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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: TECHNOLOGY PROPERTIES LIMITED, LLC, a California corporation, Debtor.	Case No.: 13-51589-SLJ-11 Chapter 11 Date: October 1, 2014 Time: 2:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

CREDITOR CHARLES H. MOORE'S POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO APPOINT CHAPTER 11 TRUSTEE AND TO REMOVE DEBTOR-IN-POSSESSION

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Should this Court appoint a Chapter 11 Trustee and remove the debtor-in-possession where the debtor in possession is no longer in possession of the Debtor? Creditor Charles H. Moore submits that under these unusual and perhaps unprecedented circumstances, this Court should and must enter its order directing the appointment of a Chapter 11 Trustee and removing debtor-in-possession Daniel Leckrone.

Over a year has come and gone since Mr. Leckrone's counsel repeatedly assured this Court and the estate's creditors that a 100% plan would be in place within weeks. Nine months have passed since this Court ended exclusivity and opened the door for reorganization plans from interested parties. Nearly seven months have passed since February 14, 2014, when the Creditors' Committee submitted a reorganization plan to compete with Debtor TPL's plan. Endless negotiations and at least seven continuances ensued, as the Debtor and the Committee promised Court and creditors that a plan and disclosure statement was just around the corner; at one point, if memory serves, we were a mere "21 lines" away from a joint, duly negotiated plan between Debtor and the Committee.

Meanwhile, the Debtor's most valuable asset – the MMP Portfolio – withers on the vine; individual patents within the portfolio begin to expire shortly. Alliacense, the licensing company owned outside of this bankruptcy by debtor-in-possession Mr. Leckrone, with exclusive rights to license the MMP Portfolio, has issued no MMP license in over a year. MMP-founded litigation before the International Trade Commission, the centerpiece of Debtor and Alliacense's litigation-first plan to compel licenses and yield licensing revenues for TPL, has ended in a disastrous loss of all submitted cases. The sole litigation "victory" for Debtor and the MMP Portfolio yielded a $960,000 judgment rather than the $9 million verdict expected from the infringer/defendant (who has taken the judgment to the Ninth Circuit).

And, amazingly and perhaps uniquely, the debtor-in-possession has recently resigned all positions with Debtor TPL: we have here a Chapter 11 case in which the debtor-in-possession has dispossessed himself from the Debtor.

The best interests of Debtor TPL, its creditors, its owner and all interested parties will here be served by Mr. Leckrone's replacement by a Chapter 11 Trustee. Creditor Moore has

submitted a Chapter 11 Plan and Disclosure Statement both dependent upon removal of the debtor-in-possession and his replacement by a Chapter 11 Trustee who waits in the wings to effectuate Mr. Moore's MMP Plan.

There are many historical precedents for what must be done when events have overtaken an existing administration whose inaction can no longer be tolerated or excused. This Court should and must say to debtor-in-possession, as did Oliver Cromwell to a Parliament that attempted to remain after dissolving itself:

> You have sat too long for any good you have been doing lately. Depart, I say, and let us have done with you. In the name of God, go![1]

Creditor Charles H. Moore respectfully moves this Court for an order directing the appointment of a Chapter 11 Trustee and removing Daniel Leckrone as debtor-in-possession in this Chapter 11 proceeding.

1. Authority for Appointment of a Trustee; Removal of the Debtor-in-Possession

Section 1104 of Title 11 (the "Code") authorizes appointment of a trustee or examiner under the following circumstances:

> (a) At any time after the commencement of the case but before confirmation of a plan, on the request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee –
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> (1) For cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2) If such appointment is in the best interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders if securities of the debtor or the amount of assets or liabilities of the debtor.

11 USC Sec. 1104(a).

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[1] Oliver Cromwell, addressing Parliament on April 20, 1653; repeated in paraphrase by MP Leo Amery to Neville Chamberlain, May 7, 1940 (three days before Britain turned to Winston Churchill for a new direction).

