

1 PAUL HASTINGS LLP
Todd M. Schwartz (Cal. Bar No. 288895)
2 Will Clark Farmer (Cal. Bar No. 329170)
1117 S. California Avenue
3 Palo Alto, California 94304
Telephone: (650) 320-1800
4 Facsimile: (650) 320-1900
E mail: toddschwartz@paulhastings.com
5 willfarmer@paulhastings.com

6 Nathan S. Gimpel (admitted *pro hac vice*)
Matthew Smart (admitted *pro hac vice*)
7 71 South Wacker Drive, Suite 4500
Chicago, Illinois 60606
8 Telephone: (312) 499-6000
Facsimile: (312) 499-6100
9 E mail: nathangimpel@paulhastings.com
matthewsmart@paulhastings.com

10 *Proposed Attorneys for Debtor and*
11 *Debtor in Possession*

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

14 In re,
15 SVXR, INC., a Delaware corporation,¹

16
17 Debtor.

Case No. 21-51050 (SLJ)

Chapter 11

**DEBTOR'S REPLY IN SUPPORT OF
DEBTOR'S APPLICATION FOR
ENTRY OF AN ORDER
(I) AUTHORIZING THE
EMPLOYMENT AND RETENTION OF
GREENHILL & CO., LLC AS
INVESTMENT BANKER TO THE
DEBTOR, EFFECTIVE AS OF
PETITION DATE, AND (II) GRANTING
RELATED RELIEF**

Date: October 5, 2021
Time: 2:00 pm (PT)
Place: United States Bankruptcy Court
Crtrm: 9, via Zoom
280 South First Street
San Jose, CA 95113

28 ¹ The last four digits of SVXR, Inc.'s federal tax identification number are (1893). The mailing address for SVXR, Inc. is 90 Bonaventura Drive, San Jose, California 95134.

1 The above-captioned debtor and debtor in possession (the “Debtor”) respectfully submits
2 this reply (this “Reply”) ² in support of the *Debtor’s Application for Entry of an Order*
3 *(I) Authorizing the Employment and Retention of Greenhill & Co., LLC as Investment Banker to*
4 *the Debtor, Effective as of the Petition Date, and (II) Granting Related Relief* [Docket No. 113]
5 (the “Application”) ³ and in response to the objection filed by the United States Trustee for the
6 Northern District of California (the “U.S. Trustee”) to the Application [Docket No. 123]
7 (the “Objection”). In support of the Application, the Debtor submits the original declaration of
8 Christopher T. Grubb in support of the Application (the “Original Declaration”), attached as
9 Exhibit C to the Application, and the *Supplemental Declaration of Christopher T. Grubb in Support*
10 *of Debtor’s Application for Entry of an Order (I) Authorizing the Employment and Retention of*
11 *Greenhill & Co., LLC as Investment Banker to the Debtor, Effective as of the Petition Date, and*
12 *(II) Granting Related Relief* (the “Supplemental Declaration”), filed contemporaneously herewith.
13 In further support of the Application, the Debtor respectfully states as follows:

14 **Preliminary Statement**

15 For over a year, Greenhill has worked with the Debtor to market and secure a transaction
16 (without any payments beyond a *de minimis* expense reimbursement) based on the promise that the
17 Debtor would pay Greenhill a customary fee on the closing of the transaction, subject to bankruptcy
18 court approval if necessary, including approval of Greenhill’s fee structure under section 328 of the
19 Bankruptcy Code. Greenhill has upheld its end of the bargain, having helped the Debtor secure
20 and close the sale of substantially all of its assets for an amount that is likely to provide full or near-
21 full recoveries for the Debtor’s unsecured creditors—an overwhelmingly positive result that
22 provides immense value for the Debtor’s estate and creditors. Through the Application, the Debtor
23 seeks to uphold its end of the bargain and fulfill its obligations to Greenhill. However, the U.S.
24 Trustee objects to this relief, arguing that Greenhill has failed to disclose necessary information
25 and the terms of Greenhill’s Engagement Letter are unreasonable. *See* Obj. ¶¶ 1–5.

