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6 Attorneys for Reorganized Debtor
7 Technology Properties Limited, LLC

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re

12 TECHNOLOGY PROPERTIES LIMITED,
13 LLC,

14 Debtor.
15
16

Case No: 13-51589 SLJ

Chapter 11

Date: September 21, 2016

Time: 2:00 p.m.

Place: Courtroom 3099
280 South First Street
San Jose, California

17
18 **MOTION FOR RELIEF FROM DEFAULT ON ORDER RE REQUEST OF**
19 **MICHAEL DAVIS FOR PAYMENT OF ADMINISTRATIVE EXPENSE**
(FRCP 60(b); FRBP 9024)

20 TO MICHAEL DAVIS AND HIS COUNSEL OF RECORD:

21 Reorganized Debtor Technology Properties Limited (“TPL”) hereby moves the
22 Court for an order granting this Motion and relieving it from the since-cured payment
23 default under the Order¹.
24

25 ¹ Order Re Request of Michael Davis for Payment of Administrative Expenses [DKT #739] (the “Order”) entered on
26 February 1, 2016.

1 TPL respectfully represents as follows in support of this Motion:

2 1. TPL commenced this case by filing a voluntary Chapter 11 petition on March 20,
3 2013.

4 2. This case was contested heavily at almost every level. On January 8, 2015, TPL
5 and the Committee filed their Disclosure Statement re: Joint Plan of Reorganization by Official
6 Committee of Unsecured Creditors and Debtor (January 8, 2015)(“Disclosure Statement”) [Dkt.
7 #587] and Joint Plan of Reorganization by Official Committee of Unsecured Creditors and
8 Debtor (January 8, 2015)(“Plan”) [Dkt. #586]. After a contested hearing on February 11, 2015,
9 the Plan was confirmed. The Order Confirming Joint Plan of Reorganization By Official
10 Committee Of Unsecured Creditors and Debtor (Dated January 8, 2015) [Dkt. #670] was
11 entered on March 19, 2015. TPL declared the Plan’s Effective Date to be August 28, 2015.

12 3. The Plan provides that Non-Professional Administrative Claims are to be “paid in
13 cash, in full upon the later of: (a) the Effective Date ... and (c) if such Claim is incurred after the
14 Petition Date in the ordinary course of the Debtor’s business, within such time as payment is
15 due pursuant to the terms giving rise to such Claim or as otherwise authorized by the
16 Bankruptcy Court.”

17 4. The Plan further provides that “... Professional Fee Claims will be determined by
18 the Bankruptcy Court and, once Allowed pursuant to entry of an order by the Bankruptcy Court,
19 will be promptly paid by the Reorganized Company from the Administrative Claims
20 Contribution². ”

21 5. Under the Plan the Administrative Claims Bar Date was 60 days after the
22 Effective Date. 3:12-13. Not having voted in favor of the Plan as did all similarly situated
23

24 ² “**Administrative Claims Contribution**” means the 50% of Adjusted Gross Revenue contributed each quarter (up
25 to a maximum amount not to exceed the amount of Allowed Administrative Claims) to pay holders of Allowed
26 Administrative Claims who agree to accept treatment other than payment in cash in full on the Effective Date.
27 “**Adjusted Gross Revenue**” or “**AGR**” means Gross Revenue less amounts owing under patent litigation counsel
28 contingency retainer agreements and agreements with inventors of the portfolios TPL commercializes.

1 claimants, Mr. Davis found himself in the unique position of being able to assert an
2 administrative claim for the incentive compensation he allegedly became entitled to after the
3 filing of TPL's bankruptcy case. Mr. Davis filed a timely Administrative Claim for \$573,000
4 and moved to compel payment of it, DKT #698.

5 6. The conditions for payments to Mr. Davis were set and agreed early this year. On
6 January 19, 2016, TPL, at the request of Mr. Davis, TPL made a timely wire transfer to his
7 personal bank account of \$11,750 to pay his priority wage claim. Mr. Davis agreed to provide
8 invoices for all future payments to be made to him as well as updated account information. Mr.
9 Venkidu, in turn, advised him that TPL would require a Form W-9 for all future payments to be
10 made to him.

11 7. When Mr. Davis filed a claim for \$573,000 in post-petition incentive
12 compensation, Mr. Venkidu directed the filing of TPL's Objection³ and supported it with a
13 factual declaration. Mr. Venkidu was present at Court and approved the terms of resolution
14 allowing Mr. Davis a \$375,000 Administrative Claim with \$75,000 paid as set forth below,
15 \$300,000 to be paid over time, and the balance asserted to be treated as an unsecured claim as
16 set forth in the Order⁴.

17 8. The Order, in paragraphs 1(a) and 1(c), requires the payment of \$75,000 to Mr.
18 Davis within 10 days of the receipt of funds from a pending settlement with Hewlett-Packard
19 Corporation ("HP") or with Epson, with a penalty that the full claim is due and owing if this
20 \$75,000 commission is not timely paid. Paragraph 5 of the Order required payment of the
21 proceeds from a settlement with Micron within 10 days as well, but there was no trigger or
22 penalty for failing to meet the deadline.

24 ³ Objection to Request for Payment of Administrative Expense & Declaration Of Arockiyaswamy Venkidu In
25 Support Of Objection To Request For Payment Of Administrative Expense [DKT #726] (the "Objection")

26 ⁴ Order Re Request of Michael Davis for Payment of Administrative Expenses [DKT #739] (the "Order") entered on
27 February 1, 2016.

1 9. The Order provided in paragraph 1(b) that the \$300,000 balance of Mr. Davis's
2 allowed Administrative Claim will be paid "through the pooled claim fund (i.e. via the Debtor's
3 Administrative Claim Contribution set forth in the Plan in *pari passu* with other administrative
4 claims."

