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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**KG WINDDOWN, LLC, *et al.*,<sup>1</sup>**

**Debtors.**

Chapter 11

Case No. 20-11723 (MG)

(Jointly Administered)

**BSP'S REPLY IN SUPPORT OF THE DISMISSAL MOTION**

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<sup>1</sup> 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.

BSP<sup>2</sup> hereby submits this reply (the “Reply”) in support of the Dismissal Motion,<sup>3</sup> and in response to the U.S. Trustee Objection,<sup>4</sup> and joins the Debtors’ reply. In support of the Reply, BSP relies upon the record in these Chapter 11 Cases and the Boucher Declaration, and respectfully states:

### **PRELIMINARY STATEMENT**

1. Following the successful Court-approved Sale of substantially all of the Debtors’ assets to the Purchaser, the Debtors are positioned for an orderly wind-down of their remaining business activities and the related administration of these Chapter 11 Cases.

2. BSP and the Debtors have negotiated a resolution to these Chapter 11 Cases, which entails modifying the DIP Budget<sup>5</sup> to allow for payment of Allowed Administrative Claims in full and Allowed Professional Fees in the amounts agreed, and to otherwise minimize the time and cost to resolve the Chapter 11 Cases.<sup>6</sup>

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<sup>2</sup> BSP Agency, LLC, Providence Debt Fund III L.P., Benefit Street Partners SMA-C L.P., Benefit Street Partners SMA LM L.P., Providence Debt Fund III Master (Non-US) Fund L.P., and Benefit Street Partners SMA-C SPV L.P. (collectively, “BSP”).

<sup>3</sup> *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* (the “Dismissal Motion”) (ECF No. 480). Capitalized terms used but not otherwise defined herein shall have the meanings ascribed thereto in the Dismissal Motion.

<sup>4</sup> *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* (the “U.S. Trustee Objection”) (ECF No. 482).

<sup>5</sup> Prior to the hearing on the Dismissal Motion, the Debtors will file with the Court the *Stipulation Regarding Revised Proposed Order of Dismissal* (the “Stipulation”) and revised versions of the Initial Order and the Dismissal Order (together, the “Revised Dismissal Orders”). The Claims Waterfall Schedule annexed to the revised Initial Order as Exhibit A modifies the DIP Budget (as defined therein) to permit final payments to Allowed Administrative Claims in full and Allowed Professional Fees in the amounts agreed.

<sup>6</sup> BSP did not support the Dismissal Motion at the time it was filed with the Court. BSP had certain objections to the Dismissal Motion which it informally conveyed to the Debtors. Since then, BSP and the Debtors engaged in negotiations and successfully resolved BSP’s informal objections. The Stipulation and the Revised Dismissal Orders memorialize the parties’ resolution.

3. The Debtors' decision to pursue the dismissal of the Chapter 11 Cases is only opposed by the U.S. Trustee (and none of the thousands of creditors and parties in interest that were provide notice of the Dismissal Motion).<sup>7</sup> As set forth herein, the U.S. Trustee Objection articulates policy concerns that have no bearing on the facts here, and are unmoored from supporting legal authority. Accordingly, the Court should overrule the U.S. Trustee Objection and grant the relief sought in the Dismissal Motion, as modified by the Stipulation and as set forth in the Revised Dismissal Orders.

### **REPLY**

#### **A. Dismissal of the Chapter 11 Cases is Timely and Appropriate.**

4. The U.S. Trustee argues that the Dismissal Motion is premature, and suggests that the Debtors should wait until all of the Debtors "have completed the wind-down of their estate, which includes any time needed to transfer the liquor licenses."<sup>8</sup> The U.S. Trustee's position is contrary to the undisputed realities of these Chapter 11 Cases and applicable law.

5. The Debtors sold substantially all of their assets and transitioned their business to the Purchaser. There are no unencumbered assets remaining in the estates and there is no reasonable prospect of distributions to holders of unsecured claims. In essence, the Debtors have, subject to distributions to holders of Allowed Administrative Claims and Allowed Professional Fees in the amounts agreed, completed the administration of their estates. The sole exception is three TSA Debtors who have limited continuing obligations under the Amended Transition Services Agreements and whose cases will remain open until such obligations are satisfied.

