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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	CHAPTER 11
	)	
KG WINDDOWN, LLC, *et al.*,[1]	)	
	)	CASE NO. 20-11723 (MG)
Debtors.	)	
	)	(Jointly Administered)

DEBTORS' REPLY TO THE UNITED STATES TRUSTEE'S OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF ORDERS (I) AUTHORIZING THE DEBTORS TO MAKE DISTRIBUTIONS TO ALLOWED ADMINISTRATIVE EXPENSE CLAIMS; (II) DISMISSING THE DEBTORS' CHAPTER 11 CASES; (III) ESTABLISHING PROCEDURES WITH RESPECT TO FINAL FEE APPLICATIONS; (IV) AUTHORIZING THE DEBTOR ENTITIES TO BE DISSOLVED IN ACCORDANCE WITH APPLICABLE STATE LAW; AND (V) GRANTING RELATED RELIEF

K.G. Winddown, LLC and its affiliated debtors and debtors in possession (each a "**Debtor**" and collectively, the "**Debtors**"), by and through their undersigned counsel, hereby submit Debtors' reply (the "**Reply**") to the *United State Trustee's* (the "**UST**") *Objection Relief*

[1] The Debtors in these Chapter 11 Cases (defined below), along with the last four digits of each Debtor's federal tax identification number (if any), include: KG Winddown, LLC (8556); KG USA Winddown, LLC (1682); KG III Winddown, LLC (2613); KG LV Winddown, LLC (9805); KG Florida Winddown, LLC (9385); KG Puerto Rico Winddown, LLC (0901); KG AC Winddown, LLC (5082); KG Products Winddown, LLC (0303); KG LI Restaurant Group Winddown, LLC (1623); KG LI Winddown, LLC (1488); KG Franchise Winddown, LLC (0565); KG 60th St Holdings Winddown, LLC (9997); KG Broadway Winddown, LLC (4335); KG Hamptons Winddown, LLC (0423) and KG Payroll Winddown, LLC (0807). For the purpose of these Chapter 11 Cases, the service address for the Debtors is: 12 Penns Trail, Suite 125, Newton, PA 18940.

(the "**Objection**," Dkt. 482) *to the Motion for Entry of Orders (I) Authorizing the Debtors to Make Distributions to Allowed Administrative Expense Claims; (II) Dismissing the Debtors' Chapter 11 Cases; (III) Establishing Procedures with Respect to Final Fee Applications; (IV) Authorizing the Debtors Entities to be Disallowed in Accordance with Applicable State Law; and (V) Granting Related Relief* (the "**Dismissal Motion**," Dkt. 480).[2] In support of the Reply, the Debtors submit and respectfully represent as follows:

I. PRELIMINARY STATEMENT

1. Despite raising a number of supposed concerns with the Dismissal Motion, the UST's Objection must fail as the UST has not presented the Court with any evidence that dismissal should not be granted for cause or that dismissal is not in the best interests of creditors. As this Court has noted, "[o]nce the movant has established cause, the burden shifts to the respondent to demonstrate by evidence the unusual circumstances that establish that dismissal or conversion is not in the best interests of creditors and the estate." *In re MF Glob. Holdings Ltd.*, 465 B.R. 736, 742 (Bankr. S.D.N.Y. 2012) (quoting 7 COLLIER ON BANKRUPTCY ¶ 1112.05[1]) (internal quotations omitted). The UST's Objection does not demonstrate any such "unusual circumstances." Instead, these circumstances, where the Debtors have sold substantially all of their assets but lack the requisite liquidity to fund a chapter 11 plan and a distribution to general unsecured creditors, present the exact scenario contemplated by the Bankruptcy Code and developed case law for when dismissal is in the best interest of creditors and a debtor's estate. The proposed dismissal orders effectuate the final winddown of the Debtors' estates while minimizing further administrative costs and maximizing the return to creditors in accordance with the Bankruptcy Code's priority scheme. This is achieved by authorizing the Debtors to distribute all

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Dismissal Motion.

remaining cash to administrative expense creditors and providing for the staggered dismissal of the Debtors' cases as soon as they are fully administered to avoid the incurrence of needless additional administrative expenses, which the Debtors cannot afford and which would provide no benefit to creditors. There is nothing unusual or out of the ordinary here. The proposed dismissal orders are tailored to, and justified by, the circumstances of these cases and should be approved.

