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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)

DEBTORS' OBJECTION TO THE MOTION BY BLACKBERRY LIMITED AND BLACKBERRY CORPORATION FOR RELIEF FROM THE AUTOMATIC STAY

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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); Sierra Communication International LLC (9828); 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.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors" or "Avaya") hereby object to the Motion of BlackBerry Limited and BlackBerry Corporation (collectively, the "Movants" or "BlackBerry") Pursuant to 11 U.S.C. § 362(d) for Relief From the Automatic Stay, dated (the "Motion"). In support of this objection, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. On July 27, 2016, BlackBerry commenced an action in the United States District Court for the Northern District of Texas (the "Texas District Court"), captioned BlackBerry Ltd. v. Avaya Inc., Case No. 3:16-cv-02185 (the "Action"). In the Action, BlackBerry seeks treble damages, attorney's fees, and injunctive relief for Avaya's alleged infringement of eight Blackberry patents. (Compl. ¶¶ 334-41.)[2]

2. Through this Motion, BlackBerry seeks to have the Texas District Court proceed with the Action in order to enjoin alleged postpetition violations and to liquidate unsecured prepetition claims against Avaya. (Mot. ¶ 7.) In the alternative, BlackBerry requests an order confirming that the automatic stay does not bar its claims to the extent that BlackBerry seeks injunctive relief for alleged postpetition patent infringement. Id. Both requests should be denied.

3. Lifting the stay to force the Debtors to defend BlackBerry's Action cannot help but disrupt and possibly derail the Debtors' reorganization efforts. It comes as no surprise, therefore, that BlackBerry cannot show the requisite "good cause" to lift stay and, instead, falls short of the Second Circuit's Sonnax test by a wide margin.

4. BlackBerry fails to even **address** six of the Sonnax Factors, four of which weigh heavily against lifting the stay: Avaya does not have insurance to pay for defense of the Action

[2] Citations in the form "Compl. ¶ __" refer to the complaint filed in Blackberry Ltd. v. Avaya Inc., Case No. 3:16-cv-02185 (the "Complaint").

(Sonnax Factor No. 5); Avaya is the only defendant in the Action (Sonnax Factor No. 6); judgment claims arising from the Action may be subject to equitable subordination (Sonnax Factor No. 8); and the Action is in its nascent stages (Sonnax Factor No. 11). The two remaining factors ignored by BlackBerry are, at best, neutral (Sonnax Factors Nos. 3 and 9).

5. As to the six Sonnax Factors it does address, BlackBerry comes nowhere close to meeting its prima facie burden. This is so because (a) the continued prosecution of a complex, time-consuming patent litigation at the same time that the Debtors are attempting to confirm a plan of reorganization would deprive Debtors of the "breathing spell" afforded by the automatic stay and would undoubtedly prompt others to file their own lift stay motions (See Part I (C), *infra*, discussing Sonnax Factors Nos. 2 and 7); (b) BlackBerry would not suffer comparable harm from denial of the Motion, particularly given the lethargic pace at which it has pursued the Action to date, and fails to set forth even one credible reason that its claims should be treated differently from those of other unsecured creditors (See Part I (F), *infra*, discussing Sonnax Factor No. 12); (c) judicial economy and efficiency do not weigh in favor of lifting the stay since, among other things, the Texas District Court has expended few resources on the case and, in fact, was considering transfer to the Northern District of California when Avaya filed for bankruptcy (See Part I (E), *infra*, discussing Sonnax Factor No. 10); (d) the Texas District Court is not a specialized tribunal for purposes of hearing patent infringement cases (See Part I (D), *infra*, discussing Sonnax Factor No. 4); and (e) BlackBerry concedes that, regardless of what happens in the Action, it would still be required to go through the claims allowance process in this Court (See Part I (B), *infra*, discussing Sonnax Factor No. 1).

6. BlackBerry fares no better on its alternative argument that its postpetition claims of infringement are not subject to the automatic stay. Because the subject patents were issued

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prepetition and the infringement Action was brought **prepetition**, the automatic stay applies to the Action notwithstanding the inclusion of ongoing claims for infringement (See Part II, *infra*). Moreover, preserving the stay would be an appropriate exercise of this Court's equitable powers under Section 105(a) of the Bankruptcy Code or Section 959(a) of Title 28 of the United States Code because there is no question that the prosecution of the Action would interfere with Avaya's restructuring process (See Part III, *infra*). For all these reasons, and as set forth more fully below, BlackBerry's motion to lift the automatic stay should be denied.

BACKGROUND AND PROCEDURAL HISTORY

7. Avaya is a global company that provides mission-critical real-time communication applications to private and government customers and platforms. Avaya provides a full complement of software and service solutions for contact centers, unified communications, and integrated networking, which software and services are offered on-premises, in the cloud, or using a hybrid cloud. Avaya is headquartered in Santa Clara, California, but its operations are extensive and span across Asia, the Middle East, Europe, and North America.

8. BlackBerry commenced the patent infringement action on July 27, 2016.[3] All eight patents that are the subjects of the Action were issued prior to the Petition Date.[4] The patents cover technologies related to digital data communication, such as enhanced security and cryptographic techniques, mobile device user interfaces, communication servers, and audio and

[3] Specifically, BlackBerry claimed direct infringement, contributory infringement, inducement and/or willful infringement of U.S. Patent Nos. 9,143,801 (the "801 Patent"), 8,964,849 (the "849 Patent"), 8,116,739 (the "739 Patent"), 8,886,212 (the "212 Patent"), 8,688,439 (the "439 Patent"), 7,440,561 (the "561 Patent"), 8,554,218 (the "218 Patent"), and 7,372,961 (the "961 Patent"). Compl. ¶¶ 28, 32, 36, 40, 44, 48, 52, 56.