6. Moreover, the U.S. Trustee ignores the fact that the Debtors are administratively

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<sup>7</sup> *Affidavit of Service* (ECF No. 481) (demonstrating the service of the *Notice of Hearing* in connection with the Dismissal Motion).

<sup>8</sup> U.S. Trustee Obj. at 10.

insolvent. Forcing all of the Non-TSA Debtors to remain in chapter 11, while U.S. Trustee fees and administrative expenses continue to accrue serves no purpose, and instead will only decrease recoveries for holders of Allowed Administrative Claims and Allowed Professional Fees. There is no reason to continue the Non-TSA debtor cases, particularly when the Allowed Administrative Claims, Allowed Professional Fees in the amounts agreed and the U.S. Trustee fees will be paid and satisfied.

7. Furthermore, it is not out of the ordinary for courts to authorize a staggered dismissal processes where a certain chapter 11 case remains open for a certain purpose, while the associated chapter 11 cases are dismissed. *See, e.g., The Great Atlantic & Pacific Tea Company, Inc.* Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. May 5, 2021) (ECF No. 4810) (on a contested basis, approving a dismissal process that converted one debtor into a “Wind Down Co.” for the purpose of administering certain remaining obligations of the debtors, while dismissing the remaining associated chapter 11 cases).

**B. The Dismissal Procedures Comply with the Priority Structure of the Bankruptcy Code and the Supreme Court’s Holding in *Jevic*.**

8. The U.S. Trustee asserts that the Dismissal Motion improperly seeks to achieve chapter 11 plan relief through the Dismissal Order in direct contravention of *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017).<sup>9</sup> Not true.

9. *First, Jevic* does not *per se* prohibit approval of structured dismissals. Rather, *Jevic* requires that a dismissal, liquidation, or a chapter 11 plan respect the fundamental priority structure established by the Bankruptcy Code. *Jevic*, 137 S. Ct. at 983 (“We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions

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<sup>9</sup> U.S. Trustee Obj. at 10-12.

**that do not follow ordinary priority rules** without the affected creditors' consent? Our simple answer to this complicated question is 'no.'" (emphasis added). The U.S. Trustee has not, and cannot, argue that the proposed resolution of the Chapter 11 Cases through the Initial Order and the Dismissal Order does not comply with the priority provisions of the Bankruptcy Code. In fact, all Allowed Administrative Claims, Allowed Professional Fees in the amounts agreed, and all US Trustee Fees will be paid. And, the ongoing costs and expenses of the TSA Debtors are funded in accordance with the Amended Transition Services Agreement.<sup>10</sup>

10. *Second*, the Court is well within its discretionary authority under the Bankruptcy Code to authorize and order the remaining aspects<sup>11</sup> of the proposed resolution of the Chapter 11 Cases. The relief requested is well within the bounds of what Courts in this jurisdiction and others have regularly ordered when dismissing corporate chapter 11 cases.<sup>12</sup>

11. Therefore, the U.S. Trustee Objection should be overruled on this point.

**C. BSP Is Currently The Beneficiary Of The Exculpation And Release Provisions Granted In the Final DIP Order and the Sale Order Which are Final Orders.**

12. The U.S. Trustee argues that the Dismissal Order bestows the "equivalent of third-party releases"<sup>13</sup> in favor of BSP because the Debtors are seeking for, *inter alia*, the Sale Order to remain in full force and effect after the Chapter 11 Case are dismissed.<sup>14</sup> Inexplicably, the U.S.

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<sup>10</sup> See, e.g., Interim Beverage Management Agreement between Atlantic City IM Rest, LLC and IMNY AC, LLC, dated February 2, 2021, § 2 ("[Atlantic City IM Rest, LLC] shall be responsible for and obligated to pay the [all costs of operating the Restaurant except for Alcohol Liabilities and Employee Costs.]"). An executed copy of this Interim Beverage Management Agreement was filed on this Court's docket at ECF No. 438.

<sup>11</sup> Including, but not limited to, authorizing (i) all prior orders, judgments and stipulations to remain binding and unaffected by dismissal; and (ii) a staggered dismissal of the Debtors.