2. As an initial matter, it is notable that, despite all creditors having received notice of the Dismissal Motion, only the UST has filed an objection to the relief sought. Further, the Dismissal Motion is supported by BSP, the Debtors' Prepetition Secured Lender and DIP Lender. In that regard, while BSP did provide the Debtors with an informal response to the Dismissal Motion, those issues have been resolved in the *Stipulation Regarding Revised Proposed Order of Dismissal* and the amended proposed order (the "**Amended Dismissal Order**") filed contemporaneously with this Reply. The support of the creditor body, including that of BSP, is further evidence that dismissal is in the best interest of creditors. *See Camden Ordinance Mfg. Co. of Ark., Inc. v. U.S. Trustee (In re Camden Ordnance Mfg. Co. of Ark., Inc.),* 245 B.R. 794, 798 (E.D. Pa. 2000). The facts supporting dismissal are uncontroverted by the UST's Objection and therefore the Objection should be overruled and the Dismissal Motion should be granted.

II. REPLY

3. The UST raises a number of issues in the Objection, none of which have merit. Each of the UST's objections is addressed below.

A. The Dismissal Motion is Timely and Appropriate.

4. First, the Objection argues that dismissal is "untenable" because either all of the fourteen Debtors or none of the Debtors should have their respective chapter 11 cases dismissed at once. *See* Obj. at 10. The UST's all or nothing approach, however, has no basis in law.

Dismissal of the Debtors' chapter 11 cases is to be considered on a per debtor basis and cause exists for the dismissal of each of the Debtors' cases in accordance with the procedures set forth in the Dismissal Motion. *See* 11 U.S.C. § 1112 ("the court shall . . . dismiss ***a case*** under this chapter") (emphasis added).

5. In particular, each of the Non-TSA Debtors have fully administered their bankruptcy estates, have liquidated all of their assets, have no avoidance actions or other claims to pursue, and lack the resources to prosecute a plan. Each of the TSA Debtors will also be in the same position as soon as they carry out their obligations under the Amended Transition Services Agreements, as required in connection with the Sale. The proposed Amended Dismissal Order would implement a procedure to allow for the dismissal of the Non-TSA Debtors' cases now, and cut off the further incurrence of administrative expenses in those cases, and allow for the dismissal of the TSA Debtors' cases as soon as they able upon certification of counsel. These procedures serve to maximize the Debtors' resources and benefits all stakeholders.[3] Thus, the Dismissal Motion is not "premature"—the dismissal procedures are justified by the facts and supported by law.

B. *Jevic* Does Not Bar Approval of the Dismissal Motion.

6. Second, citing *Jevic*,[4] the UST argues that the Dismissal Motion "ignores the distribution scheme embodied by the Bankruptcy Code" (Obj. at 12-13) but does not actually identify how anything in the Dismissal Order violates the Bankruptcy Code's priority scheme.

[3] The Debtors further note that there is nothing unusual about a court dismissing certain chapter 11 cases while leaving other jointly administered cases open. *See, e.g.*, *The Great Atlantic & Pacific Tea Company, Inc.* Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. May 5, 2021) [Doc. No. 4810] (on a contested basis, dismissing numerous jointly administered chapter 11 cases while leaving one case open to administer remaining obligations).

[4] *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017).

That is because the Amended Dismissal Order does indeed comport with the priority scheme, and *Jevic*, since the only distributions being made are on account of administrative expense claims.

7. The UST also relies on *Jevic* when it argues that various commonplace provisions in the Dismissal Order (characterized by the UST as "bells and whistles") go beyond "the limits imposed by Congress on relief that can accompany case dismissal." Obj. at 13. *Jevic*, however, simply stands for the proposition that a bankruptcy court cannot approve a dismissal that circumvents the priority scheme established by the Bankruptcy Code without the consent of creditors. *See Jevic*, 137 S. Ct. at 983. It has no bearing on provisions in the Amended Dismissal Order that do not relate to distribution. As noted above, and without contradiction from the UST, the priority scheme is being followed here.

C. The Debtors' Exculpation Provision

8. Third, the UST takes issue with a provision in the initial proposed dismissal order at paragraph 14 which provided for a limited exculpation in favor of the Debtors for postpetition acts in connection with the Dismissal Motion (the "**Exculpation Provision**"). While the Debtors believe that the Exculpation Provision is narrowly tailored and justified under these circumstances, the Debtors have removed that provision from the Amended Dismissal Order.[5]

[5] The Debtors note that courts in this and other districts have approved exculpation provisions that are broader in scope and application than the Exculpation Provision. *See, e.g.*, *In re Eastman Kodak Co.*, Case No. 12-10202 (ALG), at Ex. B ¶ 12.7 (Bankr. S.D.N.Y. Aug. 23, 2013), Doc. No. 4966 (overruling U.S. Trustee objection to exculpation for "any prepetition or postpetition act taken or omitted to be taken in connection with, or arising from or relating in any way to, the chapter 11 cases"); *In re Neff Corp.*, Case No. 10-12610 (SCC), at 42 (Bankr. S.D.N.Y. Sept. 20, 2010), Doc. No. 443 (approving exculpation for "any prepetition or postpetition act taken or omitted to be taken in connection with, or related to formulating, negotiating . . . the Plan"); *In re Charter Commc'ns, Inc.*, Case No. 09-11435 (JMP), at 44 (Bankr. S.D.N.Y. Nov. 17, 2009), Doc. No. 921 (approving exculpation for "any pre-petition or post-petition act taken or omitted to be taken in connection with, or related to . . . the restructuring of the Company").

