Heinz Binder (SBN87908)
Robert G. Harris (SBN 124678)
David B. Rao (SBN103147)
BINDER & MALTER, LLP
2775 Park Avenue
Santa Clara, CA 95050
Telephone: (408)295-1700
Facsimile: (408) 295-1531
Email: heinz@bindermalter.com
Email: rob@bindermalter.com
Email: david@bindermalter.com

Attorneys for Debtor and Debtor-in-Possession
TECHNOILOGY 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-11 Chapter 11 Date: October 2, 2014 Time: 3:00 p.m. Place: Courtroom 3099 280 South First Street San Jose, California

TPL OPPOSITION TO CONTINGENT CREDITOR CHARLES H. MOORE'S MOTION TO APPOINT A CHAPTER 11 TRUSTEE AND REMOVE DEBTOR IN POSSESSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Inventor Charles Moore, whose ingenuity gave birth to the eponymous Moore microprocessor, has invented something new: the ideas that (a) his contingent claim entitles him to a trustee to further his self-interest, (b) he has the marketing skill and business acumen to commercialize patent portfolios worth hundreds of millions of dollars and can ignore infringers to avoid the label of "patent troll," and (c) he should be returned to control of the invention whose rights he signed away in exchange for more than $11 million so far paid to him personally.

Mr. Moore's Motion[1] is based primarily on false claims of misconduct by TPL founder Daniel E. Leckrone. This is odd since Mr. Moore admits that he knew when he filed his Motion that Leckrone had already resigned and been replaced.[2] The Motion is, in effect, a request to replace the consensus new CEO for TPL, Swamy Venkidu, without a single fact to support such an action.

There are now two plans and two disclosure statements on file and set for hearing on October 2, 2014. The negotiated resolution of a hotly contested case is finally ready to proceed to approval. Presumably both the joint OCC[3]-TPL plan and the Moore plan can move to a joint confirmation hearing on an accelerated basis. Appointment of a trustee would only cause delay, disruption and increase expenses. In the absence of clear and convincing evidence to support a finding of cause to appoint a trustee to replace Mr. Venkidu, and given the OCC's opposition to such appointment, Mr. Moore's motion should be denied.

---

[1] Creditor Charles H. Moore's Motion To Appoint A Chapter 11 Trustee And Remove Debtor In Possession (the "Motion")

[2] Motion, 7:10-11.

[3] The Official Unsecured Creditors' Committee ("OCC")

II. ARGUMENT

A. Mr. Moore Will Not Have A Claim Or Receive Distributions Under Either His Plan or the Joint OCC-TPL Plan

Opposition to a motion does not usually begin with reference to other filings not before the Court, but in this instance such a predicate is mandatory. To begin, Mr. Moore's claim is, in his own words, purely "contingent" with "liability [only] if [the] settlement of litigation is set aside.[4]" Exhibit A to Mr. Moore's claim posits, rather incredibly, that "…TPL or others on its behalf [could] set aside the 1/23/13 Settlement Agreement [under which Moore, Patriot and TPL assigned their rights to license the MMP Portfolio to PDS and] … restore Mr. Moore's rights to the *status quo ante* "somehow entitling him to assert a claim in excess of $30 million in this case. In the next paragraph, Mr. Moore freely admits that, if the 1/23/13 settlement is "assumed and accepted … the contingency upon which this claim of Plaintiff Moore rests will not occur, and this contingent claim will not be pursued by Mr. Moore."

The OCC-TPL Joint Plan[5] and the Moore's Plan[6] both provide for assumption of the 1/23/13 settlement agreement.[7] Mr. Moore is therefore entitled to no distribution as a creditor under either Plan. While he may technically have standing to prosecute the instant Motion, the weight of his views must be considered when balanced against those of the OCC, secured claimants, unsecured claimants and insiders who will be treated under whichever plan is ultimately approved.

---

[4] Proof of Claim 26-1

[5] JOINT PLAN OF REORGANIZATION BY OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND DEBTOR (DATED SEPTEMBER 17, 2014)

[6] Creditor Charles H. Moore's Chapter 11 Plan of Reorganization For Technology Properties Limited, LLP.

[7] OCC-TPL Joint Plan, 42:1-3; and, Moore Plan, 48:13-18.

B. Mr. Moore Bears The Burden Of Proving Entitlement to a Trustee By Clear and Convincing Evidence.

"The appointment of a trustee in a chapter 11 case is an extraordinary remedy. The drafters of the Code recognized that, as a general rule, in the absence of fraud, dishonesty, incompetence, gross mismanagement, or similar grounds, the debtor's management should be given an opportunity to propose a plan of reorganization for the debtor. For this reason there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of the need for appointment of a trustee . . . ." 7 Collier on Bankruptcy Par. 1104.02[3][b][i] (Alan N. Resnick and Henry J. Sommer eds., 16th ed.) at 1104-9. As Mr. Moore assumes correctly, " … the evidence in support of appointment of a trustee must be clear and convincing." *See Sharon Steel*, 871 F.2d at 1226. 'It is settled that appointment of a trustee should be the exception, rather than the rule.' *Id.* at 1225.