[4] The dates of issue of the patents at issue in the Complaint are: September 22, 2015 (the 801 Patent); February 24, 2015 (the 849 Patent); February 14, 2012 (the 739 Patent); November 11, 2014 (the 212 Patent); April 1, 2014 (the 439 Patent); October 21, 2008 (the 561 Patent); October 8, 2013 (the 218 Patent); May 13, 2008 (the 961 Patent). Compl. at ¶¶ 32, 36, 40, 44, 48, 52, 56; Compl. at Ex. A,.

video codecs. Notably, despite its request for injunctive relief in addition to money damages and its emphasis on the importance of such relief here, in the nearly six months between the commencement of the Action by BlackBerry and Avaya's bankruptcy petition, BlackBerry never moved for a temporary restraining order or preliminary injunction in the Action. Nor has discovery begun in the Action.

9. On September 21, 2016, Avaya moved to dismiss BlackBerry's indirect infringement, willful infringement, and inducement claims. Def.'s Mot. to Dismiss at 7, 16, 20.[5] On October 5, 2016, Avaya also moved to transfer venue to the Northern District of California. Def.'s Mot. to Transfer at 5.[6] As of the Petition Date, both motions had been fully briefed but not argued or decided.

10. On January 19, 2017 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors are now operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The goal of Debtors' chapter 11 cases is to maximize value, right-size the balance sheet, and successfully complete [a] restructuring path through chapter 11. (First Day Decl.at ¶ 16.)[7]

11. As a result of the commencement of the Debtors' chapter 11 cases, and by

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[5] Citations in the form "Mot. to Dismiss at __" refer to the motion to dismiss filed by Avaya in Blackberry Ltd. v. Avaya Inc., Case No. 3:16-cv-02185.

[6] Citations in the form "Mot. to Transfer. at __" refer to the motion for transfer filed by Avaya in Blackberry Ltd. v. Avaya Inc., Case No. 3:16-cv-02185. Avaya argued in its motion to transfer that transfer was warranted for four reasons: (1) Avaya's and BlackBerry's principal places of business are both located in the Northern District of California; (2) many known witnesses are located in California, while none are located in Texas; (3) several likely material third-party fact witnesses are located within the subpoena power of the Northern District of California, while none are located in the Northern District of Texas; and (4) none of the inventors appear to have conceived of or reduced to practice the inventions contained in the asserted patents in the Northern District of Texas. See Def.'s Mot. to Transfer at 5.

[7] Citations in the form "First Day Decl. ¶ __" refer to the *Declaration of Eric Koza (I) in Support of First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 22].

operation of law pursuant to section 362 of the Bankruptcy Code, the automatic stay enjoined all entities from, among other things, commencing any litigation or continuing judicial action against any of the Debtors that was initiated before the Petition Date, including the Action. 11 U.S.C. § 362(a)(1).

12. On February 10, 2017, approximately three weeks after the automatic stay took effect, BlackBerry filed the instant motion for relief from the automatic stay or, in the alternative, for a declaration that the automatic stay does not apply to BlackBerry's postpetition infringement claims to the extent it seeks injunctive relief.

ARGUMENT

I. BLACKBERRY HAS FAILED TO SHOW CAUSE FOR RELIEF FROM THE AUTOMATIC STAY

13. Section 362 of the Bankruptcy Code "operates as a stay, applicable to all entities" of the commencement or continuation of judicial proceedings against the Debtor-Defendants. 11 U.S.C. §362(a)(1). The Supreme Court has recognized the automatic stay as "one of the fundamental debtor protections provided by the bankruptcy laws." Midlantic Nat'l Bank v. New Jersey DEP, 474 U.S. 494, 503 (1986).

14. The automatic stay serves two fundamental purposes. First, it gives the debtor a "breathing spell" after the commencement of a chapter 11 case, shielding it from creditor harassment and litigation in a variety of forums at a time when the debtor should be focusing on its restructuring efforts. E. Refractories Co. v. Forty Eight Insulations, 157 F.3d 169, 172 (2d Cir. 1998); Teachers Ins. Annuity Ass'n of Am. v. Butler, 803 F.2d 61, 64 (2d Cir. 1986). Second, it "allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." In re Ionosphere Clubs, Inc., 922 F.2d 984, 989 (2d Cir. 1992).

15. A court may only grant relief from an automatic stay "for cause." 11 U.S.C. § 362(a)(1). Second Circuit courts have interpreted this as requiring "good cause." In re Pioneer Commercial Funding Corp., 114 B.R. 45, 48 (Bankr. S.D.N.Y. 1990). In this regard, the Second Circuit has set forth the following twelve factors (the "Sonnax Factors") to be weighed in determining whether "cause" exists to lift the automatic stay:

(1) whether relief would result in a partial or complete resolution of the issues;

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

(3) whether the other proceeding involves the debtor as a fiduciary;

(4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;

(5) whether the debtor's insurer has assumed full responsibility for defending the action;

(6) whether the action primarily involves third parties;

(7) whether litigation in another forum would prejudice the interests of other creditors;

(8) whether the judgment claim arising from the other action is subject to equitable subordination;

(9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;

(10) the interests of judicial economy and the expeditious and economical resolution of litigation;

(11) whether the parties are ready for trial in the other proceeding; and

(12) the impact of the stay on the parties and the balance of harms.

Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1285-1287 (2d Cir. 1990).

16. Courts have emphasized that they will not lift the stay without a showing of "extraordinary circumstances" warranting relief. In re Leibowitz, 147 B.R. 341, 345 (Bankr. S.D.N.Y. 1992) (Unsecured claimants "should not be granted relief from the stay unless

extraordinary circumstances are established to justify such relief."); see also In re Keene Corp., 171 B.R. 180, 185 (Bankr. S.D.N.Y. 1994) ("[A] court will not grant relief from the stay, absent 'extraordinary circumstances,' simply to liquidate an unsecured claim."); In re R.F. Cunningham & Co., 355 B.R. 408, 412 (Bankr. E.D.N.Y. 2006) ("Only in extraordinary circumstances will an unsecured creditor be granted relief from the stay.").

17. The burden of demonstrating cause lies firmly with the party seeking to lift the stay. Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 48 (2d Cir. 1997). "Only when the movant makes such a showing does any burden shift to the debtors; absent a showing of cause, the court should simply deny relief from the stay." Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2d Cir. 1999). Further, even if a creditor makes a prima facie showing of cause, the debtor is still entitled to rebut the creditor's showing by demonstrating the absence of cause. In re N.Y. Med. Grp., P.C., 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001). If a debtor successfully demonstrates the absence of cause, then the motion to lift the automatic stay must be denied even though the creditor was able to make a facial showing of cause in the first instance.

18. As discussed below, BlackBerry has not carried its initial burden to demonstrate facts and law that entitle it to prima facie relief from the automatic stay, much less "extraordinary circumstances" justifying such relief.

A. BlackBerry Ignores Six Sonnax Factors That, On Balance, Weigh Against Lifting the Stay.

19. BlackBerry fails to even address six of the twelve Sonnax Factors. See Mot. ¶¶ 16-25 (discussing only Sonnax Factors 1, 2, 4, 7, 10, and 12). Four of those factors ignored by BlackBerry—numbers 5, 6, 8 and 11—weigh heavily against lifting the stay. First, Avaya has no insurance coverage for the Action, meaning the estate will bear all defense costs

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and judgment risk (Sonnax Factor No. 5). Second, Avaya is the sole defendant in the Action, and thus the continuance of the Action against Avaya would necessarily involve the active participation of Avaya and the associated personnel resources and expenses (Sonnax Factor No. 6). Third, any judgment in the Action may be subject to equitable subordination to the extent BlackBerry obtains the treble damages and attorneys' fees it seeks (Sonnax Factor No. 8). See Matter of Colin, 44 B.R. 806, 810 (Bankr. S.D.N.Y. Nov. 30, 1984) (subordinating punitive damage portion of claim against debtor's estate based on concern that punitive damages would punish the entire body of creditors and not the actual wrongdoer). Fourth, the litigation is in its very early stages, as discovery has not started and the operative Complaint has not been tested on motion to dismiss (Sonnax Factor No. 11). The two other Sonnax Factors ignored by BlackBerry—numbers 3 (does the other action involve Debtor as a fiduciary) and 9 (would other proceeding result in an avoidable judicial lien)—are either neutral or of no moment.

B. Lifting the Stay Will Not Result in a Partial or Complete Resolution of the Issues in the Action (Sonnax Factor No. 1)

20. Although BlackBerry argues that lifting the stay would resolve "all issues relating to the merits of [BlackBerry's] patent claims" (Mot. ¶ 18), it concedes that it cannot obtain complete relief before the Texas District Court because, even in the event of a favorable verdict, it would still have to "return to this Court to seek to have [its] claims allowed and determine the treatment of such claims through the chapter 11 process." (Mot. ¶¶ 20, 18.) Courts have routinely denied lift stay motions in analogous circumstances. See In re Residential Capital, LLC ("ResCap I"), No. 12-12020 (MG), 2012 WL 3249641, at * 5 (Bankr. S.D.N.Y. Aug. 7, 2012) (finding that the first Sonnax factor weighed against lifting the stay because the movants would be required to go through the bankruptcy court claims process to collect on any judgment); In re WorldCom, No. 05-cv-5704 (RPP), 2006 WL 2270379, at *8 (S.D.N.Y. Aug. 4, 2006)

(same); In re Nw. Airlines Corp., No. 05-17930 (ALG), 2006 WL 382142, at *2 (Bankr. S.D.N.Y. Jan. 13, 2006) (same); In re I. Burack, Inc., 132 B.R. 814, 816 (Bankr. S.D.N.Y. 1991) (same). Thus, the first Sonnax factor weighs against granting stay relief.

C. Permitting the Action to Proceed Will Interfere With These Chapter 11 Cases and Prejudice the Interests of Other Creditors (Sonnax Factors Nos. 2 and 7)

21. BlackBerry argues the Action is not connected to these chapter 11 cases because its patent claims are "non-core." (Mot. ¶¶ 16-17.) BlackBerry does not cite a single case for the extraordinary proposition that non-core claims are exempted from the automatic stay—a proposition that, if accepted, would neuter the automatic stay. This too comes as no surprise given that the core/non-core distinction is a jurisdictional concept, not a factor courts look at to determine whether a competing action would interfere with a bankruptcy case. See In re Vivax Medical Corp., 242 B.R. 211 (Bankr. D. Conn. 1999) (finding that proceeding was "inextricably tied" to the bankruptcy case, notwithstanding the fact that it was non-core). Indeed, the Bankruptcy Code specifically exempts broad categories of prepetition actions from the automatic stay. See generally 11 U.S.C. § 362(b). But nowhere does the Bankruptcy Code automatically exempt non-core claims from the automatic stay. Id.