5 10. While he did not disclose it at the time of settlement, Mr. Davis later claimed that
6 he had insisted upon the inclusion of the term in *pari passu* in the Order because it differs from
7 pro rata and entitles him to receive more than his pro rata share of each Administrative Claim
8 Contribution. Thus, under Mr. Davis's interpretation of in *pari passu*, without regard to the
9 amount of his claim, he is entitled to equal distributions from each dollar going into the
10 Administrative Claims Contribution, to wit: 33.3% of each dollar. This position, when Mr.
11 Venkidu was creating proposed distribution tables, and based upon Mr. Davis's assurance that
12 he was negotiating a resolution of this claimed right with the other administrative claimants,
13 caused Mr. Venkidu uncertainty and led to a payment delay as he was attempting to reconcile
14 the competing demands for payment of administrative debt as set forth below.

15 11. On March 8, 2016, the Micron deal closed, but TPL received no money from it.
16 Mr. Venkidu spoke with Mr. Davis about what a poor deal he had negotiated because TPL had
17 to pay a commission to him from its own funds with no benefit at all to TPL. Mr. Davis did not
18 at that time send an invoice for the Micron deal.

19 12. On April 13, 2016, HP made a 2-day wire to litigation counsel (TSLF) which was
20 received April 15, 2016. On April 15, 2016, TSLF made a wire payment of HP settlement
21 proceeds, the Adjusted Gross Revenue therefrom, to TPL. On April 18, 2016, the HP
22 settlement proceeds first became available in TPL's bank account.

23 13. Mr. Venkidu was on April 13, 2016, reminded by Committee counsel to make the
24 \$75,000 commission payment to Mr. Davis as set forth in the email of the same date attached as
25 Exhibit "A" to the accompanying Declaration of Swamy Venkidu.

1 14. On April 18, 2016, Mr. Davis asked Mr. Venkidu if payment had yet been
2 received. Mr. Venkidu confirmed that it had and reminded Mr. Davis send an invoice for TPL's
3 records for his commission as well as a W-9 form.

4 15. On April 19, 2016, Mr. Davis sent Mr. Venkidu invoices for HP, Micron and a
5 W-9 for a new company "Arria".

6 16. Without adequate funds to pay all claims due while still maintaining the working
7 capital reserve ("WCR") envisioned in the Plan, the TPL Board and CEO believed was
8 necessary to pay operating expenses, so Mr. Venkidu sought to find a way for TPL to balance
9 the competing interests of its claimants and survive to perform the terms of its confirmed Plan.
10 After extensive consultation with the TPL Board, on April 25, 2016, Mr. Venkidu transmitted a
11 proposed form of distribution to the law firm administrative claimants in the hope that he could
12 negotiate a lesser payment to them.

13 17. Mr. Venkidu spoke to Mr. Davis on at three occasions after receiving HP
14 settlement funds, on April 22, April 26, and April 27. Mr. Davis inquired about the details of
15 what the proposed distribution would be. Mr. Venkidu provided Mr. Davis with the proposed
16 form of distribution. Mr. Davis stated that he wanted to enforce what he viewed as a different
17 distribution to which he was entitled based upon his opinion of the meaning of the term *pari*
18 *passu* in the Order. Mr. Davis confirmed that he was giving TPL additional time to pay the
19 \$75,000 while his attorney sought to convince all parties that his interpretation of the term *pari*
20 *passu* was correct. Mr. Davis said that he was agreeable to taking a discounted amount,
21 identical to the treatment the law firm administrative claimants accepted, to help TPL maintain
22 an adequate WCR.

23 18. Mr. Davis subsequently confirmed his position in the following text to Mr.
24 Venkidu: "Here's my proposal to resolve the Admin claim: - One time reduction in the Admin
25 Claim Contribution of 25% for the HP Transaction (i.e. Admin Claim Contribution = 37.5% not
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50%). - Equal distributions to Admin Claim Pool participants (Dorsey, Binder and MLD) now and for all future distributions until I receive \$300K. - TPL will suspend (not defer) all compensation to the TPL board until all Admin Claims have been fully paid.”

19. As set forth in the email attached to the Venkidu Declaration as Exhibit “B”, on April 25, 2016, Mr. Venkidu was warned by Dorsey & Whitney not to make the payments as set forth in his spreadsheet. The email warns that doing so would be a violation of the terms of the Plan and subject TPL to liability. Since Mr. Venkidu’s table had included the \$75,000 commission to Mr. Davis, he took this email to mean that TPL was prohibited from distributing not only the administrative claimants’ share of the pooled administrative claim but the \$75,000 commission, overruling the prior reminder to pay the Davis commission.

20. On May 10, 2016, TPL paid Michael Davis \$113,500 in commissions on the HP and Micron settlements. Mr. Davis’s counsel sent a message indicating that they were being accepted and would be negotiated with a full reservation of rights.

21. Mr. Davis thereafter received the amount of \$10,400.00 from the Reorganized Debtor on July 8, 2016, which was payment of his commission from the Epson project due under Paragraph 5 of the Order.

22. Both Dorsey & Whitney and Binder & Malter have been cooperative with TPL’s efforts to fund the Plan despite low cash flows. Both firms agreed to a 25% reduction of the final approved fees and costs to which they are entitled. They have also agreed to accept a reduction of the Administrative Claims Contribution from 50% of Adjusted Revenue to 40%.