26
27 ² To the extent this Reply does not comply in all respects with the requirements of the Bankruptcy Local Rules for
28 the United States District Court for the Northern District of California (the “Local Rules”), the Debtor respectfully
requests a waiver of such requirements.

³ Capitalized terms used but not otherwise defined in this Reply have the meanings used in the Application.

1 The Debtor has worked with Greenhill to revise the proposed Order and supplement its
2 disclosures to resolve certain of the U.S. Trustee’s objections. Specifically, the Supplemental
3 Declaration discloses the amount paid to Greenhill prior to the Petition Date (\$287), clarifies that
4 Greenhill’s affiliates do not have any connections to the Potential Parties in Interest other than as
5 disclosed in the Original Declaration and the Supplemental Declaration, and discloses that neither
6 Greenhill nor its affiliates have any connections to Bruker Nano, Inc. (the purchaser). *See Supp.*
7 *Decl. **2–3.* Similarly, the Debtor revised the proposed Order to address certain of the U.S.
8 Trustee’s concerns, such as the approval of terms that may conflict with *Baker Botts L.L.P. v.*
9 *ASARCO LLC.* *See Notice of Revised Proposed Order (I) Authorizing the Employment and*
10 *Retention of Greenhill & Co., LLC as Investment Banker to the Debtor, Effective as of the Petition*
11 *Date, and (II) Granting Related Relief,* filed contemporaneously herewith, at Ex. A, ¶ 6 (the
12 “Revised Order”). As such, the Debtor believes that the U.S. Trustee’s objections with regard to
13 these issues have been resolved. To the extent the U.S. Trustee disagrees, the Debtor requests that
14 these objections be overruled.

15 The remainder of the U.S. Trustee’s objections should be overruled. The terms of
16 Greenhill’s retention are reasonable given the complexity of this chapter 11 case, in line with the
17 market for similar services, and regularly approved by bankruptcy courts. Based on the foregoing,
18 and for the reasons set forth below, the relief requested in the Application is reasonable, consistent
19 with the Bankruptcy Code and applicable law, and in the best interest of the Debtor’s estate and all
20 stakeholders. Accordingly, the Debtor respectfully requests that the Court enter the proposed
21 Revised Order and overrule the Objection.

22 **Reply**

23 **I. Greenhill’s Fee Structure Should be Approved under section 328 of the Bankruptcy**
24 **Code.**

25 Section 328(a) of the Bankruptcy Code provides that a debtor may employ and retain a
26 professional person under section 327(a) “on any reasonable terms and conditions of employment,
27 including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent
28 fee basis.” Once approved under section 328(a), “the bankruptcy court may alter the agreed-upon

1 compensation only ‘if such terms and conditions prove to have been improvident in light of
2 developments not capable of being anticipated at the time of the fixing of such terms and
3 conditions.’” *In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002) (quoting 11 U.S.C. § 328(a)).
4 “Congress enacted [section] 328(a) to eliminate the previous uncertainty associated with
5 professional compensation in bankruptcy proceedings.” *In re ASARCO, L.L.C.*, 702 F.3d 250, 258
6 (5th Cir. 2012) (noting that the certainty afforded by section 328 comes “at the expense of
7 flexibility”). Here, Greenhill’s fee structure under section 328 is reasonable and should be
8 approved.

