

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

IN RE:

PICCADILLY RESTAURANTS, LLC, *et al.*,

DEBTORS

CASE NO. 12-51127

(JOINT ADMINISTRATION REQUESTED)¹

CHAPTER 11

JUDGE ROBERT SUMMERHAYS

**MOTION FOR THE ENTRY INTERIM AND FINAL ORDERS (I) PROHIBITING
UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING
UTILITY SERVICES, (II) DEEMING UTILITY COMPANIES ADEQUATELY
ASSURED OF FUTURE PERFORMANCE, AND (III) ESTABLISHING PROCEDURES
FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

NOW INTO COURT, through undersigned counsel, come the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"),² who move for the entry of interim and final orders (a) prohibiting utility companies from altering, refusing or discontinuing utility services, (b) determining that the Utility Companies (defined below) are adequately assured of payment for future utility services, pending entry of the final order; (c) establishing certain procedures for determining requests for additional assurance; (d) granting related relief; and (e) scheduling a final hearing on this motion (this "Motion"). In support, the Debtors represent:

Jurisdiction and Venue

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

¹ Joint administration requested with *In re Piccadilly Investments, LLC*, 12-51129 (Bankr. W.D. La.), and *In re Piccadilly Food Service, LLC*, 12-51128 (Bankr. W.D. La.).

² The debtors in these chapter 11 cases include Piccadilly Restaurants, LLC ("Piccadilly"), Piccadilly Investments, LLC ("Piccadilly Investments") and Piccadilly Food Service, LLC ("Piccadilly Food Service").

Background

2. On September 10, 2012 (the "Petition Date"), the Debtors filed for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties pursuant to Bankruptcy Code §§ 1107 and 1108. No trustee or examiner has been appointed, and no official committee of creditors or equity interest holders has been established in these chapter 11 cases.

3. By separate motion (R. at 3), the Debtors have requested joint administration of these chapter 11 cases pursuant to Bankruptcy Code § 105(a) and Bankruptcy Rule 1015(b).

4. This Court is referred to the Declaration of Thomas J. Sandeman (the "Declaration") (R. at 2) for a detailed discussion of the factual background and circumstances surrounding the Debtors' commencement of these chapter 11 cases.³

Relief Requested

5. Pursuant to section 366(a) of the Bankruptcy Code, the Debtors seek the entry of an interim order (the "Interim Order") and a final order (the "Final Order"): (a) prohibiting the Utility Companies from altering, refusing or discontinuing services to, or discriminating against, the Debtors on account of pre-petition amounts due, pending entry of the Final Order; (b). determining that the Utility Companies have received adequate assurance of payment for future utility services, pending entry of the Final Order; (c) establishing certain procedures for determining requests for additional assurance; (d) granting related relief; and (e) scheduling a final hearing on the Motion (the "Final Hearing").

³ A capitalized term used herein, but not specifically defined, shall have the meaning ascribed to it in the Declaration.

6. Uninterrupted utility service is vital to the continued operation of the Debtors' businesses and, consequently, to the success of these chapter 11 cases. Termination of Utility Services provided to the Debtors (even temporarily) could result in the disruption of the Debtors' businesses, and adversely affect the ability of the Debtors to preserve and maximize the value of its estate. Thus, the relief requested herein is necessary and in the best interests of the Debtors' estates and their creditors.

7. In connection with the operation of their businesses, the Debtors have over 400 accounts across eleven states with various utility companies (the "Utility Companies") to obtain electricity, water, telephone, and/or other similar services (collectively, the "Utility Services"). Attached hereto as Exhibit A⁴ is a list of Utility Companies providing services to the Debtors as of the Petition Date.

8. In general, the Debtors have established a good payment history with virtually all of their Utility Companies, consistently making payments on a regular and timely basis. To the best of the Debtors knowledge, there are no defaults or arrearages of any significance with respect to the Debtors undisputed Utility Services invoices, other than the payment interruptions that may be caused by the commencement of these chapter 11 cases.

⁴ The Debtors have made an extensive and good faith effort to identify all Utility Companies and include them on the utility service list attached hereto as Exhibit A. For each Utility Company, the utility service list presently identifies: the name and address of the Utility Company and the account numbers under which the Utility Company provides services to the Debtors. The inclusion of any entity on, or any omission of any entity from, the utility service list is not an admission by the Debtors that such entity is or is not a utility within the meaning of Bankruptcy Code § 366, and the Debtors reserve their rights with respect thereto. In addition, the Debtors are requesting that this Motion apply to all of the Debtors' Utility Companies, whether or not any given Utility Company is included on the Utility Service List. Additionally, it is possible that certain entities may have been mistakenly included on the utility service list and, therefore, the Debtors reserve the right to assert that any such entities are not Utility Companies for the purposes of this Motion or Bankruptcy Code § 366.

