraw the reference in an action involving patent law issues of implied licenses, claim construction, and infringement because resolution of the adversary proceeding required "substantial and material consideration of patent law"); *U.S. Gypsum Co. v. Nat'l Gypsum Co.*, 145 B.R. 539, 542 (N.D. Tex. 1992) (holding that withdrawal of the reference was required where the patent issues raised by the proof of claim, which included infringement and related defenses, required "substantial and material consideration" of non-bankruptcy federal patent and antitrust law); *In re Dahlgren Int'l, Inc.*, 147 B.R. 393, 396 (N.D. Tex. 1992) (granting mandatory withdrawal of the reference for resolution of dispute over post-petition patent infringement).

to stop it is by virtue of the automatic stay. The automatic stay is not a shield against illegal activity.

25. Not surprisingly, where the debtor is using property of the estate to infringe on others' intellectual property rights, numerous courts have determined that intellectual property owners seeking injunctive relief from a debtor should be able to pursue their claims in a district court. *E,g., Dominic's Restaurant of Dayton Inc. v. Mantia*, 683 F.3d 757, 760-61 (6th Cir. 2012) (noting that injunctive relief regarding the use of the property in the commission of a tort is not prevented by section 362(a)(3) of the Bankruptcy Code.); *In re Deep*, 279 B.R. 653, 659-60 (Bankr. N.D.N.Y. 2003)(finding that this factor weighed in favor of lifting stay, as "if the Debtors are actually committing … infringement, harm to the Movants, and even to the estate due to the potential administrative expenses that would also be accruing, would continue"); *Larami*, 244 B.R. at 59 ("If [Section 362(a)(3)] were read to prevent the injunctive relief sought here, bankrupt businesses which operated post-petition could violate patent rights with impunity."); *see also Amplifier Research Corp. v. Hart,* 144 B.R. 693, 694-5 (E.D. Pa 1992) (holding that wielding the automatic stay in a suit against a debtor to prevent the debtor's alleged defamatory conduct would produce a "bizarre result" and "effectively permit a bankrupt company which stays in business post-petition to commit torts with impunity, a privilege not afforded to non-bankrupts.").

26. The foregoing factors more than suffice to constitute cause within the meaning of § 362(d)(1).

B. Even if the Court Declines to Lift the Automatic Stay, The Stay Should Not Apply To BlackBerry's Post-Petition Infringement Claims

27. As a general matter, the automatic stay does not apply to claims for damages or injunctive relief related to a debtor in possession's post-petition conduct. *See* 11 U.S.C. § 362(a)(1); *Larami Ltd. v. Yes! Ent'mt Corp.*, 244 B.R. at 58 (section 362(a)(3) of the Bankruptcy Code does not bar patent infringement suits seeking post-petition damages or injunctions); *see also* ; *In re Colorado Altitude Training, LLC,* Case No. 10-21951 EEC, 2012

WL 993530 at * 2-3 (granting relief from stay for patent infringement action seeking injunction of ongoing infringement); *Bambu Sales,* 683 F.Supp. at 917 (stating that the automatic stay "should not be used as a shield behind which a debtor may sustain the misappropriation of a trade name to which he is not rightfully entitled."). In matters of violations of intellectual property laws, courts for decades have recognized that the automatic stay does not apply to postpetition acts. *See, e.g.*, *In re Cinnabar 2000 Haircutters, Inc.*, 20 B.R. 575, 577 (Bankr. S.D.N.Y. 1982) ("the bankruptcy laws should not be a haven for contumacious conduct in violation of a party's judicially-determined tradename rights which will be diluted by a continuation of such conduct behind the shield of the automatic stay"), *cited with approval in In re Altchek*, 124 B.R. 944, 959 (Bankr. S.D.N.Y. 1991).

28. Further support is found in section 959(a) of Title 28, which applies to debtors in possession like the Debtors here. 28. U.S.C. § 959(a) provides:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

28 U.S.C. § 959(a). Courts have recognized that section 959(a) creates an exception to the automatic stay. *Haberern v. Lehigh and New England Ry.*, 554 F.2d 581, 582 (3d Cir. 1977) (stating that section 959(a) "establishes a clear exception to the blanket stays entered by a reorganization court."); *Voice Sys. & Services, Inc. v. VMX, Inc.*, 1992 WL 510121, *10 (N.D. Okla. Nov. 5, 1992) ("Section 959(a) has been held to constitute an exception to the § 362 automatic stay.").

