

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

In re:

TELEXFREE, LLC,  
TELEXFREE, INC. and  
TELEXFREE FINANCIAL, INC.,

Debtors.

Chapter 11 Cases

14-40987-MSH  
14-40988-MSH  
14-40989-MSH

Jointly Administered

STEPHEN DARR AS HE IS THE TRUSTEE  
OF THE CHAPTER 11 ESTATES OF  
TELEXFREE, LLC, TELEXFREE, INC. and  
TELEXFREE FINANCIAL, INC.,

Plaintiff,

Adv. Proc. No. 16-4019

v.

TELEXELECTRIC, LLLP,  
TELEXELECTRIC LP,  
SUNWIND ENERGY DOYLE NORTH LLC,  
SUNWIND ENERGY SOLUTIONS DOYLE  
NORTH, LLC, SUNWIND ENERGY  
SOLUTIONS LLLP, and SUNWIND ENERGY  
GROUP LLLP,

Defendants,

and

SUNWIND ENERGY DOYLE NORTH LLC,  
SUNWIND ENERGY SOLUTIONS DOYLE  
NORTH, LLC, SUNWIND ENERGY  
SOLUTIONS LLLP, and SUNWIND ENERGY  
GROUP LLLP,

Reach and Apply/Trustee Defendants.

MOTION BY TRUSTEE TO APPROVE SETTLEMENT AGREEMENT



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Stephen Darr, the duly appointed and acting Trustee (the “Trustee”) of the Chapter 11 Estates of TelexFree, Inc., TelexFree, LLC and TelexFree Financial, Inc. (collectively, “TelexFree” or the “Debtors”), respectfully requests that the Court approve the Settlement Agreement (“Agreement”) filed herewith by and among the Trustee and Sunwind Energy Doyle North LLC, Sunwind Energy Solutions Doyle North LLC, Sunwind Energy Solutions LLLP, and Sunwind Energy Group LLLP (collectively, “Sunwind”), pursuant to Federal Rule of Bankruptcy Procedure 9019. The Agreement provides for a resolution of TelexFree’s claims against Sunwind arising out of prepetition advances. In further support of this motion, the Trustee states as follows:

**Background**

1. On April 13, 2014, the Debtors filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the District of Nevada.
2. On May 6, 2014, the Court approved the motion of the Securities and Exchange Commission to transfer the Debtors’ cases to the United States Bankruptcy Court for the District of Massachusetts.
3. On May 30, 2014, this Court allowed the motion of the United States Trustee for the appointment of a Chapter 11 trustee. The Trustee was appointed on June 6, 2014.
4. The Debtors engaged in a Ponzi-pyramid scheme. Although the Debtors ostensibly were in the business of selling voice over internet protocol packages, its real business was the recruitment of new participants, using the membership fees of new entrants to compensate existing participants. On November 25, 2015, the Court on motion by the Trustee entered an Order, as amended on December 21, 2015, finding that the Debtors were engaged in a Ponzi scheme and that ruling was the law of the case in each of the jointly administrated cases.

**TelexFree Relationship with Sunwind Entities**

5. Sunwind is a start-up clean energy company which has been working on the development of a wind mill project in the Midwestern United States. TelexFree advanced funds to assist Sunwind in its start-up efforts.

6. In the fall of 2013, TelexFree LLC entered into discussions with Sunwind Energy Group LLLP in relation to TelexFree LLC making a loan to or equity investment in the Sunwind entities in the approximate amount of \$2,500,000.00.

7. The discussions were reflected in a document captioned "AGREEMENT" and dated November 4, 2013. At some time after November 4, 2013, TelexElectric LLLP, an affiliate of the Debtors, was formed and the terms of the Agreement were changed so that TelexFree LLC would advance monies to TelexElectric LLLP. The revised Agreement provided TelexElectric would make the loan to the Sunwind entities.

8. The terms of the advances by TelexElectric to the Sunwind entities are reflected in a document captioned Summary of Principal Loan Terms and Conditions. Consistent with the Agreement, forms of a Loan Agreement and a Note were prepared and dated as of November 7, 2013. While the Trustee obtained an unsigned copy of the Loan Agreement and Note, the Trustee has been unable to determine if the Loan Agreement, Note and related documents were executed.

9. The Trustee obtained a document captioned Sunwind Entities consisting of a balance sheet dated November 30, 2013, reflecting an investment by TelexFree LLC in the Sunwind entities of \$360,000.00.

10. The Trustee also obtained a document captioned Sunwind Energy Doyle North LLC's general ledger, reflecting monies due TelexElectric aggregating \$2,018,359.00 as of December 31, 2013.

11. Based on the information available to the Trustee, TelexElectric LLLP had no assets, and money lent by TelexElectric LLLP to the Sunwind entities was provided from funds transferred to TelexElectric by the Debtors.

12. The Trustee has been unable to locate any loan agreements or other documents between the Debtors and TelexElectric LLLP documenting the terms of the loan between the Debtors and TelexElectric LLLP. The Trustee, however, has obtained a document captioned TelexFree LLC Balance Sheet as of December 31, 2013, which reflects a loan to TelexElectric LLLP in the amount of \$2,022,329.00.

13. The Debtors made additional advances for the benefit of Sunwind in 2014.

14. On February 5, 2014, TelexElectric advanced \$390,000 to the Sunwind entities. On February 19, 2014, TelexElectric advanced \$200,500 to the Sunwind entities.

15. On information and belief, the funds advanced by TelexElectric to the Sunwind entities on February 5, 2014 and February 19, 2014 were from funds advanced by TelexFree LLC to TelexElectric LLLP.