Proof by the preponderance of evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not. Clear and convincing evidence is a higher standard requiring a high probability of success. *In re Kelley*, 300 B.R. 11, 17 (B.A.P. 9th Cir. 2003). Clear and convincing evidence, such as repeat filer must present in order to rebut statutory presumption of bad faith and to obtain continuation of temporary, 30-day stay, is that weight of proof which produces, in mind of trier of fact, a firm belief or conviction as to truth of allegations sought to be established, i.e., evidence so clear, direct, weighty and convincing as to enable fact finder to come to clear conviction, without hesitancy, of truth of precise facts in issue." *In re Garrett*, 357 B.R. 128 (Bankr. C.D. Ill. 2006).

C. The Motion Fails or Lack of Any Evidentiary Support and Is Insupportable On Legal Grounds.

Mr. Moore's Motion is remarkable both for its inaccuracy and the absence of admissible supporting evidence.[8] Leaving aside the detailed evidentiary objections to what is alleged on which the Court will rule separately, there is simply no basis on which a ruling of cause to appoint a trustee could be made here.

1. There Is No Evidence of Cause to Appoint a Trustee

Mr. Moore's jumbled allegations of cause in the Motion from 8:20- 9:5 are as follows: (1) prior management, Mr. Leckrone, allegedly appropriated the proceeds of an uncertain number of non-MMP licenses without notice or approval by the OCC[9]; (2) non-MMP portfolios are licensed by Alliacense without oversight or accountability,[10] and the proceeds flow directly to Mr. Leckrone with little left for TPL[11]; and, (3) TPL has been grossly mismanaged because its strategy has resulted in its being labeled a patent troll and the portfolio has been "ignored" by both TPL and Alliacense[12] with the net result being a pause in the issuance of MMP licenses. TPL responds as follows to these allegations.

First, Mr. Moore submitted no admissible evidence of his allegations that proceeds of licenses have been appropriated by Mr. Leckrone. Even if allegations as to the actions of prior management[13] were relevant to this Motion's effort to replace Mr. Venkidu with a trustee, TPL has explained in great detail its position as to why this Court's Settlement Procedures Order[14]

---

[8] TPL is concurrently filing a separate evidentiary objection to the multiple violations of the Federal Rules of Evidence contained both in the Motion and supporting Moore Declaration which include but are not limited to hearsay not within a recognized exception, best evidence, and relevance.

[9] Motion, 8:25-9:1.

[10] Motion,9:16-18

[11] Motion, 9:19-22.

[12] Motion, 9:23-10:2

[13] TPL initially responded on December 17, 2013 to the allegations in the Motion that it had violated the Settlement Procedures Order with its TPL's Statement Of Position Regarding Application And Interpretation Of Court Order.

[14] Order on Motion Regarding Settlement Procedures dated May 7, 2013, docket no. 124.

was not violated by the implementation of settlements deemed approved thereunder. This Court, after extensive briefing and a hearing, elected not to appoint a trustee based on those allegations. In any case, all proceeds generated were used strictly in accordance with orders for the use of cash collateral approved by this Court.

Second, the Settlement Procedures Order applies to all non-MMP licenses of portfolios owned by TPL. The statement that "non-MMP portfolios are licensed by Alliacense without oversight or accountability" is patently false.

Third, Mr. Moore's unsupported allegations of gross mismanagement resulting from an alleged abandonment of the MMP portfolio, and a litigation first strategy that has led the ITC to label TPL a patent troll are also false. As the Court may recall, TPL does not issue MMP licenses: PDS does.[15] PDS and Alliacense have been attempting to finalize MMP licenses, and while numerous licenses have been discussed, prospective licensees have taken a "wait and see" approach because (1) the bankruptcy process and threat of appointment of a trustee, followed by a creditor plan with a provision that would have allowed rejection of fully paid non-exclusive licenses issued, as well as litigation against insiders and IP owners, (2) there are ongoing appeals in the U.S. District Court of rulings both for and against TPL; and (3) the plans proposed have undermined Alliacense's ability to generate licenses through PDS given the threat of litigation against it. Mr. Moore, a direct beneficiary of MMP licenses, has a vested and understandable interest in seeing MMP licenses issue, but the truth is that that is not likely until a single plan is before the Court.

