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9 Attorneys for Creditor
10 MICHAEL DAVIS

11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 In re
15 TECHNOLOGY PROPERTIES LIMITED,
16 LLC,
17 Debtor.

18 Case No. 13-51589-SLJ
19 Chapter 11

20 **CREDITOR MICHAEL DAVIS'**
21 **OPPOSITION TO DEBTOR'S MOTION**
22 **FOR RELIEF FROM DEFAULT ON**
23 **ORDER RE REQUEST FOR PAYMENT**
24 **OF ADMINISTRATIVE EXPENSE**

25 Date: September 21, 2016
26 Time: 2:00 p.m.
27 Location: United States Bankruptcy Court
28 280 South First Street, Room 3099
San Jose, California 95113
Judge: Hon. Stephen L. Johnson

Administrative Creditor MICHAEL DAVIS ("DAVIS") submits this Opposition to the Debtors' Motion for Relief from Default on Order Re Request for Payment of Administrative Expense [Dkt. No. 760] (the "Relief Motion") as follows:

The Debtor seeks in the Relief Motion essentially to be absolved from its responsibilities in connection with the February 1, 2016 Order which the Debtor admits was entered into voluntarily and after much negotiation. (See Memorandum of Points and

1 Authorities in Support of Relief Motion [Dkt. No.] and Declaration of Swamy Venkidu in
2 Support of Relief Motion [Dkt. No. 760-2].) There is, however, no basis for doing so and the
3 Relief Motion should be denied.

4 As acknowledged by the Debtor, relief under Rule 60(b) is not readily available where
5 a consensual order is involved. (See Supplemental Memorandum of Points and Authorities
6 in Support of the Relief Motion [Dkt. No. 769 at 2:22 – 3:2] (“Supplemental MPA”).) As stated
7 in *Latshaw v. v. Trainer Wortham & Co.*, 452 F.3d 1097, (9th Cir. 2006), a case relied on by
8 the Debtor in its Supplemental MPA (although not fully on point with this case), “Rule
9 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes
10 to regret For purposes of subsection (b)(1), parties should be bound by and
11 accountable for the deliberate actions of themselves and their chosen counsel.” (*Latshaw*
12 *v. v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir. 2006).) Or, as stated in 3 *Moore’s*
13 *Manual: Federal Practice and Procedure* §26.23 (Matthew Bender), “the law prefers not to
14 set aside judgments that are consensual. Thus, when a party has made a free, calculated
15 and deliberate choice to submit to an agreed upon decree, rather than seek a more
16 favorable litigation judgment, their burden under Rule 60(b) may be considered more
17 formidable than had they litigated and lost.” (Footnote omitted.) The Debtor here agreed to
18 the February 1 Order and has not met the burden to be relieved of its own decision once it
19 failed to perform under that Order.

20 The Debtor’s failure to perform is not isolated. This Debtor has regularly flouted
21 Orders and requirements in this case. For example, the Debtor declared an Effective Date
22 on August 28, 2015, although, Davis is informed and believes, the Debtor did not have the
23 cash required at that time to make all the payments required on the Effective Date, an
24 essential part of the definition of “Effective Date” [Dkt. No. 637, p. 11 of 67]. Davis is further
25 informed and believes that the Debtor delayed payment of the priority wage claims required
26 to be paid on the Effective Date pursuant to the Plan (Section III.A. [Dkt. No. 637, p. 23 of
27 67]) and did not make those payments until forced, months later, to do so by the claimants.)

1 In addition, the Debtor has failed to provide the Quarterly Distribution Reports required by
2 the Plan. (See Declaration of Maureen Harrington in support of Davis' Request for
3 Immediate Payment of Administrative Expense [Dkt. 759] at ¶¶ 5 – 7.)