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a. **Who may move for Section 1104(a) relief?** Section 1104(a) affords standing to any "party in interest" to this proceeding. "Party in interest" is not defined in the Code; however, according to Section 1109, "parties in interest" include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, **a creditor**, an equity securities holder, or any indenture trustee" (**emphasis** supplied). Here, the moving party – Charles H. Moore, a creditor in this case – is clearly authorized by the Code to move for a trustee and to replace the debtor-in-possession.

b. **What burden does the moving party carry in seeking Section 1104(a) relief?**

"[T]he appointment of a trustee in a chapter 11 case is an extraordinary remedy." A.RESNICK & H.SOMMER, 7 COLLIER ON BANKRUPTCY [16TH ED.] Sec. 1104.02[3][b][i], at 1104-9 [Rel. 124-12/2012], *citing, inter alia, In re Sovereign Estates, Ltd.* (Bankr. E.D. Pa 1989), 104 B.R. 702, 704-05; *In Re Anchorage Boat Sales, Inc.* (Bankr. E.D.N.Y. 1980), 4 B.R. 635, 644-45 (appointing trustee). Moving party Moore acknowledges the "strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee," 7 COLLIER ON BANKRUPTY, *supra, citing, inter alia, Committee on Dalkon Shield Claimants v. A.H. Robins Co., Inc.* (4th Cir. 1987), 828 F.2d 239, 241-42 (declining to appoint trustee despite debtor misconduct); *In Re Parker Grande Development, Inc.* (Bankr. S.D. Ind. 1986), 64 B.R. 557, 560-63 (acknowledging presumption in favor of debtor-in-possession but nonetheless appointing trustee); *In Re Evans* (Bankr. W.D. Tex. 1985), 48 B.R. 46, 47-49 (acknowledging presumption but nonetheless appointing trustee).

While this court need not hold a full evidentiary hearing on a motion for appointment of a trustee (*In Re Casco Bay Lines, Inc*. (B.A.P. 1st Cir. 1982), 17 B.R. 946, 950-52*; In Re Ionosphere Clubs, Inc.* (Bankr. S.D.N.Y. 1990), 113 B.R. 164, 167-68), the party moving for appointment of a trustee (here, Creditor Moore) must carry the burden of proof. 7 COLLIER ON BANKRUPTCY, *op cit.*, Sec. 1104.02[4][b] "Procedures," at 1104-20 (citations omitted).

The courts differ on whether the standard of proof is preponderance of the evidence [e.g., *Keeley & Grabanski Land Partnership v. Keeley* (B.A.P. 8th Cir 2011), 455 B.R. 153, 161-63 (rejecting Third Circuit clear and convincing evidence standard as inconsistent with

later Supreme Court decision)], or clear and convincing evidence *[e.g., Official Committee of Asbestos Claimants v. G-1 Holdings, Inc.* (3d Cir. 2004), 385 F.3d 313, 319-21].

Collier suggests that the "clear and convincing evidence" standard represents the majority position, 7 COLLIER ON BANKRUPTCY, *supra*, at 1104-21. Creditor Moore can find no applicable Ninth Circuit authority on the question, so this argument will assume that the evidence in support of appointment of a trustee must be clear and convincing.

The need for replacement of Mr. Leckrone as debtor-in-possession, and for appointment of a Chapter 11 trustee in his place, could not be clearer; nor could the evidence in support of motion be more convincing.

2. Best interests of the Estate – Section 1104(a)(2).

In many cases, the "interests" standard of Section 1104(a)(2) coincides with the "cause" criteria of Section 1104(a)(1); that is, in the typical case the best interests of the estate will be satisfied by appointment of a trustee if a showing of cause for the appointment is made out under Section 1104(a)(1). See generally 7 COLLIER ON BANKRUPTCY, *op cit.*, Sec. 1104.02[3][d][i] – 1104.02[3][d][ii], at pp. 1104-14 through 1104-16. Collier suggests that a "best interests of the Estate" scenario, separate and apart from any showing of 1104(a)(1) "cause," might exist "if creditors and equity security holders have entirely lost confidence in the current management of the debtor." *Ibid*., Sec. 1104.03[3][d][iii], at 1104-16.

Here, creditors and this Court were promised a 100% plan many months ago, coupled with a quick exit from bankruptcy. Instead, 18 months into this bankruptcy case we find the following:

(1) there is no plan from the debtor-in-possession before the Court for confirmation;

(2) there is no plan from the Committee awaiting approval;

(3) after seven wasted months of discussions and negotiations between debtor and Committee, repeated requests for continuances by counsel, and violations of Court-ordered scheduling, a belated joint plan is at last before the Court, lacking a disclosure statement for the interested parties to peruse and understand, and thus still not ripe for consideration by the Court or promulgation to the creditors for vote;

(4) there has been no licensing activity for over a year on the Debtor's most significant patent portfolio (MMP);

(5) there have been and continue to be unaccounted-for distributions, payments and holdbacks for Mr. Leckrone and his entities, consuming most Non-MMP Portfolio revenues received and leaving no funds to pay Debtor TPL's creditors;

(6) the Alliacense/TPL litigation-first strategy has resulted in an across-the-board loss in eleven MMP-based petitions taken to trial and through appeal at the ITC;