[15] It is worth noting that the PDS Board now consists of a member appointed by the OCC (since Mr. Leckrone gave up his seat as part of the term sheet with the OCC), a member appointed by PTSC, and a third member to be consensually selected by the aforementioned two members or appointed by an arbitrator. Any perceived deadlock is a thing of the past.

2. There Is No Evidence That Appointment Of a Trustee Is In The Interest of Creditors.

The Motion from 4:10- 8:19 attempts to articulate the bases on which appointment of a trustee might ever be in the interest of creditors. Mr. Moore complains of the delay in the case. He complains that neither an OCC nor a TPL plan is "awaiting approval" and that the Joint OCC-TPL Plan has no accompanying disclosure statement. He complains that no MMP licenses have issued for a year. He alleges, without specificity, that there " … have been and continue to be unaccounted-for distributions, and payments to Mr. Leckrone and his entities, consuming most of the non-MMP Portfolio revenues received . . . ." He complains that litigation setbacks have multiplied, including a problematic ruling at the ITC, that TPL has been labeled a "patent troll" and finally that Mr. Leckrone's resignation itself, notwithstanding Moore's allegations against him, justifies appointment of a trustee.

The only support offered for these many allegations are references to numerous other documents as to which he requests the Court take judicial notice.[16] TPL objects to all such references as improper uses of Federal Rules of Evidence, Rule 201, as they related to matters which are under dispute; moreover, each document contains numerous objectionable statements that are and will be challenged themselves.

3. The Law Does Not Support Appointment of a Trustee In This Case.

The factors a court should evaluate when considering appointment of a trustee under section 1104(a)(2) are as follows:

> Section 1104(a)(2), contrary to subsection (a)(1) where appointment of a trustee is mandatory upon specific finding of cause, "envisions a flexible standard .... giv[ing] discretion to appoint a trustee 'when to do so would serve the parties' and estate's interests.' " *Marvel Entm't Grp., Inc.*, 140 F.3d 463, 474 (3d Cir. 1989) (citation omitted); *1031 Tax Group*, 374 B.R. at 91 (stating that "§ 1104(a)(2) reflects 'the practical reality that a trustee is needed.' " (quoting *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 527 n.11 (Bankr.E.D.N.Y. 1989))). Under §

[16] Motion, 5:25-28.

> 1104(a)(2), the court utilizes a cost/benefit analysis and general principles of equity to determine whether appointment of trustee is in the best interests of the estate and all the constituents involved. 11 U.S.C. § 1104(a)(2); *see* 7 *Collier on Bankruptcy* ¶ 1104.02[3][d][ii] (summarizing the cost/benefit analysis under § 1104(a)(2)). In balancing these anticipated benefits and accompanying costs, the following factors are given consideration: "(1) the trustworthiness of the debtor; (2) the debtor's past and present performance and prospects for rehabilitation; (3) whether the business community and creditors of the estate have confidence in the debtor; and (4) whether the benefits outweigh the costs." *LHC*, 2013 WL 3760109, at *9 (citation omitted); *see Sundale*, 400 B.R. at 909 ("Loss of confidence, or extreme acrimony[ ] ... constitute elements relevant to the decision of whether it is in the best interests of creditors and others under section 1104(a)(2) to appoint a trustee." (citations omitted)).

In re Bergeron, __ WL __, 2013 WL 5874571 at *9 (Bkrtcy.E.D.N.C., 2013).

As the moving party, it was Mr. Moore's burden to show by clear and convincing evidence, that on balance, the advantages of appointment of a trustee outweigh the disadvantages associated therewith, specifically lacking is any indication how much his proposed trustee and licensing agent would expend replacing TPL, its new CEO and Alliacense. See *In re New Orleans Paddlewheels, Inc.*, 350 B.R. 667, 692, 56 Collier Bankr. Cas. 2d (MB) 1142 (Bankr. E.D. La. 2006) (in determining whether appointment of a trustee is in best interests of creditors and estate, court may consider the trustworthiness of the debtor balanced against the costs of the appointment) (citations omitted). No such analysis was even attempted. The Court cannot be asked to decide, without any assistance, if a trustee's professionals and staff would be a more economical alternative than the amounts Mr. Venkidu is projected to require to operate TPL. This factor alone suggests that the Motion must be denied.

Mr. Moore supports allegations of lost "trust and confidence" in the debtor-in-possession with string cites to cases from 8:14-19 which are distinguishable on the facts from the present case. See *In re Keeley And Grabanski Land Partnership* (Bktcy.B.A.P.8th Cir. 2011), 455 B.R. 153 (Debtor's repeated refusals to submit to Rule 2004 exam due to "sickness" and requests for protective orders regarding the same due to related stress and depression from the case led the court to find that the Debtor's refusal or inability to "keep the bankruptcy case moving" was a major factor in the appointment of a trustee.); *In re Products International Co* (Bktcy.D.Ariz.

