

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SGR WINDDOWN, INC., et al.,¹

Debtors.

Chapter 11

Case No. 19-11973 (MFW)
(Jointly Administered)

Hearing Date: May 12, 2020 at 2:00 p.m.

Objection Deadline: May 5, 2020 at 4:00 p.m.

**MOTION OF THE DEBTORS AND DEBTORS-IN-POSSESSION FOR
ORDER PURSUANT TO 11 U.S.C. § 105(A) AND FED. R. BANKR.
P. 9019(B) AUTHORIZING AND APPROVING SETTLEMENT**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”), respectfully submits this motion (the “Motion”) pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. Pro. 9019(b) to approve a settlement agreement (the “Settlement Agreement”)² between the Debtors, the official committee of unsecured creditors (the “Committee”), Joshua Resnick (“Mr. Resnick”), and Rosie O’Neill (“Ms. O’Neill,” and together with Mr. Resnick, the “Insider Claimants”), and in support thereof, the Debtors respectfully submit as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number or Canadian Revenue Agency, as applicable are: (1) SGR Winddown, Inc., a Delaware corporation (4356); (2) SGR Winddown International, LLC, a Delaware limited liability company (1254); and (3) SGR Canada Winddown Legacy, Ltd. (4480). The location of the Debtors’ corporate headquarters is 1700 E. Walnut Ave., 5th Floor, El Segundo, California 90245.

² Capitalized terms used but not defined herein shall have the meaning as defined in the Settlement Agreement.

BACKGROUND

3. On September 6, 2019 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”), thereby commencing the above-captioned chapter 11 cases (the “Chapter 11 Cases”);

4. Resnick and O’Neill have asserted or threatened potential claims against certain of the Debtors’ current or former officers or directors arising from or relating to their employment with the Debtors (collectively, the “D&O Claims”), which claims, if pursued, may give rise to indemnification or defense obligations owed by the Debtors, their estates, or insurance policies.

5. On October 10, 2019, Mr. Resnick filed proof of claim 56 (the “Resnick Claim”) against Sugarfina, Inc. (“Sugarfina”) by and through which he asserted (i) a secured claim in the amount of \$8,723,431.51, secured by a lien on all of the assets of Debtors, plus interest of 8.5% Sugarfina and granted pursuant to that certain Secured Subordinated Promissory Note and Security Agreement, (ii) a contingent claim against Sugarfina for indemnification based on that certain Indemnity Agreement, dated as of September 20, 2016, arising out of that certain Guaranty, dated September 19, 2016, (iii) contingent claims related to agreements or understandings with the Debtors, other corporate governance documents, including, but not limited to, bylaws and articles of incorporation of the Debtors, or applicable law; and (iv) certain claims related to a credit card issued to Mr. Resnick and utilized for business expenses of the Debtors.

6. On November 4, 2019, Ms. O’Neill filed a proof of claim assigned claim number 109 (the “O’Neill Claim,” and, together with the Resnick Claim, the “Proofs of Claim”) against

Sugarfina asserting (i) a contingent claim against Sugarfina for indemnification based on that certain Indemnity Agreement, dated as of September 20, 2016, arising out of that certain Guaranty, dated September 19, 2016, and (ii) contingent claims related to agreements or understandings with the Debtors, other corporate governance documents, including, but not limited to, bylaws and articles of incorporation of the Debtors, or applicable law.

7. On February 24, 2020, the Debtors filed a (i) Plan of Reorganization for SGR Winddown, Inc. and Affiliated Debtors Dated February 24, 2020 [D.I. 518] (the “Plan”); (ii) Disclosure Statement for the Plan of Reorganization for SGR Winddown, Inc. and Affiliated Debtors Dated February 24, 2020 [D.I. 517] (as amended, the “Disclosure Statement”); and (iii) Debtors’ Motion for Entry of an Order (I) Approving the Adequacy of Information in the Disclosure Statement, (II) Approving The Solicitation and Notice Procedures, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief [D.I. 519].

8. On March 24, 2020, the Insider Claimants filed a Reservation of Rights and Protective Objection to the Plan [D.I. 556] (the “Protective Objection”).