(7) in a Non-MMP Portfolio proceeding before the International Trade Commission, TPL and Alliacense produced a ruling against them that changes the law on domestic industry standing before the ITC, removing any possibility of future recourse to the ITC by Mr. Leckrone or Alliacense for any of the patent portfolio they own, control or license;[2]

(8) the present TPL/Alliacense business model – characterized, fairly or not, as the litigation-first patent troll model – has drawn a deluge of adverse publicity and comment from the President to the press;[3]

(9) Alliacense and Debtor TPL's litigation-first strategy before the ITC, and their resulting loss on the domestic industry standing issue noted above, led to both being characterized in popular accounts of the litigation as "patent trolls;" [4]

(10) Even before suffering its string of litigation losses, Alliacense was being characterized and analyzed as a prototype "patent troll" in a 2007 presentation for patent practitioners[5] and was treated as a model of patent troll behavior in a published scholarly paper;[6]

and finally, and most astonishingly

(9) the debtor-in-possession has here **<u>resigned all positions</u>** <u>with the Debtor</u>, leaving TPL a rudderless ship at a time when a new course must be plotted if liquidation is to be avoided.

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[2] See Exhibit A4 to Request for Judicial Notice submitted herewith.
[3] See Exhibits A1, A2 and A3 to Request for Judicial Notice submitted herewith.
[4] See Exhibit A5 to Request for Judicial Notice submitted herewith.
[5] See Exhibit A6 to Request for Judicial Notice submitted herewith, at pp. 11-20.
[6] See Exhibit A7 to Request for Judicial Notice submitted herewith, at pp. 7-9.

A leading case on the "best interests of creditors" standard governing appointment of a Chapter 11 Trustee and removal of the debtor-in-possession is *In re Sharon Steel Corporation* (Bkrtcy.W.D.Pa. 1988), 86 B.R. 455. In that case, the Court removed Victor Posner as debtor-in-possession of Debtor Sharon Steel, and directed the appointment of a Chapter 11 trustee.

The *Sharon Steel* opinion quotes with approval, and applies, the "best interests of creditors" standard derived from 11 U.S.C. Sec. 1104(a)(2) [quoted above], analyzed by the court in *In re Parker Grande Development, Inc*. (Bkrtcy.S.D.Ind. 1986) as follows:

> …11 U.S.C. Sec. 1104(a)(2) provides a flexible standard for the appointment of a Trustee. *See, In re Deena Packaging Industries, Inc.* [Bkrtcy.S.D.N.Y. 1983], 29 B.R. 705, *In re Hotel Associates, Inc*. [Bkrtcy.E.D.Pa. 1980, 3 B.R. 343], also, *see generally 5 Collier on Bankruptcy* 1104.01 (15th Ed.1979), at 1104-17. Under 11 U.S.C. Sec. 1104(a)(2), the Court may utilize its broad equity powers to engage in a cost-benefit analysis in order to determine whether the appointment of a Trustee would be in the interests of creditors, equity security holders, and other interests of the estate. *In re Hotel Associates, supra*. Consequently, the analysis becomes one of whether the cost of appointing a Trustee is outweighed by the benefits derived by the appointment
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> In order to determine the benefits of appointing a Trustee [under subsection (a)(2)], a close and careful scrutiny of a debtor-in-possession's prior and present conduct must be made and from that a determination must be made that a Trustee will accomplish the goals of a Chapter 11 Plan more efficiently and effectively. This examination makes critical an assessment of the overall management of the debtor corporation; the experience, skills, and competence of the debtor-in-possession both past and present, and the trust and confidence in the debtor-in-possession by members of the business community with whom debtor-in-possession has had business transactions and must, of necessity, continue to have the same.

Sharon Steel, supra, 86 B.R. at 457-58, *quoting Parker Grande Development, supra*, 64 B.R. at 560-61.

The *Sharon Steel* court further notes that "…if there is insufficient cause to appoint a trustee under Sec. 1104(a)(1), or if the cause cannot be proven, a trustee may still be appointed if it is in the best interests of creditors, some group of equity security holders, and other interests of the estate. … In general, the factors which have been the basis for appointing a trustee under Sec. 1104(a)(2) are diverse and in essence reflect the practical reality that a trustee is needed." 86 B.R. at 458 (citations omitted).

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Thus, in considering whether a Chapter 11 Trustee should be appointed under the "best interests of creditors" test, an "assessment of the overall management of the debtor corporation" is required:

(1) ***The experience, skills and competence of the debtor-in-possession both past and present.*** Here, while Mr. Leckrone has undoubted experience, whatever benefit that experience might bring to Debtor TPL moving forward has been voluntarily abdicated by Mr. Leckrone in resigning from all of his positions at TPL. Normally, this experience factor hugely favors retention of entrenched management: changing horses in midstream can certainly be problematic.