9 Greenhill has been providing services for the Debtor for over a year. *See* Orig. Decl. *3.
10 These services have included managing multiple marketing processes for a sale, recapitalization,
11 or debt-financing transaction. *See Amended Declaration of Daniel Trepanier in Support of First*
12 *Day Motions and Related Relief* [Docket no. 45-1], at **10–11. During this time, Greenhill
13 received no payments from the Debtor other than \$287 on account of an expense reimbursement.
14 *See* Supp. Decl. *2. The U.S. Trustee’s sole argument against approval of the Restructuring
15 Transaction Fee under section 328 of the Bankruptcy Code relates not to the amount Greenhill may
16 receive on account of such fee, but rather to Greenhill’s lack of disclosure regarding prepetition
17 payments. *See* Obj. ¶ 34. As the Supplemental Declaration makes clear, Greenhill’s sole
18 compensation for its over year-long engagement with the Debtor will be the Restructuring
19 Transaction Fee. *See* Supp. Decl. *2. Given the complexity of Greenhill’s engagement, including
20 its length and multiple marketing efforts involved, such amount is reasonable. Greenhill’s
21 engagement with potential purchasers of the Debtor’s assets and other interested parties was critical
22 to realizing value for the Debtor’s stakeholders. As such, the Debtor respectfully requests that the
23 Court approve the Restructuring Transaction Fee under section 328 of the Bankruptcy Code.

24 **II. The Streamlined Compensation Procedures Are Reasonable, Appropriate Given the**
25 **Facts of this Case, and Should Be Approved.**

26 The streamlined compensation procedures set forth in the Application and proposed Order
27 are reasonable and appropriate in this case. Nevertheless, the Debtor and Greenhill revised the
28 procedures to provide additional parties with additional notice. *See* Revised Order ¶ 4. The revised

1 procedures contemplate Greenhill filing a Sale Declaration, which shall be deemed a final fee
2 application, setting forth the fees earned and expenses incurred by Greenhill. *Id.* The Debtor will
3 serve the Sale Declaration on the U.S. Trustee and parties requesting notice pursuant to Bankruptcy
4 Rule 2002, who will have 14 days to review and object to such declaration. *Id.* If no objections
5 are filed prior to the deadline, the Debtor is authorized to pay Greenhill the requested amount.

6 These streamlined procedures balance the need for disclosure with the facts and
7 circumstances of this case. Generally, the contents of the Sale Declaration will comply with
8 Bankruptcy Rule 2016 other than the requirement to set forth the “time expended,” the inclusion of
9 which provides limited to no utility in this case. Here, the Restructuring Transaction Fee is the sole
10 source of Greenhill’s monetary compensation and is based, not on time worked, but rather on the
11 proceeds received by the Debtor on account of the sale of substantially all of its assets. *See Orig.*
12 *Decl.* *5. As such, maintaining postpetition time records would be of limited to no use to parties
13 in interest. This is particularly true here where the sale of the Debtor’s assets has closed and there
14 is a pending motion to dismiss. Moreover, the U.S. Trustee acknowledges the limited utility of
15 maintaining postpetition time records by observing that “Greenhill provided most of its services
16 prior to the Petition Date.” *Obj.* ¶ 33. Further, assuming that the Court approves Greenhill’s
17 compensation under section 328 of the Bankruptcy Code, there is no reasonableness inquiry to be
18 performed under section 330, much less one requiring postpetition time entries of Greenhill. *See*
19 *In re B.U.M. Intern., Inc.*, 229 F.3d 824, 829 (9th Cir. 2000) (“There is no question that a
20 bankruptcy court may not conduct a [section] 330 inquiry into the reasonableness of fees and their
21 benefit to the estate if the court already approved the professional’s employment under [section]
22 328”).

23 As such, the limited waiver of the requirement to maintain time records is reasonable and
24 appropriate. Further, bankruptcy courts regularly approve such relief. *See, e.g., In re Century 21*
25 *Dept. Stores LLC*, No. 20-1207 (SCC) (Bankr. S.D.N.Y. Oct. 9, 2020) [Docket No. 201] (waiving
26 the requirement to maintain time records); *In re SFP Franchise Corp.*, No. 20-10134 (JTD) (Bankr.
27 D. Del. Feb. 26, 2020) [Docket No. 253] (same); *In re Fred’s, Inc.*, No. 19-11984 (CSS) (Bankr.
28 D. Del. Oct. 25, 2019) [Docket No. 375] (same); *In re Interlogic Outsourcing, Inc.*, No. 19-31445

1 (HCD) (Bankr. N.D. Ind. Oct. 10, 2019) [Docket No. 391] (same); *In re Charming Charlie*
2 *Holdings Inc.*, No. 19-11534 (CSS) (Bankr. D. Del. Sept. 10, 2019) [Docket No. 341] (same).
3 Accordingly, the Debtor respectfully requests that the Court approve the compensation procedures
4 as set forth in the Revised Order.