4 Given the Debtor's laxity in complying with deadlines, Davis was very precise when
5 negotiating the February 1 Order; it was quite clear what would happen if payment was not
6 made when due. Specifically, the Order stated that payments to Davis "shall be made within
7 ten business days of the close of each calendar quarter." (Order, [Dkt. No. 739], ¶1.c. If TPL
8 failed to pay when due, "the entire amount of DAVIS' requested administrative claim of
9 \$573,175.47, less any amounts actually paid, shall become allowed in full and due and
10 payable immediately." (Order [Dkt. No. 739], ¶3.) *The Debtor agreed to this language* (see
11 signature of Debtors' counsel, Order [Dkt. No. 739], p. 4) and the Debtor should be held to
12 it.

13 The fact that the delay was "only" twelve days, as Debtor argues, is no matter – the
14 parties agreed to a deadline and the Debtor has not sustained the burden of proving why it
15 should not be held to its own agreement. "Excusable litigation mistakes are not those which
16 were the result of a deliberate and counseled decision by the complaining party." (*Yapp v.*
17 *Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999); see also *United States v. Bank of New*
18 *York*, 14 F.3d 756, 759 (2d Cir. 1994)("When a party makes a deliberate, strategic choice
19 to settle, she cannot be relieved of such a choice merely because her assessment of the
20 consequences was incorrect."))

21 Nor has any the Debtor provided clear and convincing evidence of fraud sufficient to
22 allow relief under Rule 60(b)(3). "[T]he party seeking relief must prove fraud on the court by
23 clear and convincing evidence." (*United States v. Sierra Pac. Indus.*, 100 F. Supp. 3d 948,
24 956 (E.D. Cal. 2015), citing *United States v. Estate of Stonehill*, 660 F.3d 415, 443 - 444
25 (9th Cir. 2011).) The only purported "fraud" the Debtor has suggested is Davis' use of the
26 phrase *in pari passu* in the agreed Order. Davis did not hide this phrase from the Debtor or
27 its counsel nor his understanding of what it meant. It is a Latin phrase that typically means

1 “on equal footing,” as opposed to *pro rata*, which means “in proportion.” If the Debtor or its
2 counsel did not know what *pari passu* meant, it was incumbent on them to ask. Davis may
3 have been driving a hard bargain, but there was no fraud here. (See also *Yapp, supra*, 186
4 F.3d at 1231 (“Yapp has proved that Excel played hardball litigation. He has not, however,
5 shown that the district court made a clear and definite error in concluding that Excel's
6 behavior did not rise to the level of Rule 60(b)(3) misconduct.”).)

7 The Debtor can fare no better under Rule 60(b)(6). As stated in *Latshaw*,
8
9 Judgments are not often set aside under Rule 60(b)(6). Rather, the Rule is
10 " 'used sparingly as an equitable remedy to prevent manifest injustice' and
11 'is to be utilized only where extraordinary circumstances prevented a party
12 from taking timely action to prevent or correct an erroneous judgment.' " *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting
13 *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Accordingly, a party who moves for such relief "must demonstrate
14 both injury and circumstances beyond his control that prevented him from
15 proceeding with . . . the action in a proper fashion." *Community Dental
16 Services v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).
17 (*Latshaw, supra*, 452 F.3d at 1103.) As in *Latshaw*, the Debtor's showing is insufficient to
18 meet the standard of “extraordinary circumstances” warranting relief under Rule 60(b)(6).
19 “To demonstrate extraordinary circumstances, it must appear that the moving party is
20 completely without fault for the situation providing the reason for relief.” 3 *Moore's Manual:
21 Federal Practice and Procedure* §26.46[2][a]. “Conversely, if the moving party is at fault to
22 any degree . . . , the court generally finds a lack of extraordinary circumstances and will
23 deny relief from judgment.” (*Id.*) The Debtor here agreed to the time limits set forth in the
24 February 1 Order and the consequences that would occur if payment was not made as
25 agreed. The Debtor was intimately involved in the creation of the agreement and was not
26 prevented from paying Davis as agreed. The Debtor simply chose not to do so, and has
27 now come up with a variety of excuses why it did not pay.

