

1 HEINZ BINDER, ESQ., ID #96533
2 ROBERT G. HARRIS, ESQ., ID #124678
3 Binder & Malter, LLP
4 2775 PARK AVENUE
5 Santa Clara, California 95050
6 Telephone: (408) 295-1700
7 Facsimile: (408) 295-1531
8 Email: Heinz@bindermalter.com
9 Email: Rob@bindermalter.com

6 Attorneys for Reorganized Debtor
7 Technology Properties Limited, LLC

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

12 In re
13 TECHNOLOGY PROPERTIES LIMITED,
14 LLC,
15 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

17
18
19
20 **SUPPLEMENTAL MEMORANDUM OF POINTS & AUTHORITIES IN**
21 **SUPPORT OF MOTION FOR RELIEF FROM DEFAULT ON ORDER RE**
22 **REQUEST OF MICHAEL DAVIS FOR PAYMENT OF**
23 **ADMINISTRATIVE EXPENSE (FRCP 60(b); FRBP 9024)**

1 Reorganized debtor Technology Properties Limited, LLC (“TPL”) hereby submits this
2 Supplemental Memorandum of Points and Authorities for the limited purpose of addressing the
3 query of the Court from the August 22, 2016 hearing: under the law of the 9th Circuit is Rule
4 60(b)(1) available to a party when the act from which relief is sought was intentionally taken? ¹

5 TPL believes that the leading case in the Ninth Circuit is *Latshaw v. Trainer Wortham &*
6 *Co.*, 452 F.3d 1097 (9th Cir. Cal. 2006). In *Latshaw* the issue before the Court was whether the
7 investor who accepted an offer of judgment under Fed. R. Civ. P. §68 based upon mistakes
8 purportedly originating from her attorney was not entitled to relief under Fed. R. Civ. P.
9 §60(b)(1). .

10 In *Latshaw*, the moving party Elizabeth Latshaw, an investor in the firm of Trainer
11 Wortham & Company, Inc. argued that she accepted an offer of judgment in the case below
12 based upon fraud by her counsel. Mrs. Latshaw claimed that her attorney had erroneously
13 advised her that she might be liable for the defendants’ attorneys’ fees if she did not sign the
14 offer of judgment and believed that both of her attorneys intended to resign. *Id.* at 1100.

15 The 9th Circuit focused on two factual points: first, that the alleged mistakes from which
16 relief were sought arose from Mrs. Latshaw’s own attorney’s misconduct; and, second, her
17 decision to accept the offer that had been found to be both deliberate and independent.

18 In its analysis, the 9th Circuit re-stated the general rule that “...parties are bound by the
19 actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set
20 aside a judgment pursuant to Fed. R. Civ. P. §60(b)(1).” *Id.* at 1101, citing *Engleson v.*

21 *Burlington Northern Railroad Co.*, 972 F.2d 1038, 1043 (9th Cir. 1989). The 9th Circuit went
22 on to state that “[g]enerally speaking, Rule 60(b) is not intended to remedy the effects of a
23 deliberate and independent litigation decision that a party later comes to regret through second
24

25 ¹ While the filing of a supplemental brief was not specifically requested, TPL believes that it is duty-bound to
26 answer the question as to potentially controlling authority raised by the Court and will ask for permission to include
this filing as part of the September 21 hearing.

1 thoughts or subsequently-gained knowledge that corrects prior erroneous legal advice of
2 counsel.” *Latshaw* at 1099.

3 The 9th Circuit found that neither of the investor’s alleged mistakes are among those that
4 Fed. R. Civ. P. §60(b)(1) is intended to remedy, and that the mistakes, if true, arose from
5 attorney misconduct. *Id.* at 1101. The 9th Circuit, in ruling against Mrs. Latshaw, concluded
6 that “Latshaw’s decision to accept the offer was deliberate and independent.” *Id.* at 1101-1102.