23. The exhibits hereto show that Dorsey & Whitney calculated the amounts to which each administrative claimant would be entitled from the Adjusted Gross Revenue received from the HP and Epson settlements. Those calculations are as follows:

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Dorsey & Whitney Owed \$1,377,946.67 = \$195,984.79

Binder & Malter Owed \$1,457,070.60 = \$207,238.56

Mike Davis Owed \$ 300,000.00 = \$ 42,668.88

Total: \$3,135,017.27/ \$447,892.5 = 14.22296%

24. TPL paid Mr. Davis \$42,688.68 on July 17, 2016, the full pro rata share of the Administrative Claims Contribution to which his \$300,000 stipulated Administrative entitles him. This payment as deposited without any reservation of rights. By contrast, the reduced payments to Dorsey & Whitney and Binder & Malter amounted to \$146,398 and \$155,280, respectively.

WHEREFORE, TPL respectfully requests that the Court GRANT this Motion and issue an order relieving TPL from the consequences of its 12-day payment default, reinstating the agreed treatment set forth in the Order and restoring the status quo.

Date: August 22, 2016

BINDER & MALTER, LLP

By: /s/ Robert G. Harris
Robert G. Harris

Attorneys for Reorganized Debtor
Technology Properties Limited, LLC

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In re

TECHNOLOGY PROPERTIES LIMITED,
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Case No: 13-51589 SLJ

Chapter 11

Date: September 21, 2016

Time: 2:00 p.m.

Place: Courtroom 3099
280 South First Street
San Jose, California

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR RELIEF FROM DEFAULT ON ORDER RE REQUEST OF
MICHAEL DAVIS FOR PAYMENT OF ADMINISTRATIVE EXPENSE
(FRCP 60(b); FRBP 9024)**

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I. INTRODUCTION

Reorganized Debtor Technology Properties Limited, LLC (“TPL”) seeks an order granting this Motion and relieving it, by amendment of the 10-day deadline in the Order, from the default that movant Michael Davis claims nullified the consensual treatment of the Davis administrative claim and allows him to assert that the entire claim is now due in full. The default in question was a delay of twelve days, at the end of which the full amount due and owing was paid. The amount was accepted with a reservation of rights, but it was accepted, and subsequent payments were accepted with no reservation at all. Mr. Davis himself gave TPL’s Chief Executive Officer before the payment period expired an extension of time to make payment. There is no prejudice to Mr. Davis is granting the requested relief; whereas denial of the relief requested herein would be to the estate and creditors when the case converts to Chapter 7.

The Court should not punish the estate and creditors for the invited delay and resulting default. Under the law, the Court has the power to relieve TPL from the brief temporal default caused by the 10-day delay in payment and restore the parties to their original positions, and for all the reasons set forth below, it should do so.

II. STATEMENT OF FACTS

1. TPL commenced this case by filing a voluntary Chapter 11 petition on March 20, 2013.

2. This case was contested heavily at almost every level. On January 8, 2015, TPL and the Committee filed their Disclosure Statement re: Joint Plan of Reorganization by Official Committee of Unsecured Creditors and Debtor (January 8, 2015)(“Disclosure Statement”) [Dkt. #587] and Joint Plan of Reorganization by Official Committee of Unsecured Creditors and Debtor (January 8, 2015)(“Plan”) [Dkt. #586]. After a contested hearing on February 11, 2015, the Plan was confirmed. The Order Confirming Joint Plan of Reorganization By Official

Committee Of Unsecured Creditors and Debtor (Dated January 8, 2015) [Dkt. #670] was entered on March 19, 2015. TPL declared the Plan's Effective Date to be August 28, 2015.

3. The Plan provides that Non-Professional Administrative Claims are to be "paid in cash, in full upon the later of: (a) the Effective Date ... and (c) if such Claim is incurred after the Petition Date in the ordinary course of the Debtor's business, within such time as payment is due pursuant to the terms giving rise to such Claim or as otherwise authorized by the Bankruptcy Court."

4. The Plan further provides that "... Professional Fee Claims will be determined by the Bankruptcy Court and, once Allowed pursuant to entry of an order by the Bankruptcy Court, will be promptly paid by the Reorganized Company from the Administrative Claims Contribution¹."

5. Under the Plan the Administrative Claims Bar Date was 60 days after the Effective Date. 3:12-13. Not having voted in favor of the Plan as did all similarly situated claimants, Mr. Davis found himself in the unique position of being able to assert an administrative claim for the incentive compensation he allegedly became entitled to after the filing of TPL's bankruptcy case. Mr. Davis filed a timely Administrative Claim for \$573,000 and moved to compel payment of it, DKT #698.

6. The conditions for payments to Mr. Davis were set and agreed early this year. On January 19, 2016, TPL, at the request of Mr. Davis, TPL made a timely wire transfer to his personal bank account of \$11,750 to pay his priority wage claim. Mr. Davis agreed to provide invoices for all future payments to be made to him as well as updated account information. Mr.

¹ **"Administrative Claims Contribution"** means the 50% of Adjusted Gross Revenue contributed each quarter (up to a maximum amount not to exceed the amount of Allowed Administrative Claims) to pay holders of Allowed Administrative Claims who agree to accept treatment other than payment in cash in full on the Effective Date. **"Adjusted Gross Revenue" or "AGR"** means Gross Revenue less amounts owing under patent litigation counsel contingency retainer agreements and agreements with inventors of the portfolios TPL commercializes.

1 Venkidu, in turn, advised him that TPL would require a Form W-9 for all future payments to be
2 made to him.

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4 compensation, Mr. Venkidu directed the filing of TPL's Objection² and supported it with a
5 factual declaration. Mr. Venkidu was present at Court and approved the terms of resolution
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16 allowed Administrative Claim will be paid "through the pooled claim fund (i.e. via the Debtor's
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22 Contribution. Thus, under Mr. Davis's interpretation of in *pari passu*, without regard to the
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12 received April 15, 2016. On April 15, 2016, TSLF made a wire payment of HP settlement
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16 \$75,000 commission payment to Mr. Davis as set forth in the email of the same date attached as
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22 W-9 for a new company "Arria".