Here, however, the horse has already left the barn: new management is already a necessity and requirement, given Mr. Leckrone's resignation. Whatever Mr. Venkidu's qualifications, his status as the largest secured creditor, with no interest in or experience with the MMP Portfolio, makes him an unlikely and immediately conflicted candidate to move TPL forward in Mr. Leckrone's absence. The unsecured creditors cannot have confidence that Mr. Venkidu, with a secured interest in Non-MMP Portfolio revenues, will devote appropriate attention to all of the company's affairs.

In sum, the experience factor that most weighs in the typical case in favor of retaining the debtor-in-possession and the status quo, is here entirely absent due to Mr. Leckrone's abandonment of the company he led into bankruptcy.

Finally, to the extent the now-absent Mr. Leckrone's "experience" might weigh in the Court's consideration, that experience is here a negative: Mr. Leckrone's business model and experience is that of a now-reviled "patent troll;" the MMP Portfolio (and TPL which will depend upon MMP-source revenues to lift the company out of bankruptcy) requires a new direction and a fresh start that only a Chapter 11 Trustee can provide.

Mr. Moore's MMP Plan takes TPL in the required new direction, away from any thought or characterization of the company as a patent troll. All that remains is to remove the remaining link to the past regime – the vestigial, not practical or operational, link, to Mr. Leckrone as TPL's now-uninvolved and disconnected debtor-in-possession.

(2) ***Trust and confidence in the debtor-in-possession by members of the business community with whom debtor-in-possession has had business transactions and must, of necessity, continue to have the same***. This factor could not tilt more adversely against Mr. Leckrone. The litigation-first business model that led TPL into bankruptcy (and that yielded losses at the ITC and a minimal recovery in federal district court) does not depend on the licensor/licensee relationship; Mr. Leckrone made that relationship one of plaintiff/defendant. And the "business transactions" meant to flow from this business model have not come to fruition, and cannot ever be realized by TPL under Mr. Leckrone, because the cases on which licensing was to rest have been lost or resulted in a minimal judgment and no recovery.

The "trust and confidence" factor, again, is a critical consideration in the typical Chapter 11 scenario of an established business with a familiar and satisfied supplier and customer base. Mr. Leckrone's approach was and apparently still is to make his prospective licensees his enemies and adversaries. And those opponents, regrettably, have bested him.

No more compelling case for appointment of a trustee under the "best interests" test can be imagined. *Accord, In re Keeley And Grabanski Land Partnership* (Bktcy.B.A.P.8th Cir. 2011), 455 B.R. 153, 161-65 (trustee appointed); *In re Products International Co* (Bktcy.D.Ariz. 2008), 395 B.R. 101, 111-12 (trustee appointed); *In re Taub* (Bktcy.E.D.N.Y. 2010), 427 B.R. 208, aff'd 2011 WL 1322390; *In re Ridgemour Meyer Properties, LLC* (Bktcy.S.D.N.Y. 2008), 413 B.R. 101.

3. ***Removal and replacement for cause – Section 1104(a)(1).***

The stated bases for "cause" upon which a trustee "shall" be appointed "include[e] fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management." Through request for judicial notice, Creditor Moore here advances the creditor's committee previous showing of clear and convincing evidence of fraud and dishonesty by the debtor-in-possession – Mr. Leckrone's appropriation of all proceeds of an uncertain number of non-MMP licenses, without notice to or approval by the creditors'

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committee.[7]

Of significance here: the unknown licenses issued by Mr. Leckrone's separate, wholly owned company (Alliacense) are indeed non-MMP licenses. As they must be: Patriot and Creditor Moore were previously victimized by Alliacense issuance of an MMP license to a major Silicon Valley electronics firm, in which Mr. Leckrone, pre-bankruptcy, sought to convert the majority of the license proceeds to his own use by claiming that the license fee was split 80% for TPL's Non-MMP Patents and 20% for the MMP Portfolio. This supposed negotiation was, to coin a phrase, patently absurd: the MMP Portfolio would represent the overwhelming majority of value in any mix of its patents with TPL's Non-MMP Patents.

Patriot filed litigation and settled that litigation with oversight by PDS of all MMP Portfolio licensing by Mr. Leckrone and Alliacense; more to the point, not only must the terms of license be disclosed to PDS prior to issuance but the license must itself be signed by Carl Johnson (the Patriot representative on the PDS board).

This PDS/Patriot oversight prevents Mr. Leckrone and Alliacense from making off with the gross proceeds of any MMP Portfolio license written by Alliacense.