22. The relevant issue under Factors 2 and 7 is whether the stayed litigation interferes with the Debtors' chapter 11 cases and prejudices their other creditors. See In re Nw. Airlines Corp., No. 05-17930 (ALG), 2006 WL 694727, at *1 (Bankr. S.D.N.Y. Mar. 13, 2006) ("A ***principal purpose*** of the automatic stay is to permit a debtor to focus its energies on reorganizing and managing its business affairs without facing diversions and litigation brought on by its creditors." (emphasis added)). Consequently, courts have long held that even slight interference with the bankruptcy proceeding warrants denial of relief. See In re Penn-Dixie Indus., Inc., 6 B.R. 832, 835 (Bankr. S.D.N.Y. 1980); see also In re Comdisco, 271 B.R. 273, 280 (Bankr. N.D.

Ill. 2002) (finding that "it would be irresponsible and subversive of the purpose of the automatic stay to allow **any** resources and attention of the Debtor to be diverted to other matters not directly related to its reorganization" (emphasis added)). For example, in In re Penn-Dixie, the court refused to lift the automatic stay for the limited purpose of procuring certain documents in prepetition antitrust litigation, reasoning that even limited relief from the automatic stay would divert the debtor's attention and focus from its reorganization efforts. 6 B.R. at 835 ("Interference by creditors in the administration of the estate, **no matter how small**, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited.") (emphasis added).

23. BlackBerry's requested relief is significantly more expansive and intrusive than the single item of discovery at issue in Penn-Dixie. Id. BlackBerry seeks to re-open the entirety of an early-stage, complex patent case involving eight different patents and claiming treble damages; defending the Action here would cause substantially more than a "slight interference" with the Debtors' bankruptcy proceeding during a critical time in their restructuring efforts. As a threshold matter, the Debtors' reorganization is only twelve weeks old, and these chapter 11 cases had been pending for only 22 days when BlackBerry filed its Motion. Debtors' management and in-house legal department are already fully engaged in seeking to resolve a number of critical, time-sensitive issues, including managing their daily business operations, maintaining business stability, and overseeing the sale of the Debtors' networking business.[8] Most fundamentally, however, the Debtors are also highly focused on confirming a chapter 11

[8] Moreover, it has also been held that the diversion of the Debtor's legal team alone is sufficient to find for the Debtors on this factor. See ResCap I, 2012 WL 3249641, at *5 ("The Debtors' Legal Department would be called upon to assist in the significant work related to either mediation or a trial . . . . The time and expense involved in such work would divert the Legal Department's attention and resources from the resolution of the Debtors' Chapter 11 cases.").

plan that will secure their prompt emergence from bankruptcy. Indeed, on April 13, 2017, the Debtors filed a plan of reorganization (the "Plan") and disclosure statement (the "Disclosure Statement") and seek to move this process forward. The automatic stay exists precisely in order to provide the Debtors with a "breathing spell" so they may focus their attentions on these efforts.

24. Further, patent infringement lawsuits, like the Action, are among the most expensive and time-consuming to defend. See Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 616 F.2d 1315, 1327 (5th Cir. 1980) (recognizing that "patent litigation is often unusually complex, lengthy and expensive"); DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) ("[P]atent litigation is the slowest and most expensive litigation in the United States."); Intellectual Ventures I LLC v. Symantec Corp., 838 F.3d 1307, 1328 (Fed. Cir. 2016) (Software patent litigation "forc[es] companies to expend exorbitant sums defending against meritless infringement suits."). The Complaint in the Action is 117 pages, with an additional 2,697 pages of exhibits. It is at best naïve for BlackBerry to suggest that such a case "will not involve significant attention from or testimony of officers or directors . . . ." (Mot. ¶ 16.) This consideration alone warrants denial of the lift stay motion where, as here, the Debtors' focus is on confirmation of the Plan and emergence from these chapter 11 cases. See Nw. Airlines, 2006 WL 694727, at *6 (denying relief from stay where debtors were "at a critical stage in their bankruptcy proceedings and [were] dealing with significant time-sensitive issues that require[d] the attention of management and counsel as well as a breathing spell from prepetition litigation that is afforded by the automatic stay"); see also In re Drexel Burnham Lambert Group, Inc., No. 90B-10421 (FGC), 1990 WL 302177, at *3 (Bankr. S.D.N.Y. Dec. 14, 1990) (denying relief from stay because participation in proceedings would "divert [d]ebtors from their reorganization efforts at prohibited costs").