23 16. Without adequate funds to pay all claims due while still maintaining the working
24 capital reserve ("WCR") envisioned in the Plan, the TPL Board and CEO believed was
25 necessary to pay operating expenses, so Mr. Venkidu sought to find a way for TPL to balance
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3 proposed form of distribution to the law firm administrative claimants in the hope that he could
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16 Venkidu: "Here's my proposal to resolve the Admin claim: - One time reduction in the Admin
17 Claim Contribution of 25% for the HP Transaction (i.e. Admin Claim Contribution = 37.5% not
18 50%). - Equal distributions to Admin Claim Pool participants (Dorsey, Binder and MLD) now
19 and for all future distributions until I receive \$300K. - TPL will suspend (not defer) all
20 compensation to the TPL board until all Admin Claims have been fully paid."

21 19. As set forth in the email attached to the Venkidu Declaration as Exhibit "B", on
22 April 25, 2016, Mr. Venkidu was warned by Dorsey & Whitney not to make the payments as set
23 forth in his spreadsheet. The email warns that doing so would be a violation of the terms of the
24 Plan and subject TPL to liability. Since Mr. Venkidu's table had included the \$75,000
25 commission to Mr. Davis, he took this email to mean that TPL was prohibited from distributing
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not only the administrative claimants' share of the pooled administrative claim but the \$75,000 commission, overruling the prior reminder to pay the Davis commission.

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Dorsey & Whitney	Owed \$1,377,946.67 = \$195,984.79
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Binder & Malter	Owed \$1,457,070.60 = \$207,238.56
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Mike Davis	Owed \$ 300,000.00 = \$ 42,668.88
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Total:	\$3,135,017.27/ \$447,892.5 = 14.22296%
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24. TPL paid Mr. Davis \$42,688.68 on July 17, 2016, the full *pro rata* share of the Administrative Claims Contribution to which his \$300,000 stipulated Administrative entitles him. This payment was deposited without any reservation of rights. By contrast, the reduced payments to Dorsey & Whitney and Binder & Malter amounted to \$146,398 and \$155,280, respectively.

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III. LEGAL ARGUMENT

A. The Court Can Grant Relief from the 10-Day Payment Requirement in the Order under FRCP 60.

Federal Rule of Civil Procedure 60 is applies in cases under the Bankruptcy Code pursuant to the provisions of Federal Rule of Bankruptcy Procedure 9024. Rule 60 provides as follows in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

...

(3) fraud (whether previously called intrinsic or extrinsic),
misrepresentation, or misconduct by an opposing party;...

(6) any other reason that justifies relief.

1. The Court Should Grant Relief Under Rule 60(b)(1).

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), the United States Supreme Court set forth the factors a court must consider to determine whether "neglect" is "excusable" within the meaning of Rule 60, and their adoption in and application by the 9th Circuit (as to an attorney's error) was more recently noted by the Bankruptcy Appellate Panel:

"The equitable factors a court must consider are: 1) the danger of prejudice to the opposing party; 2) the length of the delay and its potential impact on the proceedings; 3) the reason for the delay; and 4) whether the movant acted in good faith. *Bateman*, 231 F.3d at 1223-24 citing *Pioneer*, 507 U.S. at 395.

The Ninth Circuit adopted the Pioneer test for Rule 60(b)(1) cases in *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). See *Pincay v. Andrews*, 389 F.3d 853, 856-57

1 (9th Cir. 2004) (en banc). The four *Pioneer* factors are not
2 exclusive, rather they provide a framework for evaluating whether
3 excusable neglect has been established. *Bateman*, 231 F.3d at
4 1224.

5 In *Pincay*, the Ninth Circuit recently held that the weighing
6 of Pioneer's equitable factors is left "to the discretion of the district
7 court in every case." *Pincay*, 389 F.3d at 860. Thus, our review of
8 a court's findings of each factor is highly deferential assuming, of
9 course, that the court engaged in the appropriate analysis.

10 *U.S. Forest Indus. v. Spar-Tek Indus. (In re United States Forest Indus.)*, 2005 Bankr. LEXIS
11 3406, *7-8 (B.A.P. 9th Cir. June 8, 2005).

12 Application of the four factors favors the granting of relief in the case at bar.

- 13 - First, Mr. Davis has received all of the money to which the Order, but for the 12-day
14 delay in payment of his first \$75,000, entitles him. He would suffer no prejudice
15 from a 30-day retroactive modification of the due date for payment of that \$75,000.
16 The timing to pay the remaining \$393,586.59 of what is owed to Mr. Davis would
17 simply be deaccelerated.
- 18 - Second, while there has been a delay of some six months in seeking relief from the
19 10-day default provision of the Order, ongoing negotiations with Mr. Davis (and the
20 other administrative claimants) suggested to TPL that a solution could be agreed
21 without judicial intervention. Conserving precious legal resources in a case in which
22 cash is already at a premium mandated not bringing such a motion so long as a
23 negotiated solution was possible.
- 24 - Third, TPL's reasons for delay are compelling and go directly to Mr. Venkidu's
25 reaction to the demands by both Mr. Davis and Dorsey & Whitney to his proposed
26 form of distribution. Both Davis and Dorsey & Whitney directed him not to make
27 payments as he had proposed. Mr. Davis, within Mr. Venkidu's understanding, gave
28 Mr. Venkidu additional time to make the \$75,000 while TPL attempted to achieve a

1 consensual distribution that would account for Mr. Davis's view as to the meaning of
2 *pari passu*; and,

- 3 - Finally, TPL has acted in good faith throughout a difficult period of Plan
4 implementation. The Court is aware of the disputes that have so far limited
5 distributions from the MMP portfolio. Those bars to the free flow of funds, including
6 disputes with Alliacense, have finally been resolved. While Core Flash and Fast
7 Logic settlements have come in under expectations, an overall resolution is under
8 discussion that may allow a regular and much lower-cost income stream to reach TPL
9 and its creditors. TPL is not, in short, holding back large amounts of funds; it has
10 simply been forced to aggressively conserve its financial resources to allow
11 operations to continue.