5 **III. The Indemnity Provisions as Modified By the Proposed Order Are Reasonable and**
6 **Should Be Approved.**

7 The U.S. Trustee argues the Indemnification Provisions in the Engagement Letter are
8 unreasonable because they do not expressly carve-out claims for negligence. *See* Obj. ¶ 37. The
9 Debtor disagrees. There is no *per se* rule that indemnification provisions that do not carve-out
10 claims for negligence are unreasonable. *In re Metricom, Inc.*, 275 B.R. 370, 371 (Bankr. N.D. Cal.
11 2002). Instead, like all other components of professional compensation, they are evaluated based
12 on their reasonableness. *Id.* When evaluating the reasonableness of such provisions, reference is
13 typically made to the market and whether the requested provision is consistent with market practice.
14 *See United Artists Theatre Co. v. Walton*, 315 F.3d 217, 229 (3d Cir. 2003) (recognizing a “market-
15 driven’ approach” when deciding “what constitutes ‘reasonable’ compensation for professionals”);
16 *In re Baltimore Emergency Servs. II, LLC*, 291 B.R. 382, 386 (Bankr. D. Md. 2003) (recognizing
17 a “market driven” approach to reasonableness).

18 A review of the market demonstrates that “[i]ndemnification of financial advisors against
19 their own negligent conduct is becoming a common market occurrence.” *United Artists*, 315 F.3d
20 at 229. Indeed, numerous courts have approved provisions substantially similar to those at issue
21 here. *See, e.g., id.* at 235 (approving indemnity provision that did not carve out negligence); *In re*
22 *Joan & David Halpern Inc.*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000) (approving an indemnity
23 provision that covered ordinary negligence); *In re NPC Int’l, Inc.*, No. 20-33353 (DRJ) (Bankr.
24 S.D. Tex. Dec. 16, 2020) [Docket No. 1233] (approving indemnification except in cases of bad-
25 faith, self-dealing, breach of fiduciary duty, gross negligence, or willful misconduct); *In re Pacific*
26 *Drilling S.A.*, No. 20-35212 (DRJ) (Bankr. S.D. Tex. Dec. 16, 2020) [Docket No. 224] (same); *In*
27 *re Glob. Eagle Entm’t, Inc.*, No. 20-11835 (JTD) (Bankr. D. Del. Aug. 8, 2020) [Docket No. 278]

28

1 (same); *In re MTE Holdings LLC*, No. 19-12269 (CSS) (Bankr. D. Del. July 29, 2020) [Docket No.
2 1373] (same).

3 Not only are the Indemnification Provisions in line with the market, they were negotiated
4 at arm's length and in good faith and comprise a critical element of the overall compensation
5 payable to Greenhill under the of the Engagement . *See* Orig. Decl. *7. The Debtor believes that
6 the provisions are reasonable, as demonstrated by its willingness to enter into the Engagement
7 Letter. Nevertheless, as reflected in the proposed Order, Greenhill has agreed to subject any request
8 for indemnification to review by the Court during the pendency of this chapter 11 case. *See* Revised
9 Order ¶ 3. These additional restrictions on the Indemnification Provisions further demonstrate their
10 reasonableness in this case. Accordingly, the Debtor respectfully requests that the Court approve
11 the Indemnification Provisions, as modified by the proposed Order.

12 Conclusion

13 For the foregoing reasons, the Debtor respectfully requests that the Court overrule the
14 Objection and enter the Revised Order approving the Application.

1 Dated: September 30, 2021

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAUL HASTINGS LLP

By /s/ Todd M. Schwartz
TODD M. SCHWARTZ

*Proposed Attorneys for Debtor and
Debtor in Possession*