28 The Debtor's reliance on a text message sent by Davis to Mr. Venkidu *after the
payment was due* certainly did not impede the Debtor from paying Davis or provide the

1 Debtor with any basis to delay payment further. According to Mr. Venkidu's own Declaration
2 [Dkt. 760-2], ¶19, the text was clearly in the nature of a compromise offer and is, therefore,
3 inadmissible under the Federal Rules of Evidence. (Fed. R. Ev. 408.)

4 The Debtor voluntarily agreed to the Order. No good reason for allowing the Debtor
5 to be relieved from the agreed consequences of failing to perform under that Order has
6 been provided. The Relief Motion must be denied.

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8 Dated: September 12, 2016

GREENFIELD DRAA & HARRINGTON LLP

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By: /s/ Marcia E. Gerston

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MARCIA E. GERSTON
Attorneys for Creditor
MICHAEL DAVIS

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15 TECHNOLOGY PROPERTIES LIMITED,
16 LLC,
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18 Case No. 13-51589-SLJ
19 Chapter 11

20 **DECLARATION OF MICHAEL DAVIS
21 IN OPPOSITION TO DEBTOR'S
22 MOTION FOR RELIEF FROM
23 DEFAULT ON ORDER RE REQUEST
24 FOR PAYMENT OF ADMINISTRATIVE
25 EXPENSE**

26 Date: September 21, 2016
27 Time: 2:00 p.m.
28 Location: United States Bankruptcy Court
280 South First Street, Room 3099
San Jose, California 95113
Judge: Hon. Stephen L. Johnson

29 I, MICHAEL DAVIS, declare as follows:

30 1. I am over the age of 18 and a resident of San Francisco, California. I make
31 this Declaration in opposition to Reorganized Debtor TECHNOLOGY PROPERTIES
32 LIMITED's ("TPL") Motion for Relief from Default on Order Re Request of Michael Davis for
33 Payment of Administrative Expense filed in the above-reference bankruptcy case. The
34 following facts are within my personal knowledge and if called upon and sworn as a witness
35

1 I could testify competently thereto.

2 2. I am informed and believe that the Debtor did not have the cash required to
3 make all the payments required on the Effective Date on August 28, 2015, when the Debtor
4 declared an "Effective Date."

5 3. I am further informed and believe that the Debtor delayed payment of the
6 priority wage claims required to be paid on the Effective Date pursuant to the Plan and did
7 not make those payments until months later, after being pressed by the wage claimants.

8 4. In each of the calls referred to in Paragraph 18 of Mr. Venkidu's Declaration
9 [Dkt. No. 760-2], I requested payment. I did not, either by text or otherwise, agree to accept
10 delayed payment.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct to the best of my knowledge, and that this declaration was
13 executed on September 12, 2016 at San Jose, California.

14
15 /s/ Michael Davis
MICHAEL DAVIS

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20 **CERTIFICATE OF SERVICE**

21 Date: September 21, 2016
22 Time: 2:00 p.m.
23 Location: United States Bankruptcy Court
24 280 South First Street, Room 3099
25 San Jose, California 95113
26 Judge: Hon. Stephen L. Johnson

27 I hereby certify that I am a citizen of the United States, over the age of 18 years, and
28 not a party to the within action. On the date set forth below, I served the following:

- 29 1. **Creditor Michael Davis' Opposition to Debtor's Motion for Relief from Default on Order Re Request for Payment of Administrative Expense**
- 30 2. **Declaration of Michael Davis in Opposition to Debtor's Motion for Relief from Default on Order Re Request for Payment of Administrative Expense**

31 in said action by serving true and correct copies via CM/ECF electronic mail on all registered
32 users.

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. I declare that I am employed in the office of a member of the bar of this Court at whose direction the services were made.

Executed on September 12, 2016 at San Jose, California.

/s/ Caitlin Hannon
Caitlin Hannon