12 **2. Relief is Also Appropriate under Rules 60(b)(3) and 60(b)(6)**

13 The 9th Circuit has described succinctly what is needed to obtained relief under Rule
14 60(b)(3):

15 "To prevail, the moving party must prove by clear and convincing
16 evidence that the verdict was obtained through fraud,
17 misrepresentation, or other misconduct and the conduct
18 complained of prevented the losing party from fully and fairly
19 presenting the defense." *De Saracho v. Custom Food Machinery,*
20 *Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). "Federal Rule of Civil
21 Procedure 60(b)(3) requires that fraud . . . not be discover-able by
22 due diligence before or during the proceedings." *Pac. & Arctic Ry.*
23 *and Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148
(9th Cir. 1991).

24 Casey v. Albertson's Inc., 362 F.3d 1254, 1260, 2004 U.S. App. LEXIS 6419,
25 15-16, 93 Fair Empl. Prac. Cas. (BNA) 841, 58 Fed. R. Serv. 3d (Callaghan) 45
26 (9th Cir. Cal. 2004)

27 Mr. Davis seems to have had, from the time of the hearing on his Request, an understanding
28 that he did not share with other claimants. He apparently intended to demand a different and higher

1 share of distributions from the Administrative Claims Contribution than the other administrative
2 claimants. TPL would not have consented the Order had this been known. Mr. Davis concealed his
3 intent for some time after entry of the Order. Then, by representing to Mr. Venkidu before payment
4 was yet due that TPL could take additional time to pay the \$75,000 while a negotiated solution was
5 attempted, he contributed to or induced occurrence of the 12-day delay he now claims entitles him to
6 accelerated treatment and immediate payment.

7 It may well be that Mr. Davis will contest Mr. Venkidu's testimony about his understanding
8 of the meaning of *pari passu* and what he said about a consensual delay in the payment of the
9 \$75,000. If so, then an evidentiary hearing should be set to allow both Mr. Venkidu and Mr. Davis to
10 be examined and cross-examined on the record so that the Court can evaluate the demeanor of each
11 witness.

12 IV. CONCLUSION

13 The current dispute is one that revolves, to a large degree, around novel issues. The hair trigger
14 nature of the Order and right to immediate payment, in the context of a Plan confirmed before a
15 claim was filed or allowed, is juxtaposed against the short delay in payment, seemingly excusable on
16 equitable grounds or by reason of conduct of the opposing party. Given the brevity of delay in
17 payment and fact that Mr. Davis has been made whole TPL, for all the reasons set forth above,
18 requests that the Court grant TPL's motion and relieve it from the 10-day trigger in the Order and
19 resulting default.

20 Date: August 22, 2016

BINDER & MALTER, LLP

21
22 By: /s/ Robert G. Harris
23 Robert G. Harris
24 Attorneys for Reorganized Debtor
25 Technology Properties Limited, LLC
26
27

1 HEINZ BINDER, ESQ., ID #96533
2 ROBERT G. HARRIS, ESQ., ID #124678
3 Binder & Malter, LLP
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8 Email: Heinz@bindermalter.com
9 Email: Rob@bindermalter.com

6 Attorneys for Reorganized Debtor
7 Technology Properties Limited, LLC

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re

12 TECHNOLOGY PROPERTIES LIMITED,
13 LLC,

14 Debtor.
15
16

Case No: 13-51589 SLJ

Chapter 11

Date: September 21, 2016

Time: 2:00 p.m.

Place: Courtroom 3099
280 South First Street
San Jose, California

17
18 **DECLARATION OF SWAMY VENKIDU IN SUPPORT OF MOTION**
19 **FOR RELIEF FROM DEFAULT ON ORDER RE REQUEST OF**
20 **MICHAEL DAVIS FOR PAYMENT OF ADMINISTRATIVE EXPENSE**
21 **(FRCP 60(b); FRBP 9024)**

22 I, Swamy Venkidu, know the following matters to be true of my own, personal
23 knowledge and, if called as a witness, could and would testify competently thereto:
24
25
26
27

1 1. I am the Chief Executive Officer of Technology Properties Limited LLC, the
2 Reorganized Debtor in the above-captioned case and have knowledge of the events set forth
3 below though my official actions in my capacity as CEO and, before that, as a creditor.

4 2. TPL commenced this case by filing a voluntary Chapter 11 petition on March 20,
5 2013.

6 3. This case was contested heavily at almost every level. On January 8, 2015, TPL
7 and the Committee filed their Disclosure Statement re: Joint Plan of Reorganization by Official
8 Committee of Unsecured Creditors and Debtor (January 8, 2015)(“Disclosure Statement”) [Dkt.
9 #587] and Joint Plan of Reorganization by Official Committee of Unsecured Creditors and
10 Debtor (January 8, 2015)(“Plan”) [Dkt. #586]. After a contested hearing on February 11, 2015,
11 the Plan was confirmed. The Order Confirming Joint Plan of Reorganization By Official
12 Committee Of Unsecured Creditors and Debtor (Dated January 8, 2015) [Dkt. #670] was
13 entered on March 19, 2015. TPL declared the Plan’s Effective Date to be August 28, 2015.

14 4. The Plan provides that Non-Professional Administrative Claims are to be “paid in
15 cash, in full upon the later of: (a) the Effective Date ... and (c) if such Claim is incurred after the
16 Petition Date in the ordinary course of the Debtor’s business, within such time as payment is
17 due pursuant to the terms giving rise to such Claim or as otherwise authorized by the
18 Bankruptcy Court.”