9. The Debtors intend to pay their post-petition obligations to the Utility Companies timely. The Debtors will make these payments from their cash reserves as of the Petition Date and cash generated through their continued operations.⁵

Basis for Relief Requested

10. If the Utility Companies are permitted to terminate Utility Services, the Debtors could be forced to cease operations at their headquarters and restaurants. Thus, termination of utility services will result in substantial (and potentially irreparable) disruption to the Debtors businesses, as well as loss of revenue and profits. Any interruption of Utility Services would substantially diminish or impair the Debtors efforts to preserve and maximize the value of their estates. It is therefore critical that Utility Services continue uninterrupted.

11. Bankruptcy Code § 366 provides that, in a chapter 11 case, during the initial thirty (30) days after the commencement of a bankruptcy case, utilities may not alter, refuse or discontinue service to, or discriminate against, a debtor solely on the basis of the commencement of its case or the existence of pre-petition debts owed by the debtor.⁶ In a chapter 11 case, following the thirty-day period under Bankruptcy Code § 366(c), utilities may discontinue service to the debtor if the debtor does not provide adequate assurance of future performance of

⁵ Concurrently with the filing of this Motion, the Debtors have filed a motion for authority to use cash collateral. The relief requested herein is consistent with the Debtor's request to use cash collateral.

⁶ There is an apparent discrepancy between subsections (b) and (c) of Bankruptcy Code § 366 because these two subsections set forth different time periods during which a utility is prohibited from altering, refusing or discontinuing utility service. Specifically, Bankruptcy Code § 366(b) allows a utility to alter, refuse or discontinue service "if neither the trustee nor the debtor, within twenty days after the date of the order for relief, furnishes adequate assurance of payment," while Bankruptcy Code § 366(c)(2) allows a utility in "a case filed under chapter 11" to alter, refuse or discontinue service to a chapter 11 debtor "if during the thirty-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service...".

Under the statutory construction canon *lex specialis derogate legi generali* ("specific language controls over general"), the language of Bankruptcy Code § 366(c)(2) controls here because the Debtors are chapter 11 debtors. See 3 COLLIER ON BANKR. ¶ 366.03[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev. 2006) ("it is unclear how the 30-day period [in section 366(c)(2) of the Bankruptcy Code] meshes with the normal twenty-day period in section 366(b). The better view is that, because Bankruptcy Code § 366(c) is more specifically applicable to chapter 11 case, the thirty-day period in section 366(b), should apply.").

its post-petition obligations in a form that is satisfactory to the utility, subject to the Court's ability to modify the amount of adequate assurance.

12. While the form of adequate assurance of payment may be limited to the types of security enumerated in Bankruptcy Code § 366(c)(1)(A),⁷ the determination of the amount of the adequate assurance is within the discretion of the Court. It is well established that the requirement that a utility receive adequate assurance of payment does not require a guarantee of payment. Instead, the protection granted to a utility is intended to avoid exposing the utility to an unreasonable risk of nonpayment.

13. The policy underlying Bankruptcy Code § 366 is to protect Debtors from utility service cutoffs upon the filing of a bankruptcy case, while at the same time providing utility companies with adequate "assurance of payment" for post-petition utility service. *See* H.R. Rep. No. 95-595, at 350 (1978), reprinted in 1978 U.S.C.A.N. 5963, 6306. Section 366(c)(1) of the Bankruptcy Code, as modified in October 2005, defines "assurance of payment" to mean several enumerated forms of security (*e.g.*, cash deposits, letters of credit, prepayment for utility service) while excluding from the definition certain other forms of security (*e.g.*, administrative expense priority for a utility's claim). In addition, Bankruptcy Code § 366(c)(3)(B) provides that a court may not consider certain facts (*e.g.*, a debtor's pre-petition history of making timely payments to a utility) in making a determination of adequate assurance of payment.

14. While Bankruptcy Code § 366(c) clarifies what does and does not constitute "assurance of payment" and what can be considered in determining whether such assurance is adequate, Congress, in enacting that section, did not divest the Court of its power to determine what amount, if any, is necessary to provide adequate assurance of payment to a Utility

⁷ Bankruptcy Code § 366(c)(1)(A) provides that "assurance of payment" may be in the form of a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or another form of security that is mutually agreed on between the utility and the debtor. 11 U.S.C. § 366(c)(1)(A).