D. Prior Orders of the Court, including the Final DIP Order and Sale Order, Should Remain Effective Post-Dismissal

9. Fourth, the UST contends that the releases and exculpations set forth in the Final DIP Order and Sale Order (the "**Releases**") should be vacated upon dismissal of the Debtors' chapter 11 cases. *See* Obj. at 14-19. This argument is also without merit. The Releases were approved by this Court upon notice and an opportunity to object to creditors and other parties-in-interest, including the UST. *See* Sale Order ¶ E; Final DIP Order at 4. The UST had a full and fair opportunity to raise any issues it may have had with the Releases in connection with the approval of each of those orders. The UST could have filed an objection or appeared at the hearings to consider those orders to put forth the very same arguments the UST makes in the Objection, including with respect creditor consent and fair consideration, but the UST did not. The UST cannot now ask this Court to unwind those orders. The Sale Order and Final DIP Order have long been final orders of this Court and dismissal of the Debtors' chapter 11 cases should not change that.

E. Cause Exists to Abrogate Section 349(b) of the Bankruptcy Code in the Dismissal Order

10. Fifth, and relatedly, the UST argues that cause has not been shown for relief from section 349(b) of the Bankruptcy Code and, therefore, the Releases should not remain in effect post-dismissal. As an initial matter, it is questionable whether section 349(b) would operate to invalidate the Final DIP Order and/or Sale Order as it only vacates orders arising under certain specified Bankruptcy Code provisions.[6] In addition, it would be unfair, prejudicial, and impossible

[6] *See* 11 U.S.C. § 349(b) (providing that dismissal "vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title"). Further, the legislative history of section 349(b) explains that "the basic purpose of the subsection [b] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. ***This does not necessarily encompass undoing sales of property from the estate to a good faith purchaser. Where there is a question over the scope of the***

to unwind the asset transfers, payments, and other provisions of the Final DIP Order and Sale Order that all parties-in-interest relied upon to the benefit of the estates. All parties-in-interest justifiably relied upon the Final DIP Order and Sale Order and there is no basis, and it would serve no purpose, to place the stakeholders in the uncertain, costly, and impenetrable morass that would result from vacating those orders.

11. In any event, cause certainly exists here to preserve the status quo of the transactions approved by this Court on full notice and opportunity to be heard. These chapter 11 cases engendered numerous transactions, settlements, and related orders that the Debtors, creditors, governmental authorities, and other parties-in-interest negotiated and relied upon in connection with the administration of these estates. The Final DIP Order, Sale Order, and the order appointing the CRO are just a few examples of the heavily negotiated transactions that have benefitted all creditors and parties-in-interest and have allowed the Debtors to maximize value and save jobs during these chapter 11 cases. Unwinding those and other orders entered in these cases would destroy these accomplishments. Thus, to the extent section 349(b) applies to prior orders of the Court in these cases, cause exists to bar its effectiveness under the Dismissal Order.

F. Dissolution of the Debtors

12. Sixth, the UST argues that the Court lacks the authority to dissolve the Debtors in accordance with state law. *See* Obj. at 2, 9. The Dismissal Motion, however, does not ask the Court to dissolve the Debtors. Instead, the motion only seeks authorization for the Debtors to take action under state law to dissolve post-dismissal. Like many of the other provisions objected to by the UST, this is a commonplace provision found in dismissal orders that simply that makes

subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977) (emphasis added).

clear that the Debtors may take action to dissolve post-dismissal. *See* Dismissal Mot. ¶ 63 (citing various dismissal orders). While the Debtors maintain that this provision is appropriate, it has been deleted from the Amended Dismissal Order.

G. Section 305(a) is Not Implicated

13. Finally, the UST argues that dismissal under section 305(a) is not warranted. Obj. at 19. While the Debtors disagree—as set forth above and in the Dismissal Motion, dismissal is in the best interest of creditors—the Debtors did not move for dismissal under 305(a). An inadvertent reference to section 305(a) has been removed from the Amended Dismissal Order.

CONCLUSION

14. Accordingly, the Debtors request that this Court enter (i) the Initial Order, (ii) the Amended Dismissal Order, upon filing of a Certification, and (iii) such other and further relief as the Court may deem just and proper.

Dated: June 4, 2021

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