19 5. The Plan further provides that “... Professional Fee Claims will be determined by
20 the Bankruptcy Court and, once Allowed pursuant to entry of an order by the Bankruptcy Court,
21 will be promptly paid by the Reorganized Company from the Administrative Claims
22 Contribution¹. ”

23
24 ¹ **“Administrative Claims Contribution”** means the 50% of Adjusted Gross Revenue contributed each quarter (up
25 to a maximum amount not to exceed the amount of Allowed Administrative Claims) to pay holders of Allowed
26 Administrative Claims who agree to accept treatment other than payment in cash in full on the Effective Date.
“Adjusted Gross Revenue” or “AGR” means Gross Revenue less amounts owing under patent litigation counsel
contingency retainer agreements and agreements with inventors of the portfolios TPL commercializes.

1 6. Under the Plan the Administrative Claims Bar Date was 60 days after the
2 Effective Date. 3:12-13. Not having voted in favor of the Plan as did all similarly situated
3 claimants, Mr. Davis found himself in the unique position of being able to assert an
4 administrative claim for the incentive compensation he allegedly became entitled to after the
5 filing of TPL's bankruptcy case. Mr. Davis filed a timely Administrative Claim for \$573,000
6 and moved to compel payment of it, DKT #698.

7 7. The conditions for payments to Mr. Davis were set and agreed early this year. On
8 January 19, 2016, TPL, at the request of Mr. Davis, TPL made a timely wire transfer to his
9 personal bank account of \$11,750 to pay his priority wage claim. Mr. Davis agreed to provide
10 invoices for all future payments to be made to him as well as updated account information. I
11 advised him that TPL would require a Form W-9 for all future payments to be made to him.

12 8. When Mr. Davis filed a claim for \$573,000 in post-petition incentive
13 compensation, I directed the filing of TPL's Objection² and supported it with a factual
14 declaration. I was present at Court and approved the terms of resolution allowing Mr. Davis a
15 \$375,000 Administrative Claim with \$75,000 paid as set forth below, \$300,000 to be paid over
16 time, and the balance asserted to be treated as an unsecured claim as set forth in the Order³.

17 9. The Order⁴ in paragraphs 1(a) and 1(c), requires the payment of \$75,000 to Mr.
18 Davis within 10 days of the receipt of funds from a pending settlement with Hewlett-Packard
19 Corporation ("HP") or with Epson, with a penalty that the full claim is due and owing if this
20 \$75,000 commission is not timely paid. Paragraph 5 of the Order required payment of the
21
22

23 ² Objection to Request for Payment of Administrative Expense & Declaration Of Arockiyaswamy Venkidu In
24 Support Of Objection To Request For Payment Of Administrative Expense [DKT #726] (the "Objection")

25 ³ Order Re Request of Michael Davis for Payment of Administrative Expenses [DKT #739] (the "Order") entered on
February 1, 2016.

26 ⁴ Order Re Request of Michael Davis for Payment of Administrative Expenses [DKT #739] (the "Order") entered on
February 1, 2016.

1 proceeds from a settlement with Micron within 10 days as well, but there was no trigger or
2 penalty for failing to meet the deadline.

3 10. The Order provided in paragraph 1(b) that the \$300,000 balance of Mr. Davis's
4 allowed Administrative Claim will be paid "through the pooled claim fund (i.e. via the Debtor's
5 Administrative Claim Contribution set forth in the Plan in *pari passu* with other administrative
6 claims."

7 11. While he did not disclose it at the time of settlement, Mr. Davis later claimed that
8 he had insisted upon the inclusion of the term in *pari passu* in the Order because it differs from
9 pro rata and entitles him to receive more than his pro rata share of each Administrative Claim
10 Contribution. Thus, under Mr. Davis's interpretation of in *pari passu*, without regard to the
11 amount of his claim, he is entitled to equal distributions from each dollar going into the
12 Administrative Claims Contribution, to wit: 33.3% of each dollar. This position, when Mr.
13 Venkidu was creating proposed distribution tables, and based upon Mr. Davis's assurance that
14 he was negotiating a resolution of this claimed right with the other administrative claimants,
15 caused Mr. Venkidu uncertainty and led to a payment delay as he was attempting to reconcile
16 the competing demands for payment of administrative debt as set forth below.

17 12. On March 8, 2016, the Micron deal closed, but TPL received no money from it
18 contrary to what Mr. Davis has represented. I spoke with Mr. Davis about what a poor deal he
19 had negotiated because TPL had to pay a commission to him from its own funds with no benefit
20 at all to TPL. Mr. Davis did not at that time send an invoice for the Micron deal.

21 13. On April 13, 2016, HP made a 2-day wire to litigation counsel (TSLF) which was
22 received April 15, 2016. On April 15, 2016, TSLF made a wire payment of HP settlement
23 proceeds, the Adjusted Gross Revenue therefrom, to TPL. On April 18, 2016, the HP
24 settlement proceeds first became available in TPL's bank account.

1 14. I was on April 13, 2016, reminded by Committee counsel to make the \$75,000
2 commission payment to Mr. Davis as set forth in the email of the same date attached as Exhibit
3 “A” hereto.

4 15. On April 18, 2016, Mr. Davis asked me if the HP payment had yet been received.
5 I confirmed that it had and reminded Mr. Davis send an invoice for TPL’s records for his
6 commission as well as a W-9 form.

7 16. On April 19, 2016, Mr. Davis sent me invoices for HP, Micron and a W-9 for a
8 new company “Arria”.

