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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

REPLY TO CREDITOR MICHAEL DAVIS' OPPOSITION TO MOTION FOR RELIEF FROM DEFAULT ON ORDER RE REQUEST OF MICHAEL DAVIS FOR PAYMENT OF ADMINISTRATIVE EXPENSE (FRCP 60(b); FRBP 9024)

Reorganized Debtor Technology Properties Limited, LLC ("TPL") responds as follows to the Opposition:[1]

I. INTRODUCTION

1. Claimant Michael Davis, standing on the strictest reading of his February 1, 2016 Order to impose the most severe consequence possible for a default that he is alleged to have induced, neglected to contest or contradict the argument and testimony establishing three of the four elements supporting relief under Rule 60(b)(1).[2] It is undisputed that TPL's payment of the full amount Davis had agreed to accept occurred only 12 days and that he has since been made whole so that granting the current Motion[3] will result in no prejudice to him. The 12-day delay was short in time relative to the length of this case and has had no impact on the proceedings beyond Davis hiring contingency counsel to seek a windfall from the estate. Further, it should be apparent from the efforts of TPL's CEO in working with various creditors to survive a cash crunch that, while not all aspects of TPL's confirmed plan have yet been performed, it has acted in good faith.

2. The unresolved factual question potentially blocking relief under Rule 60(b)(1) is whether Davis consented to an extension of time to pay and induced the breach. Mr. Venkidu says Davis did. Mr. Davis denies it. Live testimony from both Mr. Davis and Mr. Venkidu is merited so that the Court can assess the demeanor of the witnesses and determine who is telling the truth.

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[1] Creditor Michael Davis' Opposition to Debtor's Motion for Relief from Default on Order re Request for Payment of Administrative Expense [Dkt #775] (the "Opposition").

[2] Those elements are (a) the danger of prejudice to the opposing party; (b) the length of the delay and its potential impact on the proceedings; (c) the reason for the delay; and (d) whether the movant acted in good faith.

3 Motion for Relief from Default on Order re Request of Michael Davis for Payment of Administrative Expense (FRCP 60(b); FRBP 9024) [Dkt #760] (the "Motion").

3. Davis argues that, as a matter of law, no relief is available to the party whose deliberate choice to agree to an order yielded a different result than may have been intended. TPL will, as set forth below, argue that the cases cited by Davis are distinguishable, the facts before this Court are unique, and an extension of Rule 60(b)(1), 60(b)(3) or 60(b)(6) is merited.

4. At the end of this brief TPL will address Mr. Davis's misunderstanding and misapplication of the Latin words *pari passu* and why he, not TPL or the estate, should bear the burden of his misunderstanding of an unambiguous and commonly used legal term.

II. FACTS

A. Unchallenged Testimony

5. Swamy Venkidu, TPL's Chief Executive Officer, testified without contradiction as follows:

> A condition set by TPL for payment to Mr. Davis was that he first had to provide invoices and W-9 forms to TPL[4].
>
> Davis did not provide either invoices or W-9 forms until April 19, 2016, a day after the HP settlement proceeds first became available in TPL's bank account.[5]
>
> On May 10, 2016, TPL paid Davis $113,500 in commissions on the HP and Micron settlements, the full amount he was owed at the time. An email from Mr. Davis's counsel establishes that payments were being accepted but would be negotiated with a full reservation of rights. TPL made a further payment of $10,400.00 from the Reorganized Debtor or July 8, 2016, which was payment of Davis's commission from the Epson project.[6]

[4] 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) (the "Venkidu Declaration"), ¶7

[5] Venkidu Decl., ¶13, 16

[6] Venkidu Decl., ¶21, 22

> When TPL paid Mr. Davis the full *pro rata* share of the Administrative Claims Contribution to which his $300,000 stipulated Administrative entitled him, a total of $42,688.68 on July 17, 2016, it was three days after the last communication from Davis's counsel.[7] This payment was deposited without any reservation of rights whatsoever.[8]