**TelexFree LLC's Investment in the Sunwind Entities**

16. TelexFree allegedly had the right to an "equity kicker" of approximately 26% of the Sunwind entities on account of monies advanced.

17. The Sunwind entities balance sheet dated as of November 30, 2013 reflects an "Equity Contribution" from TelexFree LLC in the amount of \$360,000, which amount is part of the advances identified above.

18. Further, the document captioned "Agreement" dated November 4, 2013, between TelexFree LLC and the Sunwind entities, reflects an agreement to grant TelexFree a 25% equity interest in the project.

19. The Trustee obtained a copy of an unexecuted document captioned Purchase Agreement, dated December 2, 2013, which the Trustee believes was executed by a representative of the Sunwind entities, reflecting the purchase by TelexElectric of 26.572188% of all issued and outstanding shares of the Sunwind entities.

20. Sunwind has disputed that any agreements were finalized for TelexFree to obtain an equity interest in the Sunwind entities or that TelexFree paid to acquire an equity position. Sunwind continues to seek investors or partners to assist in bringing its energy project to market.

#### **Stipulation of Settlement**

21. The Trustee and Sunwind have entered into negotiations to resolve the estates' claims against or interest in Sunwind. As a result of these discussions, the Parties have entered into the Agreement which provides substantially as follows:

- (i) Sunwind acknowledges its indebtedness to the Trustee, which consists of advances in the aggregate amount of \$2,608,889 plus interest through April 1, 2016 of \$423,497.35, with interest continuing to accrue on the principal at the rate of five percent (5%) per annum (the "Obligation");
- (ii) The Trustee shall forbear from exercising his rights to enforce the Obligation against Sunwind until the earlier of an Event of Default or April 30, 2017 to provide Sunwind with an opportunity to find additional financing;
- (iii) The Trustee and Sunwind waive claims against one another, other than those rights arising under the Agreement;

- (iv) Sunwind shall provide periodic financial reporting to the Trustee;
- (v) Sunwind shall forbear from taking certain actions without the consent of the Trustee, and the Obligation shall be payable in full upon a series of events, including sale or lease of Sunwind assets, financing, or a change in control.

### **Basis for Approval of Stipulation**

22. Bankruptcy Rule 9019(a) provides, in relevant part, that “On the motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Settlements and compromises are normal parts of the process of reorganization. While the decision to approve a particular settlement lies within the sound discretion of the Bankruptcy Court, the Court should give some deference to the business judgment of the estate representative. Jeffrey v. Desmond, 70 F.3d 183 (1<sup>st</sup> Cir. 1995).

23. The Court of Appeals has described the test to be used by Bankruptcy Courts called upon to approve or reject proposed compromises and settlements as follows:

The bankruptcy judge has the authority to approve a compromise of a claim pursuant to Bankruptcy Rule 9019(a). The ultimate issue on appeal is whether the bankruptcy court abused its discretion when it approved the compromise, which is a process requiring the bankruptcy court to “assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.” In re GHR Cos., 50 B.R. 925, 931 (Bankr. D. Mass. 1985) (quoting In re Boston & Providence R.R., 673 F.2d 11, 12 (1<sup>st</sup> Cir. 1982)). The specific factors which a bankruptcy court considers when making this determination include: (i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise. In re Anolik, 107 B.R. 427, 429 (D. Mass. 1989).

Jeffrey v. Desmond, 70 F.3d 183, 185 (1<sup>st</sup> Cir. 1995).

24. In determining whether the proposed settlement is fair and equitable, two principles should guide the court. First, “[c]ompromises are favored in bankruptcy[.]” 10 Lawrence P. King, *Collier on Bankruptcy*, ¶ 9019.01, at 9019-2 (15<sup>th</sup> ed. Rev. 1997) (citing *Marandas v. Bishop (In re Sassales)*, 160 B.R. 646, 653 (D. Ore. 1993)). See also *In re A & C*

*Properties*, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986) (“The law favors compromise and not litigation[.]”). Second, settlements should be approved if they fall above the lowest point on the continuum of reasonableness. “[The] responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness.” *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2<sup>nd</sup> Cir. 1983); *In re Planned Protective Services, Inc.*, 130 B.R. 94, 99 n.7 (Bankr. C.D. Cal. 1991). Thus, the question is not whether a better settlement might have been achieved, or a better result reached if litigation pursued. Instead, the court should approve settlements that meet a minimal threshold of reasonableness. *Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994); 10 *Collier on Bankruptcy*, ¶ 9019.02, at 9019-4.

25. The Trustee asserts that the Stipulation is fair and reasonable and should be approved by the Court. The Agreement confirms the Trustee’s right to recover the Obligation, with interest continuing to accrue, while Sunwind explores its developmental plans, notwithstanding the absence of any signed loan documentation. The interest rate on the Obligation is also resolved. The Agreement provides Sunwind with a breathing spell to pursue its business plan unimpeded by collection efforts. Sunwind has minimal assets and any collection activity at this time would be of little or no utility. In the interest of resolving this dispute, the Trustee has agreed not to pursue claims of an equity interest in Sunwind, as the evidence to substantiate this interest is incomplete and the value of any such interest is speculative.

26. Good cause exists to approve the Agreement.

Wherefore, the Trustee prays that this Court:

1. Approve the Agreement for the reasons set forth; and

2. Grant such other relief as is just and proper.

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STEPHEN DARR AS HE IS THE  
TRUSTEE OF THE CHAPTER 11  
ESTATES OF TELEXFREE, LLC,  
TELEXFREE, INC. and  
TELEXFREE FINANCIAL, INC.

By his attorneys,

/s/ Charles R. Bennett, Jr.  
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