9 17. Without adequate funds to pay all claims due while still maintaining the working
10 capital reserve (“WCR”) envisioned in the Plan, the TPL Board and I believed was necessary to
11 pay operating expenses, I sought to find a way for TPL to balance the competing interests of its
12 claimants and survive to perform the terms of its confirmed Plan. After extensive consultation
13 with the TPL Board, on April 25, 2016, I transmitted a proposed form of distribution to the law
14 firm administrative claimants in the hope that he could negotiate a lesser payment to them.

15 18. I spoke to Mr. Davis on at three occasions after receiving HP settlement funds, on
16 April 22, April 26, and April 27. Mr. Davis inquired about the details of what the proposed
17 distribution would be. I provided Mr. Davis with the proposed form of distribution I had
18 developed after consulting with the TPL Board. Mr. Davis stated that he wanted to enforce
19 what he viewed as a different distribution to which he was entitled based upon his opinion of
20 the meaning of the term *pari passu* in the Order. Mr. Davis confirmed that he was giving TPL
21 additional time to pay the \$75,000 while his attorney sought to convince all parties that his
22 interpretation of the term *pari passu* was correct, and I relied on that statement. Mr. Davis said
23 that he was agreeable to taking a discounted amount, identical to the treatment the law firm
24 administrative claimants accepted, to help TPL maintain an adequate WCR.

1 19. Mr. Davis subsequently confirmed his position in the following text to me:
2 “Here’s my proposal to resolve the Admin claim: - One time reduction in the Admin Claim
3 Contribution of 25% for the HP Transaction (i.e. Admin Claim Contribution = 37.5% not 50%).
4 - Equal distributions to Admin Claim Pool participants (Dorsey, Binder and MLD) now and for
5 all future distributions until I receive \$300K. - TPL will suspend (not defer) all compensation to
6 the TPL board until all Admin Claims have been fully paid.”

7 20. As set forth in the email attached hereto as Exhibit “B”, on April 25, 2016, I was
8 also warned by Dorsey & Whitney not to make the payments as set forth in my spreadsheet.
9 The email warns that doing so would be a violation of the terms of the Plan and subject TPL to
10 liability. Since my table had included the \$75,000 commission to Mr. Davis, I took this email
11 to mean that TPL was prohibited from distributing not only the administrative claimants’ share
12 of the pooled administrative claim but the \$75,000 commission, overruling the prior reminder to
13 pay the Davis commission.

14 21. On May 10, 2016, TPL paid Michael Davis \$113,500 in commissions on the HP
15 and Micron settlements. I saw an email from Mr. Davis’s counsel that they were being accepted
16 and would be negotiated with a full reservation of rights.

17 22. Mr. Davis thereafter received the amount of \$10,400.00 from the Reorganized
18 Debtor on July 8, 2016, which was payment of his commission from the Epson project due
19 under Paragraph 5 of the Order.

20 23. Both Dorsey & Whitney and Binder & Malter have been cooperative with TPL’s
21 efforts to fund the Plan despite low cash flows. Both firms agreed to a 25% reduction of the
22 final approved fees and costs to which they are entitled. They have also agreed to accept a
23 reduction of the Administrative Claims Contribution from 50% of Adjusted Revenue to 40%

24. The exhibits hereto show that Dorsey & Whitney calculated the amounts to which each administrative claimant would be entitled from the Adjusted Gross Revenue received from the HP and Epson settlements. Those calculations are as follows:

Dorsey & Whitney Owed \$1,377,946.67 = \$195,984.79

Binder & Malter Owed \$1,457,070.60 = \$207,238.56

Mike Davis Owed \$ 300,000.00 = \$ 42,668.88

Total: \$3,135,017.27/ \$447,892.5 = 14.22296%

25. TPL paid Mr. Davis \$42,688.68 on July 17, 2016, the full *pro rata* share of the Administrative Claims Contribution to which his \$300,000 stipulated Administrative entitles him. This payment as deposited without any reservation of rights. By contrast, the reduced payments to Dorsey & Whitney and Binder & Malter amounted to \$146,398 and \$155,280, respectively

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 22nd day of August, 2016, at San Jose, California.

/s/ Swamy Venkidu
SWAMY VENKIDU

EXHIBIT A

From: franklin.robert@dorsey.com [<mailto:franklin.robert@dorsey.com>]
Sent: Wednesday, April 13, 2016 10:59 AM swamyv@bicmosfoundry.com
Cc: Rob Harris; oneill.stephen@dorsey.com; advisors@krysium.com; marciska@gmail.com
Subject: Settlement Proceeds

Swamy,

Thank you for sending the two waterfalls from the ----- and ----- settlements. TPL's total gross proceeds will be \$-----
. Under the Plan, one-half of these proceeds (\$-----) are to go to the Administrative Contribution Fund for distribution to the professionals who have accepted such treatment and Mike Davis under the settlement negotiated by TPL with him relative to his administrative claim. Please review and confirm figures. Once received, please set aside this amount and make payments to the following entities in the following amounts:

- | | | |
|----|--|---|
| a. | Dorsey & Whitney – Owed \$1,377,946.67 = | \$196,887.79 |
| b. | Binder & Malter -- Owed \$1,457,070.60 = | \$208,193.40 |
| c. | Mike Davis -- Owed <u>\$300,000</u> = | <u>\$ 42,865.47</u> |
| | Total: | <u>\$3,135,017.27/ \$447,892.5 = 14.288491%</u> |

I have attached Dorsey's wire instructions.

(Note that under the settlement with Davis, TPL needs to pay him \$75,000 from its share of the settlement proceeds, plus commissions on the HP and Epson settlements)

Regards,

Bob

Robert A. Franklin
Of Counsel



DORSEY & WHITNEY LLP
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From: Franklin, Robert
Sent: Monday, April 25, 2016 2:39 PM
To: 'Gmail-Avenkidu'; 'Rob Harris'
Cc: 'Krysium Advisors Ltd'; 'Marcie Brown'; O'Neill, Stephen (oneill.stephen@dorsey.com); William Bretschneider (wlb@svlg.com)
Subject: RE: Payments from HP proceeds
Importance: High

Please confirm immediately that no distributions will be made pursuant to the spreadsheet you prepared (attached). Otherwise, we will be compelled to file a motion with the court to interpret the plan language.