B. Partially Contested Testimony

6. Mr. Venkidu testified as follows:

> "I spoke to Mr. Davis on at three occasions after receiving HP settlement funds, on April 22, April 26, and April 27. Mr. Davis inquired about the details of what the proposed distribution would be. I provided Mr. Davis with the proposed form of distribution I had developed after consulting with the TPL Board. Mr. Davis stated that he wanted to enforce what he viewed as a different distribution to which he was entitled based upon his opinion of the meaning of the term *pari passu* in the Order. Mr. Davis confirmed that he was giving TPL additional time to pay the $75,000 while his attorney sought to convince all parties that his interpretation of the term *pari passu* was correct, and I relied on that statement. Mr. Davis said that he was agreeable to taking a discounted amount, identical to the treatment the law firm administrative claimants accepted, to help TPL maintain an adequate WCR.[9]"

7. Mr. Davis testifies, without written evidence, only as to his alleged lack of consent in response and not at all as to his willingness to accept his originally agreed treatment:

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

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[7] Declaration of Maureen Harrington in Support of Creditor Michael Davis' Request for Immediate Payment of Administrative Expense [Dkt #759], ¶4, Exhibit C.

[8] Venkidu Decl., ¶25

[9] Venkidu Decl., ¶18

[10] **Error! Main Document Only.**Declaration of Michael Davis in Opposition to Debtor's Motion for Relief from Default on Order re Request for Payment of Administrative Expense, &4.

III. LEGAL ARGUMENT

A. An Evidentiary Hearing With Live Testimony Is Needed to Get to the Truth.

8. Live testimony is merited where the truthfulness of testimony is at issue.

> Federal Rule of Bankruptcy Procedure 9017 makes Fed.R.Civ.P. 43, together with the Federal Rules of Evidence and other rules relating to the taking of evidence, applicable to proceedings in cases under title 11. "Federal Rule of Civil Procedure 43 requires, with limited exceptions, that in all trials the testimony of witnesses be taken orally in open court. Such a requirement provides the obvious advantage of permitting the judge ... to observe the appearance and demeanor of witnesses so as more readily to determine the truth or weight to be given to the testimony." 10 Collier on Bankruptcy, ¶ 9017.02[1] (Alan Resnick & Henry Sommer, eds., 15th ed.2008).

In re Budryk, 2009 WL 1395469 at *1 (Bankr. D. Mass, E.D. 2009). Whether Davis consented to an extension to pay is directly relevant to the Motion.

B. There is No Legal Bar to TPL Seeking Relief under Rule 60(b)(1)

9. Davis's initial pass at defeating the Motion on legal grounds appears at page 2 of the Motion. There, Davis references *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097 (9th Cir. Cal. 2006), the topic of TPL's Supplemental Memorandum. Davis relies simply on a quote from the case, without context or facts. Davis also makes no attempt to address TPL's multiple arguments as to why *Latshaw* is distinguishable. TPL's unchallenged arguments were as follows:

> First, TPL did not rely on erroneous legal advice or negligence of its own counsel. Rather, TPL relied on the party to whom its $75,000 payment was due, Mr. Davis, and his express representations allowing TPL additional time to pay. Second, Dorsey & Whitney, acting not as counsel but as an administrative claimant, threatened TPL that payment as it had been proposed would be a violation of the terms of the plan and would subject TPL to liability. Third, TPL's non-payment in this case was not a deliberate and independent legal decision that it came to later

regret but was in direct response to the representations made by Mr. Davis and threats made by Dorsey & Whitney.[11]

10. Davis adds to his passing reference to *Latshaw* a quote from Moore's Federal Practice about the setting aside of consensual order. The citation form was not sufficiently specific to allow the actual quote to be found, but the fact that section 26.23 of that volume of Moore's Federal Practice Guide is entitled "Expert Witness Disclosure" should be enough to cause the Court to discount the quote's legal relevance.