25. Finally, allowing the proposed Action to go forward at this time would open the floodgates to similar motions, further prejudicing Avaya's other creditors and interfering with the Debtors' efforts to restructure their businesses and confirm the Plan. This Court has recognized on numerous occasions that such harm is not merely speculative, but a serious concern that, standing alone, warrants a finding for Debtors on this factor. See In re Residential Capital ("ResCap II"), No. 12-12020 (MG), 2012 WL 3555584, at *3 (Bankr. S.D.N.Y. Aug. 16, 2012) (finding the second Sonnax factor to "strongly weigh" in favor of maintaining the stay based on the risk of "open[ing] the floodgates" to other litigation alone); see also SunEdison, 557 B.R. 303, 308 (Bankr. S.D.N.Y. 2016) (finding for Debtors on this factor based in part on risk of "encourag[ing] other claimants to file their own stay relief motions"); In re Bally Total Fitness of Greater N.Y., 402 B.R. 616, 623 (Bankr. S.D.N.Y. 2009) (same); In re Nw. Airlines Corp., No. 05-17930 (ALG), 2006 WL 687163, at *2 (Bankr. S.D.N.Y. Mar. 10, 2006) (same). As of the Petition Date, the Debtors have 59 lawsuits pending in courts across the country encompassing a wide variety of claims. (First Day Decl. at Ex. J.) Moreover, the floodgates are already threatening to open wide, as the Debtors were served with another lift stay motion on the heels of BlackBerry's—following precisely the same playbook utilized by BlackBerry here. (See Network-1 Technologies, Inc.'s Motion for Relief from Automatic Stay, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y.) [Docket No. 204].) Other litigants will only follow suit if BlackBerry's motion is granted at this time. This consideration alone justifies denial of the lift stay motion. See Lawrence v. Motors Liquidation Company (In re Motors Liquidation Co.), No. 09-50026 (RJH), 2010 WL 4966018, at *5 (S.D.N.Y. Nov. 17, 2010) (noting that the potential for opening floodgates to "other litigants with garden variety claims" is "the very state of affairs the automatic stay was enacted to prevent").

D. No Specialized Tribunal Has Been Established to Hear the Action (Sonnax Factor No. 4)

26. BlackBerry asserts that "[t]he district court in the Northern District of Texas is ***subject to the jurisdiction*** of specialized tribunals," (Mot. ¶ 21 (emphasis added)), in an attempt to gloss over the fourth Sonnax Factor, which asks whether there is a specialized tribunal hearing the litigation in the first instance, not whether there is some specialized tribunal to which the trial court is subject. See Sonnax, 907 F.2d at 1285 (the fourth Sonnax factor considers "whether a specialized tribunal with the necessary expertise ***has been established*** to hear the cause of action." (emphasis added)).

27. No specialized tribunal has been assembled here to preside over the Action. For example, BlackBerry's case is not pending before the Patent Trial and Appeal Board, the Patent and Trademark Office, or the International Trade Commission. It is pending before the Texas District Court. But an Article III court, like the Texas District Court, is not a "specialized tribunal" for all patent cases simply because it has original jurisdiction over patent infringement claims. See In re Lahman Mfg. Corp., 31 B.R. 195 (Bankr. D.S.D. 1983). In fact, in Lahman, the court expressly held that the United States district court did not constitute a "specialized tribunal" with respect to patent enforceability or infringement disputes. Id. at 199 (denying lift stay motion). The Lahman court contrasted the district court's limited expertise in patent law cases with other tribunals that truly reflected specialized expertise, including state-created patient compensation panels for medical malpractice claims and the National Labor Relations Board for claims by members of a bargaining unit. Id. By contrast, the bankruptcy court "[could not] accept [creditor's] suggestion that the Federal District Court is a specialized patent law tribunal with the requisite expertise shown in the [other] cases." Id. Accordingly, this Sonnax Factor supports maintaining the stay.

E. The Interests of Judicial Economy and Economical Resolution of Litigation Are Best Served By Maintaining the Automatic Stay (Sonnax Factor No. 10)

28. BlackBerry broadly claims that lifting the automatic stay will serve the interests of judicial economy, supposedly because "[t]he 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." (Mot. ¶ 23.)[9] Notably, BlackBerry offers no evidence to support its suggestion that the Texas District Court is likely to resolve the issue more expeditiously than this Bankruptcy Court confirms the Plan—itself highly questionable given the languid pace at which the Action has moved thus far.[10]

29. The situation here is analogous to that in Sonnax, where the Second Circuit affirmed denial of the lift stay motion in part because "the litigation in state court has not progressed even to the discovery stage." Sonnax, 907 F.2d at 1287. Similarly, in In re RCM Global Long Term Capital Appreciation Fund, Ltd., this Court denied a lift stay motion in part on judicial efficiency and economy grounds, finding that the competing action was in its "infancy" despite the fact that "an ample amount of discovery" had occurred. 200 B.R. 514, 527 (Bankr. S.D.N.Y. 1996). Here, by contrast, very little has transpired in the District Court. Discovery has not commenced or even been scheduled. See generally BlackBerry Ltd. v. Avaya

9 Moreover, the case on which BlackBerry relies for the proposition that lifting the stay would serve the interest of judicial economy, In re Cicale, involved litigation of a narrow issue—the validity of a mortgage—and the litigation's outcome could have "alleviate[d] the need" for an ongoing dischargeability proceeding in the bankruptcy court. 2007 WL 1893301, at *4 (Bankr. S.D.N.Y. 2007). Thus, the case is entirely inapposite because the outcome of the Action would not affect any ongoing proceedings in this Court.

10 BlackBerry's argument here is particularly unpersuasive given that, as discussed above, patent infringement cases are among the slowest moving actions. See Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 616 F.2d 1315, 1327 (5th Cir. 1980) (recognizing that "patent litigation is often unusually complex, lengthy and expensive"); DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) ("[P]atent litigation is the slowest and most expensive litigation in the United States.").

Inc., No. 3:16-cv-02185 (N.D. Tex.) The motion to dismiss the original Complaint is *sub judice*, as is the motion to transfer. Id. Indeed, Avaya has not filed an answer or been required to answer. Consequently, because minimal District Court time and few resources have been expended with respect to this case, maintaining the stay would not lead to a waste of judicial resources or undermine efficient resolution of the litigation.

30. In short, it makes little sense to ask the Texas District Court to adjudicate Network-1's patent infringement claims while this Court simultaneously presides over the Debtors' reorganization proceedings; rather, efficiency would be best served by allowing the Texas District Court to stand down on the Action for the few months it will take to confirm the Debtors' plan.