From: Franklin, Robert
Sent: Monday, April 25, 2016 2:32 PM
To: 'Gmail-Avenkidu'; 'Rob Harris'
Cc: 'Krysium Advisors Ltd'; 'Marcie Brown'; O'Neill, Stephen (oneill.stephen@dorsey.com)
Subject: RE: Payments from HP proceeds
Importance: High

Thanks Swamy, but this calculation is unacceptable. The Plan is very clear that the Administrative Claims Contribution is to be paid from one-half of the Adjusted Gross Revenues. See the below definitions. You should not make any distributions based on the spreadsheet you prepared.

“Administrative Claims Contribution” means the 50% of Adjusted Gross Revenue contributed each quarter (up to a maximum amount not to exceed the amount of Allowed Administrative Claims) to pay holders of Allowed Administrative Claims who agree to accept treatment other than payment in cash in full on the Effective Date.

“Adjusted Gross Revenue” or “AGR” means Gross Revenue less amounts owing under patent litigation counsel contingency retainer agreements and agreements with inventors of the portfolios TPL commercializes.

The proceeds payable as an Administrative Claims Contribution total one-half of Adjusted Gross Revenues of \$891,178.07 or \$445,892.53. Proceeds from the Administrative Claims Contribution must be paid as follows:

- a. Dorsey & Whitney – Owed \$1,377,946.67 = **\$195,984.79**
- b. Binder & Malter -- Owed \$1,457,070.60 = **\$207,238.56**
- c. Mike Davis -- Owed \$300,000 = **\$ 42,668.88**

Total: \$3,135,017.27/ \$447,892.5 = 14.22296%

The estate's professionals agreed to defer payment based on the provisions of the confirmed Plan and are now entitled to be paid the above amounts from the Administrative Claims Contribution. **You may not** reserve for WCR or make other Effective Date payments from the Administrative Claims Contribution.

Please confirm that you will not be making any distributions based on the attached spreadsheet. Any allocation of settlement proceeds that does not result in an Administrative Claims Contribution of \$445,892.53 or any disbursements made from the Administrative Claims Contribution to anyone other than Dorsey & Whitney, Binder & Malter or Mike Davis as described above would be in violation of the express terms of the Plan and subject the Debtor to liability and will result in Dorsey & Whitney taking any action it deems appropriate to protect its interests.

-----Original Message-----

From: Gmail-Avenkidu [<mailto:avenkidu@gmail.com>]

Sent: Monday, April 25, 2016 11:24 AM

To: 'Rob Harris'; Franklin, Robert

Cc: 'Krysium Advisors Ltd'; 'Marcie Brown'

Subject: RE: Payments from HP proceeds

Rob , Bob – Attached the payments based on the Plan per my understanding and the Board. Unfortunately Mike Davis's portion comes off of settlement like MCM and Others. we also have to cross the effective date payments before we go with distributions all other classes.

I reviewed this with the Board before sending this over. I and Board are available to discuss if any questions.

Thanks, swamy

Heinz Binder (SBN87908)
Robert G. Harris (SBN 124678)
David B. Rao (SBN103147)
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Attorneys for Reorganized Debtor
TECHNOLOGY PROPERTIES LIMITED, LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re

TECHNOLOGY PROPERTIES LIMITED,
LLC,

Debtor.

Case No: 13-51589 SLJ

Chapter 11

Date: September 21, 2016

Time: 2:00 p.m.

Place: Courtroom 3099
280 South First Street
San Jose, California

CERTIFICATE OF SERVICE

I, Natalie D. Gonzalez, declare:

I am employed in the County of Santa Clara, California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is 2775 Park Avenue, Santa Clara, California 95050.

On August 22, 2016 I served a true and correct copy of the following document(s):

**MOTION FOR RELIEF FROM DEFAULT ON ORDER RE REQUEST OF MICHAEL
DAVIS FOR PAYMENT OF ADMINISTRATIVE EXPENSE
(FRCP 60(b); FRBP 9024)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
RELIEF FROM DEFAULT ON ORDER RE REQUEST OF MICHAEL DAVIS FOR
PAYMENT OF ADMINISTRATIVE EXPENSE (FRCP 60(b); FRBP 9024)**

**DECLARATION OF SWAMY VENKIDU IN SUPPORT OF MOTION FOR RELIEF
FROM DEFAULT ON ORDER RE REQUEST OF MICHAEL DAVIS FOR PAYMENT
OF ADMINISTRATIVE EXPENSE (FRCP 60(b); FRBP 9024)**

**NOTICE OF HEARING ON MOTION FOR RELIEF FROM DEFAULT
ON ORDER RE REQUEST OF MICHAEL DAVIS FOR PAYMENT OF
ADMINISTRATIVE EXPENSE (FRCP 60(b); FRBP 9024)**

via electronic transmission and/or the Court's CM/ECF notification system to the parties
registered to receive notice as follows:

U.S. Trustee

John Wesoloski
United States Trustee
Office of the U.S. Trustee
280 So. First St., Room 268
San Jose, CA 95113
Email: john.wesolowski@usdoj.gov

Counsel to Michael Davis

Marcia E. Gerston
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Unsecured Creditors Committee Attorney

c/o Robert Franklin, Esq.
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Executed on August 22, 2016, at Santa Clara, California. I certify under penalty of
perjury that the foregoing is true and correct.

/s/ Natalie D. Gonzalez
Natalie D. Gonzalez