11. Davis returns to the point once again at page 3, lines 13-20, claiming that TPL has not met the burden to prove why it should not be held to "its own agreement". Davis cites two cases, both of which are distinguishable. In *Yapp v. Excel Corp.*, 183 F.3d 122 (10th Cir. 1999) Appellant Yapp had negotiated a settlement of $14,000 in return for a Stipulation for Dismissal with Prejudice that resulted in the unforeseen consequence of the Appellee supplementing its answer in a separate action, its pending motion for summary judgment, and a final pretrial order in to include the affirmative defense of claim preclusion. Yapp filed a 60(b) motion, seeking to rescind the Stipulation for Dismissal with Prejudice and Order for Dismissal with Prejudice in the Overtime Action. Yapp argued that relief should be based upon fraud, misrepresentation, misconduct of the adverse party, breach of covenant of good faith and fair dealing, failure to achieve a meeting of the minds, mistake of law, and mutual mistake. The Motion was denied. Nowhere does the reported case reveal that *after* execution of the dismissal Appellee Excel had done anything to induce the default, as was the case with Mr. Davis in the case at bar.

12. In *United States v, Bank of New York*, 14 F.3d 756 (2nd Cir. 1994), a defendant, who pled guilty of engaging in interstate sale or transportation of drug paraphernalia entered into settlement of forfeiture action commenced against his assets. The conviction was

[11] Supplemental Memorandum Of Points & 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) [Dkt #769] (the "Supplemental Memorandum"), 3:15-4:1.

overturned based upon a change in decisional law: "Two months after the consent decree was ordered by the district court, this Court held in *United States v. Hong–Liang Lin*, 962 F.2d 251 (2d Cir.1992), that 21 U.S.C. § 857 did not criminalize the manufacture or sale of crack vials." *Id.* at 758. Plaintiff Wu then sought to set aside the resolution of the forfeiture action under Rule 60, contending that because his criminal conviction was based on an erroneous interpretation of the law he was entitled to relief from the settlement agreement made pursuant to his civil forfeiture action. This fascinating case holds little value for Mr. Davis. It was a case about what happens to a contract decision made after there has been a superseding change in a law but not a change that made the contract illegal. Nowhere is it alleged that any party acted so as to cause Mr. Wu to rely to his detriment on it, him or her, miss a deadline or to have entered into the agreement in the first place. This case should therefore be disregarded as well.

C. Davis's Incorrect and Concealed Misinterpretation of Pari Passu is Itself a Ground For Relief

13. In the Opposition, Davis had admitted to the Court his hidden agenda: by using the word *pari* passu in his order he sought to change his percentage entitlement vis a vis other administrative claimants and give himself a form of higher priority. Shockingly, Davis implied that it was up to the parties and, indeed, the Court to pry from the recesses of his mind his inaccurate interpretation of the term *pari passu* and that, having failed to do so, TPL is imperiled.[12] He then argues that what he did does not add up to fraud. TPL asks that the Court instruct Mr. Davis and his counsel that he has no greater right to a share of monies available to administrative claimants than his *pro rata* share of the total of administrative claims allows him.

[12] Opposition, 3:25-4:3.

14. TPL has provided Mr. Davis multiple times with complete explanations of the term *pari passu* in the hope that he would recognize that putting words into an order that he believed to have one meaning, when he never disclosed to the Court or TPL what that meaning was, does not change their meaning or make his interpretation correct.