F. The Balance of Harms Favors Maintaining the Automatic Stay (Sonnax Factor No. 12)

31. BlackBerry fails to show that it would sustain meaningful harm if the stay were not lifted, much less that its alleged harms outweigh those sustained of the Debtors should the Action be permitted to proceed at this time. See In re Micro Design, Inc., 120 B.R. 363, 369 (E.D. Pa. 1990) (unsecured creditors "bear the heavy and possibly insurmountable burden of proving that the balance of hardships tips significantly in favor of granting relief as against the hardships to the Debtor in denying relief."). To the extent BlackBerry seeks to liquidate a prepetition claim for monetary damages, denial of the relief sought would simply maintain the status quo of the dispute with no additional prejudice to BlackBerry. Being held to the status quo is nothing more than the ordinary, temporary delay that all creditors face in complex chapter 11 proceedings, and does not justify giving BlackBerry preferential treatment. See In re Comdisco, 271 B.R. 273, 277 (Bankr. N.D. Ill. 2002) ("The automatic stay always delays litigants. That, after all, is its purpose, and the reason they call it a stay."). Nor does BlackBerry's alleged loss

of its right to a jury trial (Mot. ¶ 21) establish sufficient harm to warrant the "extraordinary remedy" of lifting the stay, particularly given that it can avoid this purported harm simply by waiting for its case to resume in the Texas District Court after the stay has lifted by operation of law. Vivax Medical, 242 B.R. at 214 (declining find that balance of harms weighed in favor of Movant despite alleged loss of right to jury trial).

32. Moreover, to the extent that BlackBerry seeks an injunction for alleged postpetition conduct, the harm it claims to sustain "[e]very day," (Mot. ¶ 24), is belied by its lethargic approach to the Action. The Petition Date occurred six months after the Action was commenced, yet BlackBerry never moved for a temporary restraining order or preliminary injunction, nor did it push to commence discovery. This matter became "urgent" for BlackBerry only after the Debtors filed for bankruptcy protection. See In re Smith, 389 B.R. 902, 920 (Bankr. D. Nev. 2008) (denying stay relief where creditors' delay "belies [their] stated desire for swift resolution"); see also In re Ziets, 79 B.R. 222, 226 (Bankr. E.D. Pa. 1987) (denying stay relief where "nothing in [the] facts suggests a particular urgency in the Movant's situation, nor a desire or action on her part to expedite disposition of the [underlying] proceedings").

33. Nor is there any reason to believe that waiting for the stay to lift by operation of law will have a material effect on when BlackBerry obtains relief, if at all. As noted, it may be years before the claims in the Action can be adjudicated on the merits and all appeals are exhausted; by contrast the Debtors are working towards their exit from chapter 11, already having filed the Plan and Disclosure Statement. (See Joint Chapter 11 Plan of Reorganization of Avaya Inc. and Its Debtor Affiliates, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y.) [Docket No. 389]). Under such circumstances, courts are particularly reluctant to lift stay. Bally, 402 B.R. at 624 (stay relief unwarranted where plaintiffs "are no more prejudiced than any other

potential creditor by what the Debtors anticipate will only be a short-term delay until a plan of reorganization is confirmed”).

34. Conversely, the continued prosecution of complex patent litigation while the Debtors are working towards the Plan’s confirmation cannot help but cause substantial harm to the Debtors and their estates by threatening to derail reorganization efforts at a critical point in these chapter 11 cases. See, e.g., In re Calpine Corp., 365 B.R. 401, 410 (S.D.N.Y. 2007); In re Enron Corp., 306 B.R. 465, 477 (Bankr. S.D.N.Y. 2004). The Debtors’ limited time must be spent addressing the multitude of tasks required to proceed through the restructuring process, not reviewing documents, preparing for depositions, planning litigation strategy, and traveling back and forth between California, New York, and Texas. See Anderson v. Hoechst Cleanse Corp. (In re U.S. Brass Corp.), 173 B.R. 1000, 1006 (Bankr. E.D. Tex. 1994) (“When balancing the hardships in lifting the stay, the most important factor is the effect of such litigation on the administration of the estate; even slight interference with the administration may be enough to preclude relief.”). Further, as noted above, such relief would also almost certainly open the “floodgates” to similar requests which, if granted, would make the Debtors’ chapter 11 cases unmanageable. See SunEdison, 557 B.R. at 308 (weighing this factor in favor of debtors where granting motion would threaten to open the floodgates to additional litigation). Thus, this balance of harms weighs strongly in favor of the Debtors. See Bally, 402 B.R. at 624 (holding that the overall balance of harms weighed strongly in favor of denying stay relief because forcing the debtors to litigate would distract them from reorganizing and threaten to open the “floodgates” to other lift stay motions).

G. This Court’s Decision in SunEdison is Instructive

35. This Court’s recent decision in SunEdison is directly on point. 557 B.R. at 303. In a similar large chapter 11 case, this Court observed that forcing the debtors to defend against

the stayed action would "interfere substantially" with the progress of the bankruptcy case and prejudice the interests of the other creditors by "diverting the [d]ebtors' resources and personnel at a critical time in the case." Id. at 308. Even involving management in written or fact discovery would be impermissibly burdensome. Id. The balance of the harms also weighed heavily in favor of the debtors: like BlackBerry, the movant in SunEdison failed to articulate any credible reason that brief postponement of the Action would cause meaningful harm, particularly because the case was still pre-discovery. Id. This Court also expressed concern that lifting the automatic stay would encourage a flurry of other claimants to file their own stay relief motions, further straining the debtors' resources and personnel. Id. In fact, here, the mere filing of BlackBerry's motion appears to have prompted another claimant to move for similar relief. (See Network-1 Technologies, Inc.'s Motion for Relief from Automatic Stay, Case No. 17-10089 (SMB) (Bankr. S.D.N.Y.) [Docket No. 204].) Thus, the same concerns that led this Court to maintain the stay in SunEdison counsel for the same outcome here.

