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

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

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

20 **REPLY TO DEBTOR'S OBJECTION
21 TO DAVIS' REQUEST FOR PAYMENT
22 OF ADMINISTRATIVE EXPENSE**

23 Date: January 13, 2016
24 Time: 2:00 p.m.
25 Location: United States Bankruptcy Court
26 280 South First Street, Room 3099
27 San Jose, CA 95113
28 Judge: Honorable Stephen L. Johnson

19 Creditor Michael Davis ("DAVIS") hereby replies to the Debtor's Objection to DAVIS'
20 Request for Payment of Administrative Expense ("Objection")(Docket #726) as follows:

21 The Debtor's argument that DAVIS' Request for Payment of Administrative Expense
22 (Docket #698)("Request") should not be paid hinges primarily on one sentence -- actually
23 one *prefix* of one word of a sentence -- in the Debtor's Disclosure Statement: "The
24 Employee Compensation Contracts will be rejected as of the Effective Date under the Plan,
25 and all damages, pre and **post-** petition, will be treated as general unsecured claims in
26 Classes 6A and 6B." (Objection, p. 2.) This sentence appears in the Debtors' Disclosure
27

1 Statement (Docket #638, p. 30 of 104), not the Plan, as erroneously stated in the Debtor's
2 Objection,¹ and appears only in a paragraph entitled "Priority Claims" which in turn refers
3 to Schedule E of the Debtor's Bankruptcy Schedules. Schedule E lists *pre-petition* wages,
4 salaries and commissions of employees, and does not appear to have any bearing on work
5 performed after the bankruptcy petition was filed.²

6 This one sentence in the Disclosure Statement, purportedly about Priority Claims (a
7 sentence that does not appear in the Plan) is insufficient to put DAVIS on notice that he
8 would not be paid as an administrative claimant if he continued to do work for the Debtor.
9 The description of Classes 6A and 6B from the Plan quoted at length in the Objection (p. 2
10 – 4) doesn't change this conclusion: this section of the Plan describing the treatment of
11 claims in Classes 6A and 6B (Docket #637, pp. 26 – 28 of 67) refers twice to DAVIS'
12 already-filed claim (Claim No. 35) for *pre-petition* compensation, indicating (again) that
13 these two Classes cover payment of *pre-petition* claims, which are to be paid over time in
14 the manner stated therein. **Nowhere in the long description of Classes 6A and 6B does**
15 **it say that post-petition compensation is included in this treatment**, notwithstanding
16 the throw away statement in Debtor's Objection that this section "specifies that Mr. Davis'
17 pre- and post- petition Incentive Compensation Claims are to be paid over time." (Objection,
18 p. 2.) If that were the case, this section describing Classes 6A and 6B could (and should)
19 have explained, in simple terms, that in addition to the already filed pre-petition claims

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21 ¹ In fact, the Objection does not identify where any of its quotes are from (other than saying they're from "the
22 Plan"). This is likely because the quotes do not come from the Plan, as stated above, but also because the
23 purported treatment of DAVIS' claim for post-petition compensation is not described in the Plan in any one
24 place clearly and with sufficient information for DAVIS (or anyone else) to understand. It is certainly not clear
25 from the Plan that DAVIS' compensation for work performed post-petition, which would normally be an
26 administrative claim pursuant to section 507 of the Bankruptcy Code, would be paid in some other fashion.

27 ² This is further borne out by the definition of "Priority Claim" in the Plan as "any Claim entitled to priority
28 pursuant to Sections 507(a)(1) through (a)(7) of the Bankruptcy Code, *but not including an Administrative*
29 *Claim.*" (Plan, Docket #637, p. 15 of 67(emphasis added).) "Administrative Claim" is defined, in pertinent
30 part, as "a Claim for any cost or expense of administration of a kind specified in Section 503(b) of the
31 Bankruptcy Code, including (a) any actual and necessary costs and expenses of preserving the Bankruptcy
32 Estate incurred *on or after the Petition Date and through the Effective Date*" (Plan, Docket #637, p. 6 of
33 67 (emphasis added).)