15. The definition of the term *pari passu* in Black's Law Dictionary is limited. It simply says that the Latin term means "By an equal progress ; equably; ratably; without preference." A much more complete explanation, with examples that fit the current situation perfectly, was found in a January 19, 2016 article entitled "Demystifying Pari Passu in Commercial Real Estate", from Property Metrics [https://www.propertymetrics.com/blog/2016/01/19/pari-passu/]. The author offers this explanation:

> *Pari Passu* is Latin for "on equal footing". In the world of finance it refers to situations where two or more classes of people or transactions are managed without preference. Assets, obligations, securities, investors, and creditors can all be managed with a *pari passu* structure. One classic example of *pari passu* is the way unsecured creditors are treated in a bankruptcy. All the unsecured creditors get paid at the same time and the same fractional rate of the debt they were owed. In commercial real estate the *pari passu* structure is often used in commercial mortgage backed securities (CMBS) or in the waterfall structure of commercial real estate partnerships. In this article we'll discuss *pari passu* in commercial real estate and clarify with some relevant examples.
>
> ***Difference Between Pari Passu and Pro Rata***
>
> First of all, let's tackle a commonly asked question about *pari passu*. What's the difference between *pari passu* and *pro rata*? The terms *pari passu* and *pro rata* are often confused with each other. *Pari passu* is used to refer to a class. The debts or bonds are held *pari passu*. Pro rata technically refers to how something is distributed. ***In the bankruptcy example above, the unsecured debts are all pari passu. They are of the same class and will be paid on the same priority and without preference. Because the debts are pari passu, they must be paid pro rata. Distributing the***

> ***money otherwise would give priority to some of the unsecured debt over others. In a practical sense there is little difference between pari passu and pro rata because when anything is held pari passu, the only way to preserve the "equal footing" is to distribute profits or losses pro rata.***

16. Judges in reported bankruptcy cases apply the term *pari passu* exactly as the author has explained it: creditors who are *pari passu* hold equal priority or stature and share *pro rata* in distributions based on their share of the creditor class in question. *See e.g. In re Tristar Esperanza Properties, LLC*, 488 B.R. 394, 402 (B.A.P. 9th Cir. 2013), aff'd, 782 F.3d 492 (9th Cir. 2015)(noting historical problem of investors recovering fraud claims *pari passu* with general creditors in bankruptcy cases); see also In re Churchill Nut Co., 251 B.R. 143, 150 (Bankr. N.D. Cal. 2000)("As the Supreme Court stated in *Union Bank v. Wolas*, the two policies underlying the preference statute "are not entirely independent," 502 U.S. at 161, 112 S.Ct. 527, and once a bankruptcy is commenced, neither are the policies underlying the preference statute and the producer's lien law. . . . the Court declines to allow a race to the courthouse within 90 days of the bankruptcy filing to result in a better position for the creditor who won that race. Furthermore, it insures that creditors who were equally positioned prior to the transfer share *pari passu* in the distribution under the Bankruptcy Code.").

III. CONCLUSION

17. Mr. Davis, it no

to which he was entitled. He ensured that a term he believed would aid him in this regard, *pari passu*, was inserted into the February 1, 2016 Order. According to testimony he was asked for and granted an extension of the time to receive his $75,000 payment and was, in fact, paid that amount and more only 12 days later then claimed he had granted no extension. Mr. Davis was subsequently paid, accepted, and deposited his *pro rata* share of the first Administrative Claims

Contribution from TPL, $42,688.88 but still wants to assert an unfair advantage over all other administrative claimants.

18. No party has been harmed by the short delay in payment Davis experienced on his $75,000 commission. Neither the estate nor its creditors should be forced to suffer as a result of the delay that occurred here. This Court has the power under Rule 60(b) to relieve TPL from that default by now granting relief from the 10-day payment requirement in the February 1, 2016 Order, this authorizing the payment made on May 10, 2016, as timely.

Date: September 14, 2016

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By: /s/ *Robert G. Harris*
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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 September 14, 2016 I served a true and correct copy of the following document(s):

REPLY TO CREDITOR MICHAEL DAVIS' OPPOSITION TO 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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Executed on September 14, 2016, at Santa Clara, California. I certify under penalty of perjury that the foregoing is true and correct.

/s/ *Natalie D. Gonzalez*
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