II. BLACKBERRY'S ACTION FOR POSTPETITION INFRINGEMENT MAY NOT PROCEED UNDER § 362(A)(1) OR 28 U.S.C. § 959

36. BlackBerry argues, in the alternative, that its claim for postpetition injunctive relief is not subject to the automatic stay. This argument is wrong as a matter of law. It also ignores the fact that, in addition to the automatic stay under Section 362, this Court has the discretion to stay the Action under Section 959(a) of the United States Code or Section 105(a) of the Bankruptcy Code.

A. The Action for Postpetition Infringement Claims is Stayed By § 362(a)(1)

37. In addition to seeking to lift the automatic stay, BlackBerry seeks a declaration that the stay is inapplicable to its request for injunctive relief for alleged postpetition infringement. (Mot. ¶¶ 15-17.) The relief requested by BlackBerry finds no refuge in the well-settled case law.

38. Courts have long held that where, as here, the patents on which the infringement case is based were issued **prepetition**, and the infringement claim was or could have been brought **prepetition**, then the action is subject to the Section 362 automatic stay irrespective of alleged continuing postpetition infringement.[11] See In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig., 140 B.R. 969 (N.D. Ill 1992).

39. The case In re Mahurkar is directly on point. Id. There, Judge Easterbrook, sitting by designation on the district court, considered the very question before this Court: whether an automatic stay applied to the plaintiff's request to seek injunctive relief with regard to its postpetition patent infringement claim. First, Judge Easterbrook categorically rejected movant's argument that its request for injunctive relief should be treated differently than a request for monetary damages: "Nothing in § 362(a)(1) suggests any difference between legal

[11] By contrast, in the only Second Circuit case cited by BlackBerry, the patent at issue had been approved ***postpetition***, a crucial distinction for purposes of this analysis. See Larami Ltd. v. Yes! Entertainment Corp., 244 B.R. 56, 58 (D.N.J. 2000) (automatic stay did not apply in patent infringement case where "[t]he patent in contention did not issue until May 25, 1999, more than three months after [defendant] filed its petition for bankruptcy."). Similarly, in In re Colorado Altitude Training LLC, the plaintiff was assigned the rights, title, and interest in the patent at issue ***postpetition***. No. 10-21951 EEB, 2012 WL 993530, at *1 (Bankr. D. Colo. Mar. 23, 2012). Moreover, all other cases cited by BlackBerry are easily distinguishable or inapposite. In In re Cinnabar 200 Haircutters, Inc., the district court action had already issued a judgment that the debtor had infringed on plaintiff's trade name rights; the stay was lifted for the limited purpose of allowing the district court to enforce its prior judgment. 20 B.R. 575, 577 (Bankr. S.D.N.Y. 1982). Similarly, Bambu Sales v. Sultana Crackers did not address the postpetition/prepetition distinction at all, but rather lifted the stay only for the "limited purpose" of summary judgment as to liability on claims of trademark infringement. 683 F. Supp. 899, 917 (E.D.N.Y. 1988).

and equitable relief."[12] See id. at 976. Judge Easterbrook then turned to—and rejected—the argument that the stay was inapplicable where the relief sought was only for postpetition infringement, reasoning that because the patent in question was issued prepetition and the allegedly infringing conduct began prepetition, "[the] action could have been, and was, commenced before [the debtor] filed its petition in bankruptcy.'" Id.

40. Similarly, in In re Spansion, the court held that the automatic stay applied to a movant's request for both prepetition monetary damages and a postpetition injunction in a patent infringement action, explicitly rejecting the movant's "attempts to bifurcate the patent infringement claims into prepetition and postpetition components." 418 B.R. 84, 91 (Bankr. D. Del. 2009). Instead, like the Mahurkar court, the Spansion court found that infringement claims brought prepetition and pertaining to a patent issued prepetition "could have been, and were, asserted prepetition." Id. Thus, all such claims were subject to the stay. Id.

41. This same principle has been applied in numerous cases involving the alleged infringement or wrongful use of intellectual property. See Nike, Inc. v. Nat'l Shoes, Inc. (In re Nat'l Shoes, Inc.), 18 B.R. 507, 509 (Bankr. D. Me. 1982) (finding that the automatic stay applied to plaintiff's action against debtor's alleged postpetition trademark infringement, noting that "[b]ifurcating its claim [between prepetition and postpetition infringement] does not change the fact that its claim is one which arose before the commencement of the Defendant's Chapter 11 case and that this proceeding could have been commenced before the commencement of the Defendant's Chapter 11 case within the meaning and intent of § 362(a)(1)").[13]

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[12] Judge Easterbrook further reasoned that, "Section 362(b) supports this conclusion, for a number of its subsections exclude from the stay a number of equitable proceedings. These exceptions are unnecessary if §362(a) does not apply in the first place [to them]." In re Mahurkar, 140 B.R. at 976.