9. On March 30, 2020, the Bankruptcy Court entered an Order approving the Disclosure Statement Motion [Docket No. 568] (the “Disclosure Statement Order”) that, among other things, approved solicitation procedures, set a deadlines for voting on the Plan, and scheduled a hearing to consider confirmation of the Plan,

10. The Debtors and the Committee have reached a resolution (the “Proposed Settlement”) with the Insider Claimants as set forth in the Settlement Agreement, a copy of

which is attached hereto as **Exhibit A**, which provides, amount other things:³

- (i) Mr. Resnick shall have an allowed non-priority general unsecured claim in the amount of six million dollars (\$6,000,000.00) (the “Liquidated Claim”), which will be subordinated in all respects to all allowed administrative, priority and secured claims, and other than the Liquidated Claim, Mr. Resnick shall not seek or be entitled to any further recoveries on account of the Resnick Claim, from the Debtors, the Debtors’ estates, or the Reorganized Debtors, and their respective assets and properties.
- (ii) The Insider Claimants will each agree to vote in favor of the Plan and not to opt out of the Releases contained in Article VIII of the Plan.
- (iii) The parties agreed to the following releases:
 - (a) The Debtors and the Debtors’ estates, each on their own behalf and on behalf of their successors, assigns, affiliates, and representatives (including any current or subsequently appointed committees, chapter 11 or chapter 7 trustee and/or any trustee of a liquidating trust or similar fiduciary under any confirmed plan and/or other mechanism) (collectively, the “Releasing Debtor Parties”) forever discharge each of the Insider Claimants;
 - (b) Mr. Resnick forever discharges the Debtors and the Debtors’ estates, each on their own behalf and on behalf of their successors, assigns, affiliates, representatives, and any current or former directors and officers (including any current or subsequently appointed committees, chapter 11 or chapter 7 trustee and/or any trustee of a liquidating trust or similar fiduciary under any confirmed plan and/or other mechanism) (collectively, the “Released Debtor Parties”) of and from any and all manner of actions, causes of action, suits, debts, accounts, covenants, contracts, controversies, agreements, variances, damages, judgments, claims, demands, duties and obligations of any nature whatsoever, whether present or future, whether known or unknown, whether suspected or unsuspected, whether liquidated or unliquidated, whether matured or unmatured, which Resnick, now has, or can, shall or may have at any time against the Released Debtor Parties, including but not limited to, the D&O Claims; provided, however, that the foregoing shall not apply with respect to (i) any D&O Claims that are raised by Resnick as a counterclaim, offset or otherwise to an affirmative action, claim or

³ The following is a summary of the terms of the Settlement Agreement. In the event and to the extent of any inconsistency between the Settlement Agreement and the summary herein, the terms of resolution amount the parties shall be governed by Settlement Agreement.

litigation commenced by a D&O against Resnick, or (ii) Sugarfina Holdings LLC, Sugarfina Acquisition Corp., Sugarfina USA LLC, and each of their respective affiliates, predecessors, and assigns; and

- (c) Ms. O'Neill forever discharges the Released Debtor Parties of and from any and all manner of actions, causes of action, suits, debts, accounts, covenants, contracts, controversies, agreements, variances, damages, judgments, claims (including the amounts asserted in the O'Neill Claim, which is hereby waived and released, and shall be marked as disallowed and expunged on the claims register maintained in the Chapter 11 Cases), demands, duties and obligations of any nature whatsoever, whether present or future, whether known or unknown, whether suspected or unsuspected, whether liquidated or unliquidated, whether matured or unmatured, which O'Neill, now has, or can, shall or may have at any time against the Released Debtor Parties, including but not limited to, the D&O Claims; provided, however, that the foregoing shall not apply with respect to (i) any D&O Claims that are raised by O'Neill as a counterclaim, offset or otherwise to an affirmative action, claim or litigation commenced by a D&O against O'Neill, or (ii) Sugarfina Holdings LLC, Sugarfina Acquisition Corp., Sugarfina USA LLC, and each of their respective affiliates, predecessors, and assigns.⁴

- (v) Neither the Settlement Agreement nor the Order approving the Settlement Agreement will modify the Order Authorizing Payment of Defense Costs Under Insurance Policy [D.I. 511], and the Debtors or the Reorganized Debtors, and Mr. Resnick and Ms. O'Neill shall continue to be paid Defense Costs, as defined therein, in accordance with and subject to the terms and conditions of the Policy, as defined therein.

11. The terms of the Settlement Agreement are expressly subject to entry of a final order approving the settlement by the Bankruptcy Court after notice and an opportunity for hearing.

⁴ The Debtors will file a form of order seeking approval of the Plan which provides that, to the extent that there are any inconsistencies between the releases contained in this Agreement and those in the Plan and confirmation order, those in this Agreement control.

RELIEF REQUESTED

12. By this Motion, the Debtors, after consultation with the Committee, seek approval of the Settlement Agreement pursuant to Section 105 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure.

BASIS FOR RELIEF REQUESTED

13. This Court has the authority to grant the relief requested in this Motion pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019. Section 105(a) of the Bankruptcy Code provides that “[t]he court may issue any order . . . that is necessary or appropriate to carry out the provision of this title.”

14. Bankruptcy Rule 9019 grants the Court authority to approve settlements of claims and controversies after notice and a hearing.⁵ Under this authority, the Third Circuit has emphasized that “to minimize litigation and expedite the administration of a bankruptcy estate, ‘[c]ompromises are favored in bankruptcy.’” Myers v. Martin (In re Martin), 91 F. 3d 389, 393 (3d Cir. 1996) (quoting 9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. 1993)). In addition, courts in this district have recognized that the approval of a proposed compromise and settlement is committed to the sound discretion of the bankruptcy court. See In re Louise’s, Inc., 211 B.R. 798, 801 (D. Del. 1997).