<sup>12</sup> See Reply ¶¶ 4-7 (authority to permit a staggered dismissal); 15-18 (authority to authorize all prior orders, judgments and stipulations to remain binding and unaffected by dismissal).

<sup>13</sup> U.S. Trustee Obj. at 14-18.

<sup>14</sup> Dismissal Order ¶ 3.

Trustee equates the exculpation provision under the Sale Order (the “Sale Order Exculpation”)<sup>15</sup> to a third party release.<sup>16</sup>

13. BSP is not seeking any affirmative relief under the Dismissal Order. The U.S. Trustee’s suggestion that the Dismissal Motion seeks a new third party release is without any foundation. And, any indirect attack on the Sale Order Exculpation is legally barred. The Sale Order is a final and non-appealable order entered by this Court close to 6 months ago. Thousands of creditors and parties in interest received notice of the Sale, *including the U.S. Trustee*, and not a single person filed an objection or submitted informal comments concerning any aspect of the Sale Order Exculpation. The Dismissal Motion is not a forum for the U.S. Trustee to litigate an issue that is law of the case and not subject to challenge.

14. The U.S. Trustee’s argument also overlooks that the Sale Order and the Final DIP Order<sup>17</sup> will remain in full force and effect even without the requested “for avoidance of doubt” language in the Dismissal Order regarding the continued efficacy of prior orders. The power of Bankruptcy Code Section 349(b) to reinstate transfers and vacate orders and judgments is limited

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<sup>15</sup> Sale Order ¶ 34 (“**Exculpation of Buyer.** Effective upon the Closing, and to the maximum extent available under applicable Law, neither the Buyer nor any of its members, partners, employees, Affiliates, successors, assigns, advisors, or representatives shall have or incur any Liability to, or be subject to any action by, the Debtors, their estates, or any of their predecessors, successors or assigns, including any trustee or examiner appointed in these cases or upon a conversion of these cases to chapter 7 of the Bankruptcy Code, any official committee of unsecured creditors, other fiduciaries that are or may be appointed in these cases, or any Persons or entities, arising from, based on, or related in any way to the negotiation, documentation, or due diligence in respect of, or the performance or consummation of the Asset Purchase Agreement and any related agreements entered into in connection therewith, the Debtors, their estates, and the conduct of their business prior to the Closing, and the entry into and consummation of the Sale Transaction, other than (with respect to the Buyer only) the Buyer’s obligations under this Order or the Asset Purchase Agreement or any related agreements entered into in connection with the Sale Transaction; provided that, to the extent that a claim or cause of action by the Debtors, their estates, or any of their predecessors, successors, or assigns is determined by order of this Court or any court of competent jurisdiction to have resulted from fraud, gross negligence, or willful misconduct of the Buyer, such claim or cause of action shall not be released against the Buyer.”).

<sup>16</sup> U.S. Trustee Obj. ¶ 13.

<sup>17</sup> The Final DIP Order also contains exculpation and release provisions that are binding and effective. *See* Final DIP Order ¶¶ 31, 38, 40.

to specific provisions of the Bankruptcy Code.<sup>18</sup> Section 349(b) is silent as to whether transfers authorized under and orders entered pursuant to Bankruptcy Code Sections 105(a), 363 and 364 are reinstated or vacated, as applicable, after a bankruptcy case is dismissed. At least one bankruptcy court, albeit in a chapter 13 context, has held that “that the sale order survives the dismissal of the case.” *In re Witte*, 279 B.R. 585, 589 (Bankr. E.D. Cal. 2002). Moreover, Bankruptcy Code Sections 363(m) and 364(e) underscore the bankruptcy policy and market importance of the continued efficacy of this Court’s Final DIP Order and Sale Order. As the transfers, payments and other provisions of these, and the other, orders entered by the Court have been fully implemented Section 349(b)(3) by its terms does not apply to these orders. Nonetheless, for the avoidance of doubt, as has been done in other cases, the Dismissal Order should be clear that all prior orders of the Court remain in full force and effect.