1 referred to in this portion of the Plan, Classes 6A and 6B a/so included wages, salaries and
2 commissions for work which may be performed by these employees for the Debtor post-
3 petition. It does not say this, and DAVIS did not understand the Plan to work that way.
4 Certainly, the Bankruptcy Code and its provisions for payment of post-petition wages,
5 salaries and commissions in sections 503(b) and 507 are not set up that way. To the extent
6 this Plan intended to modify those provisions of the Bankruptcy Code, it should be
7 conspicuous and unmistakable.

8 This Plan is undoubtedly difficult for a layperson to understand (in fact, it is one of
9 the more convoluted the undersigned experienced bankruptcy attorney has seen), but
10 DAVIS believed he deciphered the process for payment of his compensation. As explained
11 in DAVIS' Request, DAVIS understood that his pre-petition claim (Claim No. 35) would be
12 paid over time through a pooled fund with other creditors (75% through Class 6A and 25%
13 thereafter through Class 6B), similar to a prior arrangement previously made with the
14 debtor, as evidenced by Exhibit 1 to the Davis Dec. His agreement to provide consulting
15 services to the Debtor, which could ultimately result in licensing agreements worth millions
16 of dollars to the Debtor, however, would not be rejected until an Effective Date was
17 declared. If he continued to perform work for the Debtor, he would be entitled to request
18 payment for his post-petition services as a non-professional administrative claimant, as
19 allowed by the Bankruptcy Code. (See Declaration of Michael Davis in Support of Request
20 for Payment of Administrative Claim ("Davis Dec."), ¶7, and Plan, Docket #637, pp. 21 - 22
21 of 67.)³ DAVIS understood that he would not be paid as each post-petition licensing deal

22 ³ The section of the Plan entitled "Administrative Claims – Non-Professional" (p. 21 of 67) begins, "Except to
23 the extent that the holder of a particular Administrative Claim has agreed to deferral or other treatment of
24 such Claim...." DAVIS never agreed to such deferral and the failure to object to the Plan with its description
25 of Classes 6A and 6B cannot be seen to constitute such an agreement. This paragraph continues:

26 ... each holder of an Allowed Administrative Claim shall be paid in cash, in full
27 upon the later of: (a) the Effective Date; (b) if such Claim is initially a Disputed
28 Claim, if and when it becomes an Allowed Administrative Claim; 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.

Davis, who continued to perform services for the Debtor in the ordinary course of business after

1 was made, but was under the impression (based on the wording of the Plan) that his
2 agreement remained operative until the Effective Date and that he could request payment
3 at that time. (See Davis Dec., ¶7 and footnote 3, *supra*.) (DAVIS also understood that a
4 portion of his filed pre-petition claim was disputed; he did not think that, as he continued to
5 work for the benefit of the Debtor's estate, his compensation for that work would become
6 part of that disputed claim.) There was a clear mechanism in the Plan for non-professional
7 administrative claims – who else would fall into such a category but employees or
8 consultants like DAVIS who continued to work and bring in revenue for the Debtor after it
9 filed bankruptcy?

10 DAVIS therefore continued to work on the Debtor's behalf. Now that the Debtor has
11 accepted the benefit of DAVIS' labors, the Debtor wants to point to minutiae in the Plan and
12 Disclosure Statement to avoid paying DAVIS for his efforts. DAVIS' reading of the Plan
13 terms is just as reasonable as the Debtor's. If DAVIS' compensation for work performed for
14 the Debtor was to be deferred, it should have been *much* more clear in the Plan documents.
15 It was not, and DAVIS should be paid as an administrative claimant, pursuant to the process
16 set out for non-professional administrative claims.