29. In the Patent Infringement Action, the injury at issue is Debtor's patent infringement. Notably, "each act of patent infringement gives rise to a separate cause of action." *Hazelquist v. Guchi Moochie Tackle Co., Inc.*, 437 F.3d 1178, 1180 (Fed. Cir. 2006); *see also Stone v. Williams,* 970 F.2d 1043, 1049-50 (2d Cir. 1992) (finding that each act of copyright

infringement is distinct harm giving rise to independent claim for relief such that infringement during statute of limitations period did not allow recovery for infringement prior to limitations period); Richard M. Cieri et al., *Protecting Technology and Intellectual Property Rights When a Debtor Infringes on Those Rights*, 8 Am. Bankr. Inst. L. Rev. 349, 360 (2000) ("[U]nder intellectual property law . . . each infringing act by an entity constitutes a separate and distinct wrong. . . . As a result, the intellectual property holder's cause of action against the postpetition infringement could not have been commenced prepetition since it is separate from the holder's cause of action against the prepetition infringement and section 362(a)(1) does not apply.")

30. Accordingly, even if the Court were not inclined to grant relief from stay for cause, the automatic stay should not preclude BlackBerry from proceeding with its claims seeking to enjoin Debtor's ongoing and post-petition infringement of BlackBerry's patents. *See Voice Sys.*, 1992 WL at *10; *see also In re Newman Cos. of Wis., Inc*., 45 B.R. 308, 309 (Bankr. E.D. Wis. 1985) (finding that pursuant to § 959(a), automatic stay did not apply to state court action brought to enforce noncompetition agreement since debtor was being sued with respect to acts or transactions carried on for postpetition business).

C. Cause Exists To Justify Waiver of Bankruptcy Rule 4001(a)(3)

38. BlackBerry also seeks a waiver of any stay of the effectiveness of an order approving this Motion. Pursuant to Bankruptcy Rule 4001(a)(3), "[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the Court orders otherwise." FED. R. BANKR. P. 4001(a)(3). BlackBerry requests that any order entered granting this Motion be effective immediately so that BlackBerry may proceed immediately with the Patent Infringement Action. If such order does not become immediately effective, Debtor could take actions that would prejudice BlackBerry with respect to the patents being litigated in the Patent Infringement Case. Moreover, BlackBerry only has limited time to recover its R&D investments that led to the patents it is asserting (as the patents have a limited lifetime), and continued acts of

infringement by Debtor may lead others to infringe BlackBerry's patents. *See Voice Systems*, 16 USPQ 2d at *9-10.

VI. CONCLUSION

31. Based on the facts and authorities set forth above, BlackBerry respectfully request that the Court grant this Motion and enter an order granting relief from the automatic stay to permit the Patent Infringement Action to proceed as against Debtor.

Dated: February 10, 2017

/s/ Victoria F. Maroulis

Kevin P.B. Johnson
Victoria F. Maroulis
QUINN EMANUEL URQUHART & SULLIVAN LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
Email: kevinjohnson@quinnemanuel.com
victoriamaroulis@quinnemanuel.com

Eric Winston (*pro hac vice pending*)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
Email: ericwinston@quinnemanuel.com

Kate Scherling
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
Email: katescherling@quinnemanuel.com

Attorneys for BlackBerry Limited and BlackBerry Corporation

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 11
AVAYA, INC., *et al*.[1]	)	
	)	Case No. 17-10089 (SMB)
Debtors.	)	
	)	(Jointly Administered)
	)	
	)	

ORDER GRANTING MOTION OF BLACKBERRY LIMITED AND BLACKBERRY CORPORATION PURSUANT TO 11 U.S.C. § 362(d) FOR RELIEF FROM THE AUTOMATIC STAY

Upon the Motion of BlackBerry Limited and BlackBerry Corporation Pursuant to 11 U.S.C. § 362(d) for Relief from the Automatic Stay (the "Motion")[2]; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and this Court having reviewed the Motion and the Declaration of Victoria Maroulis in support

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Avaya Inc. (3430); Avaya Cala Inc. (9365); Avaya EMEA Ltd. (9361); Avaya Federal Solutions, Inc. (4392); Avaya Holdings Corp. (9726); Avaya Holdings LLC (6959); Avaya Holdings Two, LLC (3240); Avaya Integrated Cabinet Solutions Inc. (9449); Avaya Management Services Inc. (9358); Avaya Services Inc. (9687); Avaya World Services Inc. (9364); Octel Communications LLC (5700); Sierra Asia Pacific Inc. (9362); Technology Corporation of America, Inc. (9022); Ubiquity Software Corporation (6232); VPNet Technologies, Inc. (1193); and Zang, Inc. (7229). The location of Debtor Avaya Inc.'s corporate headquarters and the Debtors' service address is: 4655 Great America Parkway, Santa Clara, CA 95054.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

of the Motion, and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED;

2. BlackBerry Limited and BlackBerry Corporation may continue with litigation against Debtor Avaya Inc. pending in the United States District Court, Northern District of Texas, Case No. 3:16-cv-02185.

3. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2017
New York, New York

_____
United States Bankruptcy Judge