[13] This approach is also consistent with that of the courts in a variety of other contexts. For example, in Advanced Comp. Servs. of Mich., Inc. v. MAI Sys. Corp., independent computer service organizations filed an antitrust suit against the debtor for allegedly using its copyrights to prevent competition in repairing computer systems

42. Here, the subjects of BlackBerry's claims were patents that were issued prepetition, and its claims not only could have been asserted prepetition, they were, in fact, asserted prepetition. Therefore, BlackBerry's request to seek injunctive relief for its postpetition patent claims is also stayed and, as discussed in Section I above, BlackBerry has not demonstrated cause sufficient to warrant relief from Section 362(a).

B. The Action May Not Proceed Under 28 U.S.C. § 959(a)

43. BlackBerry's reliance on 28 U.S.C. § 959(a) for authority to file postpetition patent infringement claims without obtaining relief from the automatic stay is similarly misplaced and should be rejected. While Section 959(a) permits certain postpetition claims against debtors-in-possession to proceed, it also cautions that "[s]uch 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." 28 U.S.C. § 959(a). With that caution in mind, courts routinely stay claims under Section 959(a) if the continued prosecution of such claims would "embarrass, burden, delay or otherwise impede the reorganization proceeding." Investors Funding Corp. of N.Y. v. Bloor (In re Investors Funding Corp.), 547 F.2d 13, 16 (2d Cir. 1976). Courts will also stay claims under Section 959(a) that "interfere with the orderly administration of the debtor's estate." In re Television Studio School of N.Y., 77 B.R. 411, 412-13 (Bankr. S.D.N.Y. 1987) (staying copyright infringement action under § 959(a) because it would divert the attention of the debtor's management and cause a great detriment to the debtor's reorganization efforts).

44. Here, all of the relevant considerations under § 959(a) weigh in favor of maintaining the stay. As demonstrated above, lifting the stay to allow the Action to proceed

manufactured by the debtor. 161 B.R. 771, 772-74 (E.D. Va. 1993). The court held that, because the debtor's alleged anticompetitive conduct began prepetition, the stay barred plaintiffs' antitrust claims. Id. at 774-75. Notably, the court declined to consider postpetition conduct in its decision.

would "impede the reorganization proceeding." Invs. Funding Corp., 547 F.2d at 16. It would also "interfere with the orderly administration of the debtor's estate." Television Studio Sch. of N.Y., 77 B.R. at 412-13. Therefore, even if BlackBerry's postpetition claims were not subject to the automatic stay, this Court should nonetheless exercise its equitable powers to extend the stay to those claims.

III. THIS COURT SHOULD EXERCISE ITS EQUITABLE POWERS UNDER § 105(A) TO EXTEND THE STAY TO BLACKBERRY'S POSTPETITION CLAIMS.

45. Finally, and in any event, if the Section 362(a) stay were not applicable to BlackBerry's claims—and it is—this Court should still enforce the stay under its equitable powers. See Neuman v. Leffler (In re Neuman), 71 B.R. 567, 571 (S.D.N.Y. 1987). As this Court knows, Section 105(a) of the Bankruptcy Code gives it broad authority and discretion to "issue any order . . . necessary or appropriate" for the purpose of ensuring orderly conduct of reorganization proceedings. Id. ("The Bankruptcy Court has authority under § 105(a) broader than that under the automatic stay provision, § 362, and may use its equitable powers to assure the orderly conduct of the reorganization proceedings."). Moreover, it is well settled that Section 105(a) relief is appropriate "precisely in those instances where parties are attempting to obstruct the reorganization." Id.

46. There can be no genuine question that maintenance of the stay with respect to BlackBerry's Action is "necessary or appropriate" to ensure the orderly conduct of the Debtors' reorganization proceedings. Nor can there be any real question that BlackBerry's attempt to lift the stay in order to pursue its sprawling patent infringement Action is an attempt to obstruct Debtors' reorganization; this is especially evident given the fact that BlackBerry dragged its feet in the Action for more than six months yet moved to lift the stay here a mere three weeks after Debtors' Petition Date. Accordingly, if necessary, this Court should exercise its equitable

powers under Section 105(a) to extend the stay to the entire Action, including BlackBerry's postpetition claims.[14]

CONCLUSION

47. BlackBerry has not carried its burden to establish good cause for lifting the automatic stay, as the vast majority of the Sonnax Factors—one half of which BlackBerry ignores—weigh heavily against such relief. Nor has BlackBerry established that its claims are somehow exempt from the automatic stay, either because they are non-core or to the extent they are based on postpetition allegations of infringement. Finally, as seen above, in addition to the Section 362(a) automatic stay, continuance of the automatic stay here is warranted under, and would be an appropriate use of, this Court's equitable powers reflected in Section 959(a) of the United States Code and Section 105(a) of the Bankruptcy Code.

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[14] BlackBerry also requests that any order granting the relief requested include a waiver of the fourteen day stay provided by Bankruptcy Rule 4001(a)(3). (Mot. ¶ 38.) BlackBerry has provided no credible basis for this request. Its supposed rationale—that "Debtor could take actions that would prejudice BlackBerry with respect to the patents being litigated in the [Action]" and "BlackBerry only has limited time to recover its R&D investments that led to the patents it is asserting" (Id.)—are not compelling given the sluggish pace at which BlackBerry has permitted the District Court case to proceed, and the fact that it never requested a preliminary injunction in the Action over the course of six months. Waiting just 14 days in compliance with a well-established rule that serves an important policy will not cause the harm alleged by BlackBerry.

WHEREFORE, for the foregoing reasons, the Debtors request that the Court enter an Order denying BlackBerry's Motion for Relief from the Automatic Stay.

Dated: April 18, 2017
New York, New York

/s/ Joseph Serino

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