In contrast, TPL's Non-MMP Portfolios are licensed by Alliacense without oversight or accountability. The result: while Alliacense has negotiated no licenses for the MMP Porfolio since August 2013 (those licenses yield gross proceeds to independent party PDS, safe from appropriation, conversion or diversion by Mr. Leckrone), Alliacense continues to negotiate Non-MMP Portfolio licenses (the gross proceeds from those licenses flow directly to Mr. Leckrone, with the result that there are minimal net proceeds for TPL and no surplus available for TPL's creditors).

TPL has been grossly mismanaged. Its litigation-first licensing strategy has been a disaster before the ITC; has labeled TPL, with Alliacense, as a patent troll; has yielded no recovery for TPL's creditors. The MMP Portfolio, vital to any conceivable Chapter 11 Plan,

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[7] Creditor Moore seeks judicial notice of the Committee's papers and showing in support of Mr. Leckrone's removal and the appointment of a trustee; see Exhibits B1 – B6 to the Request for Judicial Notice attached hereto.

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has been ignored both by debtor-in-possession and by his wholly owned company holding exclusive licensing rights for MMP patents.

This is a case where cause and best interests combine to make a compelling and mandatory case for appointment of a Chapter 11 Trustee and removal of the already voluntarily displaced debtor-in-possession.

Section 1104(a) imposes duties upon the debtor beyond its explicit terms: the statute's four bases for removal are not exhaustive but are merely suggestive. See 7 COLLIER ON BANKRUPTCY, *supra*, Sec. 1104.02[3][c], at 1104-11 ("Use of the word 'including' means that the [four] grounds listed are not exclusive and that a finding of cause [for appointment/removal] may be based on other factors as well"), *citing In re Marvel Entertainment Group, Inc.* (3d Cir. 1998), 140 F.3d 463, 472.

The present case is informed by the following decisions representing trustee removal above and beyond the four stated factors of the statute itself -

- *In re Oklahoma Refining Co.* (10th Cir. 1988), 838 F.2d 1133, 1136 (debtor in possession failed to keep adequate records and to file reports, coupled with a history of questionable transactions between the debtor and affiliated companies; trustee appointed);

- *In re Embrace Systems Corp.* (Bankr. W.E. Mich. 1995), 178 B.R. 112, 128-29 (debtor's principal had irreconcilable conflict through interest in another enterprise seeking to acquire debtor's technology; principal more concerned with his other enterprise than with the debtor, and an independent, disinterested person was necessary to manage the debtor and investigate various causes of action that might exist; underlying conflicts and self-dealing held to constitute cause for court's *sua sponte* appointment of a trustee);

- *Keeley & Grabanski Land Partnership v. Keeley, supra*, 455 B.R. at 153, 163-65 (controlling partner rented land from debtor/partnership at no or below market rate and failed to move case forward; appointment of trustee affirmed under both "cause" and 1104(a)(2) "best interests" standards);

- *In re Cajun Electrical Power Coop Inc.* (5th Cir. 1995), 69 F.3d 746, rehearing granted and result reversed, 74 F.3d 599, 600 (conflicts among debtor's cooperative and debtor in

possession failure to collect payments due from family members provided basis for appointment of trustee);

- *In re Marvel Entertainment Group, supra,* 140 F.3d at 472-74 (intense, irreconcilable acrimony between debtor and creditors);

- *In re Celeritas Techs, LLC,* (Bankr. D. Kan. 2011), 446 B.R. 514, 519-21 (acrimony, coupled with debtor using bankruptcy as litigation tactic and filing of reorganization proposals that were mere ruses, led to finding of cause for appointment of trustee under 1104(a)(1) as well as "best interests" finding for such appointment under 1104(a)(2).

Conclusion

For the reasons and on the authorities stated, Creditor Moore has provided this Court with clear and convincing evidence that the appointment of a chapter 11 trustee, and the removal of the debtor-in-possession, will serve the best interests of all concerned parties. This showing, coupled with evidence of cause that has moved other courts to appoint a trustee, calls out to this Court to exercise its discretion to enter its order granting Creditor Moore's motion for appointment of a chapter 11 trustee and to remove the debtor-in-possession.

Appointment of a trustee will permit this case to proceed to and through plan approval, reorganization and the payment of all creditor claims, whether though the MMP Plan submitted by Mr. Moore or under such other plan as may provide Debtor TPL with the means to satisfy its creditors' claims through licensing of the MMP Portfolio.

Respectfully submitted,

Dated: September 3, 2014

Chiles and Prochnow, LLP

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