2008), 395 B.R. 101 (IRS tax liability was not paid in a timely manner and would require the discipline of a seasoned manager to ensure the obligation was repaid. The owners of the Debtor disagreed, from a short-term and strategic long-term stand-point as to how the Debtor's operations should be conducted); *In re Taub* (Bktcy.E.D.N.Y. 2010), 427 B.R. 208, aff'd 2011 WL 1322390 (Debtor's retention of eight counsel over 21 months that the case had been pending and Debtor's failure to meet administrative obligations including to pay significant post-petition expenses to maintain certain properties); *In re Ridgemour Meyer Properties, LLC* (Bktcy.S.D.N.Y. 2008), 413 B.R. 101 (Debtor secretly transferred real property and secretly recorded deed of trust and then covered up and hid what they had done from an arbitrator and joint venture partner).

Application of the other three factors leads to the same conclusion. As set forth above, there is no admissible evidence that TPL, much less Mr. Venkidu is not trustworthy; to the contrary, the OCC selected Mr. Venkidu to run TPL precisely because they do trust him. While past performance and future prospects are relevant to the Motion, they are more relevant to the upcoming confirmation of a plan and determination of feasibility. Undoubtedly, this issue will be addressed and tested when such hearing occurs but, with two plans on the table, one from Mr. Moore, he can hardly argue that TPL has no prospect for rehabilitation. Finally, it seems self-evident that the creditors and OCC would have confidence in an entity operated by their hand-picked CEO; whether the "business community" (whoever that might be in the context of international use and infringement of TPL's intellectual property) would have confidence is not something that Mr. Moore addresses at all.

Furthermore, the cases cited at the end of Mr. Moore's motion from 10:14 through 11:8 regarding "decisions representing trustee removal above and beyond the four stated factors of the statute itself" are also distinguishable from the present case. See *In re Oklahoma Refining Co.* (10th Cir. 1988), 838 F.2d 1133 (Debtor did not attempt to collect money owed by affiliated companies and avoided offsetting of funds by lenders by depositing proceeds from sale of

inventory into a New Mexico bank account); *In re Embrace Systems Corp.* (Bankr. W.E. Mich. 1995), 178 B.R. 112 (Debtor had interests adverse to the estate, did not disclose an oral agreement which the court found to be tantamount to a secret settlement without disclosure to creditors and there were no other employees able to comply with the duties and obligations of the debtor-in-posession); *In re Cajun Electrical Power Coop Inc*. (5th Cir. 1995), 69 F.3d 746 (Court found cause for appointment of trustee due to conflicts of interest regarding Debtor's board members, who were themselves managers or board members of its twelve member companies who bought all their electricity from Debtor, fiduciary duties to its creditors and member-customers[17]); *In re Marvel Entertainment Group* (3d Cir. 1998), 140 F.3d 463 (Buyer of prepetition debt claims and bonds issued by holding companies owning Chapter 11 debtor's stock obtained control of debtor's board of directors were thus creditors and debtor-in-possession which the court found to be an unhealthy conflict of interests and cause for appointment of a trustee under 1104(a)(1).); *In re Celeritas Techs, LLC*, (Bankr. D. Kan. 2011), 446 B.R. 514 (used a preponderance of the evidence standard; also found that discovery disputes such as producing illegible ledgers, failure to disclose material information regarding improved finances, and failing to provide candid and accurate information about Debtors' profitability were breaches of fiduciary duty and sufficient to appoint a trustee).

III. CONCLUSION

TPL and its creditors have made peace. The OCC's hand-picked CEO is in charge of day-to-day operations. The Joint OCC-TPL Plan and accompanying disclosure statement are the

[17] The Motion references "failure to collect payments due from family members" as a basis for appointment of a trustee. However, this language appears nowhere in the Cajun Electric opinion. Moreover, the court's analysis of appointment of trustee in that case was withdrawn upon rehearing and the dissent's reasoning was adopted in its place, holding that the inherent conflicts of cooperative members working at "cross-purposes" was a sufficient basis for appointment of a trustee for cause under 1104(a)(1) and not 1104(a)(2). See Matter of Cajun Elec. Power Co-op., Inc., 74 F.3d 599, 600 (5th Cir. 1996).

full-throated expression of their consensual resolution of differences. The competing plans should go to a vote and creditors should make their choice. A trustee is, at this point, an unnecessary and expensive distraction. The Motion should be denied.

Dated: September 18, 2014

BINDER & MALTER, LLP

By: /s/ Robert G. Harris
Attorneys for Debtor and
Debtor-in-Possession Technology
Properties Limited

TPL/plead/SettlementProcedures/Statement of Position RE App & Interpretation of Court Order