7 By contrast many courts have held that reliance upon representations made by **adverse**
8 **parties** can constitute excusable neglect under Fed. R. Civ. P. §60(b)(1). *e.g.* *Heritage Leasing*
9 *Corp. v. Kehoe Warehouse & Distributing Co.*, 1983 U.S. Dist. LEXIS 19224, *4, (W.D. Pa.
10 Feb. 16, 1983) (Defendant’s argued failure to file pre-trial conference statement because of
11 reliance upon plaintiff’s vice-president that no further proceedings were required); *Liberty Nat’l*
12 *Bank & Trust Co. v. Yackovich*, 99 F.R.D. 518, 520, (W.D. Pa. 1982) (Court found excusable
13 neglect where plaintiff agreed to inform defendants before taking a default judgment and
14 subsequently failed to give such notice).

15 The facts of the case at bar are distinguishable from those in *Latshaw*. First, TPL did not
16 rely on erroneous legal advice or negligence of its own counsel. Rather, TPL relied on the party
17 to whom its \$75,000 payment was due, Mr. Davis, and his express representations allowing
18 TPL additional time to pay.² Second, Dorsey & Whitney, acting not as counsel but as an
19 administrative claimant, threatened TPL that payment as it had been proposed would be a
20 violation of the terms of the plan and would subject TPL to liability.³ Third, TPL’s non-
21 payment in this case was not a deliberate and independent legal decision that it came to later
22 regret but was in direct response to the representations⁴ made by Mr. Davis and threats made by
23

24 ² Declaration of Swamy Venkidu in Support of Motion for Relief from Default on Order Re Request of Michael
25 Davis for Payment of Administrative Expense (“Venkidu Decl.”), ¶ 18, 19)

26 ³ Venkidu Decl., ¶ 20.

27 ⁴ TPL has confirmed that the date of the text received from Mr. Davis was June 8, 2016, and did not provide consent
28 to a delay in payment prior to the date that it was due.

1 Dorsey & Whitney.⁵ Thus, the Court here should not find the *Latshaw* case binding so as to
2 preclude the relief TPL has requested.

3 Date: August 25, 2016

BINDER & MALTER, LLP

4
5 By: /s/ Robert G. Harris
6 Robert G. Harris
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

25
26 _____
⁵ Venkidu Decl., ¶ 20.

1 Heinz Binder (SBN87908)
2 Robert G. Harris (SBN 124678)
3 David B. Rao (SBN103147)
4 BINDER & MALTER, LLP
5 2775 Park Avenue
6 Santa Clara, CA 95050
7 Telephone: (408)295-1700
8 Facsimile: (408) 295-1531
9 Email: heinz@bindermalter.com
10 Email: rob@bindermalter.com
11 Email: david@bindermalter.com

12 Attorneys for Reorganized Debtor
13 TECHNOLOGY PROPERTIES LIMITED, LLC

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 26, 2016 I served a true and correct copy of the following document(s):

**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)**

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

1 **U.S. Trustee**

2 John Wesoloski
3 United States Trustee
4 Office of the U.S. Trustee
5 280 So. First St., Room 268
6 San Jose, CA 95113
7 Email: john.wesolowski@usdoj.gov

8 **Unsecured Creditors Committee Attorney**

9 c/o Robert Franklin, Esq.
10 c/o Thomas Hwang, Esq.
11 Dorsey & Whitney LLP
12 305 Lytton Avenue
13 Palo Alto, CA 94301
14 Email: franklin.robert@dorsey.com
15 Email: hwang.thomas@dorsey.com

16 **Special Notice**

17 Patriot Scientific Corp.
18 c/o Gregory J. Charles, Esq.
19 Law Offices of Gregory Charles
20 2131 The Alameda Suite C-2
21 San Jose, CA 95126
22 Email: greg@gregcharleslaw.com

23 Arockiyaswamy Venkidu
24 c/o Javed I. Ellahie
25 Ellahie & Farooqui LLP
26 12 S. First St., Suite 600
27 San Jose, CA 95113
28 Email: javed@eflawfirm.com