15. Before approving a settlement under Bankruptcy Rule 9019, a court must determine whether “the compromise is fair, reasonable, and in the interests of the estate.” In re Marvel Enter. Group, Inc., 222 B.R. 243, 249 (D. Del. 1998) (quoting Louise’s, 211 B.R. at

⁵ Bankruptcy Rule 9019 provides in pertinent part that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

801). To reach such a determination, the court must assess the value of the claim that is being settled and balance it against the value to the estate of the approval of the settlement. Martin, 91 F.3d at 393. In striking this balance, the court should consider the following factors:

- (a) The probability of success in the litigation;
- (b) The complexity, expense and likely duration of the litigation;
- (c) The possibilities of collecting on any judgment which might be obtained;
- (d) All other factors relevant to making a full and fair assessment of the wisdom of the proposed compromise; and
- (e) Whether the proposed compromise is fair and equitable to the Debtor, his creditors, and other parties in interest.

Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425 (1968). See also Martin, 91 F.3d at 393. Basic to the process of evaluating proposed settlements is “the need to compare the terms of the compromise with the likely rewards of litigation.” TMT Trailer Ferry, 390 U.S. at 425. The TMT rule does not require the Court to hold a full evidentiary hearing before a compromise can be approved, rather, the Court’s obligation is “to canvass the issues and see whether the settlement ‘falls below the lowest point in a range of reasonableness.’” 10 Collier on Bankruptcy, ¶ 9019.2, 9019-4 (15th ed.) (quoting In re Drexel Lambert Group, Inc., 134 B.R. 493 (Bankr. S.D.N.Y. 1991)). See also Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983), cert. denied, 464 U.S. 822 (1983).

16. When considering the merits of the Settlement Agreement, the Debtors focused on the costs of litigating with the Insider Claimants with respect to certain issues expressly set forth in the Protective Objection, and other objections that the Debtors and Committee anticipate that the Insider Claimants may assert in opposition to confirmation of the Plan. While the

Debtors and Committee believe that they would likely succeed with respect to those objections, they recognize that any objections to the Plan would be expensive, an issue in a case such as this, where the Debtors cannot afford protracted litigation. The Proposed Settlement also avoids a contested hearing that would, under the circumstances of the COVID-19 epidemic, be difficult particularly as the Bankruptcy Court is seeking to minimize hearings to only those matters that are determined to be “time sensitive.” See Order Governing the Conduct of Hearings Due to Coronavirus Disease 2019 (COVID-19).

17. Additionally, the Debtors and the Committee believe that the proposed settlement provides a significant benefit given that it significantly reduces Mr. Resnick’s claim from \$8,723,431.51 plus unliquidated amounts to \$6,000,000. Notably, by the settlement, the Resnick Claim is recharacterized from secured to unsecured, thereby avoiding the need to file an adversary proceeding pursuant to Section 506 and Bankruptcy Rule 7001.

18. Finally, the proposed settlement provides for mutual releases as set forth therein. The Debtors, after consultation with the Committee, believe that such releases are appropriate and provide certainty with respect to claim that could be made by the Insider Claimants. At the same time, the Debtors do not believe that there are any valid claims against the Insider Claimants.⁶ Accordingly, the releases provide a benefit to the estates without causing the estate to waive any rights that they believe are valuable under the facts and circumstance of these cases.

19. Based upon the reduction of the claims and the waivers to be received from the Insider Claimants, and importantly, avoiding the costs and uncertainty of litigation in connection

⁶ The Debtors and the Committee fully reserve their rights against the Insider Claimants to the extent the Proposed Settlement is not approved.

with confirmation of the Plan and the Resnick Claim, the Debtors believe that proposed settlement provides significant benefits to the Debtors and their estates, including clearing the path for confirmation of the Plan. For the foregoing reasons, the Debtors, in their business judgment has determined that the Proposed Settlement is in the best interests of the Debtors' estates. Accordingly, the Debtors respectfully submit that the proposed settlement meets the standards set forth in TMT Trailer Ferry.

NOTICE

Notice of this Motion has been given to: (i) the United States Trustee for the District of Delaware; (ii) counsel for Mr. Resnick and Ms. O'Neill; and (iii) all parties who have requested notice.

WHEREFORE, the Debtors respectfully request that this Court enter an Order, a copy of which is attached hereto (i) authorizing the Debtors to enter into the Settlement Agreement; (ii) approving the Settlement Agreement; and (iii) granting such other and further relief as is just and proper.

Dated: April 24, 2020

MORRIS JAMES LLP

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