17 Other arguments raised in the Debtor's Objection are also unavailing:

18 There is no real dispute that DAVIS provided services to the Debtor, either as a direct
19 employee or consultant, between the filing of the Debtor's bankruptcy and the Effective
20 Date that resulted in licensing agreements beneficial to the Debtor for which Davis has not
21 been paid. The fact that he was not listed as an employee by the Debtor or that Mr. Venkidu
22 says he was not an employee is not evidence that he is not entitled to be paid. If DAVIS is
23 an independent contractor, he would not show up on the Debtor's books or records as an
24 employee, but he is still entitled to compensation. (There also appears to be some confusion
25 in the Debtor's Objection about DAVIS' right to be paid a portion of his pre-petition wage

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the bankruptcy petition was filed, seeks to be paid pursuant to the terms of his agreement, which
27 provides that commissions are to be paid on a current basis. (Exhibit 1 to Davis Dec., p.2, ¶3.)

1 claim (\$11,725) as a priority claim pursuant to section 507(a)(4) of the Bankruptcy Code.
2 This type of priority wage claim is independent of DAVIS' request to be paid for post-petition
3 services performed for the Debtor. Although both may be entitled to some sort of priority,
4 they should not be conflated.)

5 An unredacted copy of DAVIS' invoice was provided to Debtor's counsel immediately
6 upon request on December 9, 2015, so there is no merit to the argument that the Debtor
7 could not calculate the amounts due. (An unredacted copy is available to be provided to the
8 court at the hearing or upon request as well.) The Debtor is well aware of the licensing
9 agreements made with the entities listed on the invoice and can easily determine if the
10 commission amounts claimed by DAVIS are correct.

11 Similarly, the Debtor is aware that the term "minimum" is used to refer to the
12 "commission advances" of 50% of DAVIS' salary referred to in paragraph 4 of the
13 agreement attached as Exhibit 1 to the DAVIS Dec. These advances are not limited to
14 commissions from the MMP portfolio. Nor is the agreement to pay DAVIS a 2% commission
15 for licensing deals applicable only to deals from the MMP portfolio; the first paragraph of
16 the agreement does mention amounts received by PDS, but does not limit the portfolio for
17 which commissions (or advances) would be paid.

18 DAVIS is a prodigious and profitable worker on behalf of the Debtor. TPL makes its
19 money licensing patents and products in its portfolios. As set forth in DAVIS' Request and
20 the DAVIS Dec., DAVIS made licensing deals totaling over \$18 million on TPL's behalf since
21 its Plan was confirmed. The Debtor would be hard pressed to deny that DAVIS has been
22 the catalyst for most of the revenue coming into the Debtor's coffers in the last year or that
23 DAVIS is a prime source of future revenue for the Debtor, on which the success of the Plan
24 depends. His services were and are necessary to the continued vitality of the Debtor. The
25 Plan provides for a process to pay "non-professionals" for administrative (post-confirmation,
26 pre-Effective Date) claims; DAVIS has followed this procedure to the letter and should be

1 paid at this time.

2 Dated: January 6, 2016

GREENFIELD DRAA & HARRINGTON LLP

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By: /s/ Marcia E. Gerston
MARCIA E. GERSTON
Attorneys for Creditor
MICHAEL DAVIS

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16 LLC,
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19 Chapter 11

20 **CERTIFICATE OF SERVICE**

21 Date: January 13, 2016
22 Time: 2:00 p.m.
23 Location: United States Bankruptcy Court
24 280 South First Street, Room 3099
25 San Jose, CA 95113
26 Judge: Honorable Stephen L. Johnson

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

29 **Reply to Debtor's Objection to Davis' Request for**
30 **Payment of Administrative Expense**

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

33 I declare under penalty of perjury under the laws of the State of California and the
34 United States of America that the above is true and correct. I declare that I am employed

1 in the office of a member of the bar of this Court at whose direction the services were made.

2 Executed on January 6, 2016 at San Jose, California.

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/s/ Caitlin Hannon
Caitlin Hannon