**D. Prior Stipulations and Orders Should Remain  
Binding and Continue to Have Full Force and Effect.**

15. The U.S. Trustee submits that the Debtors have not established “cause” for the Court to allow all prior stipulations and orders be given continued effect, notwithstanding Bankruptcy Code Section 349.<sup>19</sup> The U.S. Trustee’s contention is contrary to the undisputed record of these Chapter 11 Cases. The Debtors have been in chapter 11 for close to a year. They have obtained this Court’s approval of a number of transactions and settlements that impact property of the estate and liabilities, and upon which various stakeholders have relied, taken actions and refrained from taking actions, and expended resources. These include, but are not

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<sup>18</sup> 11 U.S.C. 349(b) (“(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under . . . (1) reinstates— (A) any proceeding or custodianship superseded under section 543 of this title; (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and (C) any lien voided under section 506(d) of this title; (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and (3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.”).

<sup>19</sup> U.S. Trustee Obj. at 18.

limited to: the Final DIP Order, the Sale Order, the CRO Appointment Order, stipulations and orders concerning the Las Vegas restaurant location,<sup>20</sup> and stipulation and orders concerning payment of pre-petition claims.<sup>21</sup>

16. The parties who have reasonably relied on such prior stipulations and orders are numerous and varied, including equity holders, secured and unsecured creditors, customers, suppliers, and employees. The prior stipulations and orders were entered into and approved for the benefit of the Debtors' estates and stakeholders. Specifically, the Sale Order approved the sale of substantially all of the Debtors' assets. Similarly, the finality of the releases, stipulations, and protections contained in the Final DIP Order were necessary to induce BSP to extend postpetition financing. And the CRO Appointment Order, was a necessary predicate for these Chapter 11 Cases to proceed in an efficient manner. As a practical matter, the transactions consummated in reliance upon these orders are infeasible and impossible to unwind.

17. The CRO Appointment Order has particularly been beneficial, bringing necessary stability to, at the time, a free-fall chapter 11 bankruptcy proceeding. Such stability permitted the Debtors to successfully prosecute a fulsome Sale process that resulted in a sale of substantially all of the Debtors' assets and the preservation of jobs for the Debtors' former employees. Indeed, it is that stability that is needed now to bring these Chapter 11 Cases over the finish line.

18. Indeed, courts have regularly allowed orders to be given continued effect after a dismissal, notwithstanding section 349 of the Bankruptcy Code. *See, e.g., The Great Atlantic & Pacific Tea Company, Inc.* Case No. 15-23007 (RDD) (Bankr. S.D.N.Y. May 5, 2021) (ECF No.

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<sup>20</sup> *Stipulation and Order Between the Debtors and Forum Shops, LLC* (ECF No. 459); *Stipulation and Order Authorizing Rejection of Certain Unexpired Nonresidential Real Property Lease Effective as of December 14, 2020* (ECF No. 437).

<sup>21</sup> *Stipulation and Consent Order Allowing Debtors to Pay Prepetition Claims of Primal Customs Cutting, LLC* (ECF No. 334); *Order Establishing Procedures for the Assertion and Payment of PACA Claims, PASA Claims, and Related Relief Pursuant to Sections 105(a), 363 and 507(a) of the Bankruptcy Code* (ECF No. 261).

4810) (on a contested basis, providing that prior orders will remain in full force and effect and will survive dismissal); *In re Al Liebers Golf Equipment, Inc., d/b/a The World of Golf*, Case No. 12-23698 (RDD) (Bankr. S.D.N.Y. Aug. 28, 2013) (ECF No. 135) (on an uncontested basis, providing that prior orders will remain in full force and effect and will survive dismissal); *In re Harvey Electronics, Inc.*, Cash No. 07-14051 (ALG) (Bankr. S.D.N.Y. Sep. 16, 2008) (on an uncontested basis, providing that prior orders survive dismissal).

### **CONCLUSION**

**WHEREFORE**, BSP respectfully requests that the Court: (i) overrule the U.S. Trustee Objection; (ii) enter the Revised Dismissal Orders; and (iii) grant such other relief as this Court deems just and appropriate.

Dated: June 4, 2021  
New York, New York

Respectfully submitted,

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