OneBeacon Technology Insurance
c/o Gregg S. Kleiner, Esq.
McKENNA LONG & ALDRIDGE LLP
One Market Plaza
Spear Tower, 24th Floor
San Francisco, CA 94105
Email: gkleiner@mckennalong.com

Chester A. Brown, Jr. and Marcie Brown
Randy Michelson
Michelson Law Group
220 Montgomery Street, Suite 2100
San Francisco, CA 94104
Email: randy.michelson@michelsonlawgroup.com

Counsel to Michael Davis

Marcia E. Gerston
Greenfield Draa & Harrington LLP
55 S. Market St. #1500
San Jose, CA 95113
Email: mgerston@greenfieldlaw.com
Email: mharrington@greenfieldlaw.com

Special Notice

Charles H. Moore
c/o Kenneth Prochnow, Esq.
Chiles and Prochnow, LLP
2600 El Camino Real, Suite, 412
Palo Alto, Ca 94306
Email: kprochnow@chilesprolaw.com

William Thomas Lewis, Esq.
Robertson & Lewis
150 Almaden Blvd., Suite 950
San Jose, CA 95113
Email: wtl@roblewlaw.com

Cupertino City Center Buildings
c/o Christopher H. Hart, Esq.
Schnader Harrison Segal & Lewis LLP
One Montgomery Street, Suite 2200
San Francisco, CA 94104
Email: chart@schnader.com

Peter C. Califano, Esq.
Cooper, White & Cooper LLP
201 California Street, 17th Floor
San Francisco, California 94111
E-Mail: pcalifano@cwclaw.com

Sallie Kim
GCA Law Partners LLP
2570 W. El Camino Real, Suite 510
Mountain View, CA 94040
Email: skim@gcalaw.com

Toshiba Corporation
c/o Jon Swenson
Baker Botts L.L.P.
1001 Page Mill Road
Building One, Suite 200
Palo Alto, CA 94304
Email: jon.swenson@bakerbotts.com

1 Apple, Inc
2 c/o Adam A. Lewis, Esq.
3 Vincent J. Novak, Esq.
4 Morrison & Foerster LLP
5 425 Market St.
6 San Francisco, CA 94105
7 Email: alewis@mofo.com
8 Email: vnovak@mofo.com

6 Counsel for Hewlett-Packard Company
7 Ellen A. Friedman
8 Friedman, Dumas and Springwater
9 33 New Montgomery St, #290
10 San Francisco, CA 94105
11 Email: efriedman@friedmanspring.com

10 Counsel for Cupertino City Center
11 James E. Sell
12 Parton Sell Rhoades
13 900 Larkspur Landing Circle, Suite 150
14 Larkspur, CA 94939
15 Email: jsell@partonsell.com

14 **VIA ECF**

14 HTC Corporation
15 c/o Robert L. Eisenbach III
16 Cooley LLP
17 101 California Street, 5th Floor
18 San Francisco, CA 94111-5800
19 Email: reisenbach@cooley.com

Jessica L. Voyce, Esq
C. Luckey McDowell
Baker Botts L.L.P.
2001 Ross Avenue, Suite 600
Dallas, TX 75201
Email: jessica.voyce@bakerbotts.com
Email: luckey.mcdowell@bakerbotts.com

Attorneys for Sony Corporation
Lillian Stenfeldt
Sedgwick, LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104
Email:
lillian.stenfeldt@sedgwicklaw.com

Attorney for HSM Portfolio LLC
MCM Portfolio LLC
Michael St. James, Esq.
ST. JAMES LAW, P.C.
155 Montgomery Street, Suite 1004
San Francisco, California 94104
Email: Ecf@stjames-law.com

19 Executed on August 26, 2016, at Santa Clara, California. I certify under penalty of
20 perjury that the foregoing is true and correct.

21 /s/ Natalie D. Gonzalez
22 Natalie D. Gonzalez