Company. Indeed, Bankruptcy Code § 366(c) not only fails to establish a minimum amount of adequate "assurance of payment" but explicitly empowers the court to determine the appropriate level of adequate assurance required in each case. *See* 11 U.S.C. § 366(c)(3)(A) ("On request of a party in interest and after notice and a hearing, the Court may order modification of the amount of an assurance of payment ...").

15. Thus, there is nothing within Bankruptcy Code § 366 that prevents a court from ruling that, on the facts of the case before it, the amount required to adequately assure future payment to a utility company is nominal, or even zero. Prior to the enactment of Bankruptcy Code § 366(c), courts enjoyed precisely the same discretion to make such rulings pursuant to section 366(b) of the Bankruptcy Code, and frequently did so. *See Va. Elec. & Power Co. v. Caldor, Inc. – N.Y.*, 117 F.3d 646, 650 (2d Cir. 1997) ("Even assuming that 'other security' should be interpreted narrowly, we agree with the appellees that a bankruptcy court's authority to 'modify' the level of the 'deposit or other security,' provided for under § 366(b), includes the power to require no 'deposit or other security' where none is necessary to provide a utility supplier with 'adequate assurance of payment.'").

16. Moreover, Congress has not changed the requirement that the assurance of payment only be "adequate." Courts construing Bankruptcy Code § 366(b) have long recognized that adequate assurance of payment does not constitute an absolute guarantee of the debtor's ability to pay. *See, e.g., In re Caldor, Inc. – N.Y.*, 199 B.R. 1, 3 (S.D.N.Y. 1996) ("Section 366(b) requires [a] [b]ankruptcy [c]ourt to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require an 'absolute guarantee of payment.'") (citation omitted), *aff'd sub nom., Va. Elec.*, 117 F.3d 646; *In re Adelpia Bus. Solutions, Inc.*, 280 BR. 63, 80 (Bankr. S.D.N.Y. 2002) (same); *In re Steinebach*,

2004 WL 51616, *5 (Bankr. D. Ariz. 1/2/04) ("Adequate assurance of payment is not, however, absolute assurance... All §366(b) requires is that a utility be protected from an unreasonable risk of non-payment"); *In re Penn Jersey Corp.*, 72 B.R. 981, 982 (Bankr. E.D. Pa. 1987) (stating that Bankruptcy Code § 366(b) "contemplates that a utility receive only such assurance of payment as is sufficient to protect its interests given the facts of the debtor's financial circumstances").

17. The Debtors submit that, given the foregoing, entry of the proposed orders is consistent with, and fully satisfies, the requirements of Bankruptcy Code § 366. Far from offering the Utility Companies nominal (or even no) additional assurance of payment, the Debtors propose to provide the Utility Companies with (a) the authority to retain any pre-petition deposits to secure payment of post-petition obligations and (b) procedures pursuant to which the Utility Companies can seek greater or different security. When completed by the Debtors' ability to pay through access to their cash collateral, such assurance of payment significantly alleviates – if not eliminates – any honest concern of nonpayment on the part of the Utility Companies, and is thus clearly "adequate."

18. Similar relief has been granted in this district and other districts decided under amended section 366 of the Bankruptcy Code. See *In re La. Riverboat Gaming P'ship*, 08-10824 (Bankr. W.D. La. 2008); *In re Communications Corp. of Am.*, 06-50410 (Bankr. W.D. La. 2006); *In re Zarazoga Crossing, LP*, 09-11028 (Bankr. M.D. La. 2009); *In re OCA, Inc.*, 06-10179 (Bankr. E.D. La. 2006).

19. To provide adequate assurance of payment for future services to the Utility Companies, the Debtors propose that each Utility Company retain any deposit made pre-petition by the Debtors in connection with such Utility Service (the "Utility Deposit").

20. Any Utility Company that does not request a deposit or other form of adequate assurance of future performance on or before the thirtieth (30th) calendar day following the Petition Date (the "Request Deadline") shall be deemed to have adequate assurance that is satisfactory to it, within the meaning of section 366 of the Bankruptcy Code, and shall be from discontinuing, altering or refusing service on account of any unpaid prepetition charges, or requiring additional assurance of payment.

21. The Debtors submit that the retention by such Utility Companies of any prepetition deposits to secure payment for post-petition services, in conjunction with the Debtors' demonstrated ability to pay for future utility services in the ordinary course of business (the "Proposed Adequate Assurance"), constitutes sufficient adequate assurance of future payment to the Utility Companies to satisfy the requirements of section 366 of the Bankruptcy Code. Nonetheless, if any Utility Company believes additional assurance is required, they may request such assurance pursuant to the procedures described below.

22. To address the right of any Utility Company under section 366(c)(2) of the Bankruptcy Code to seek adequate assurance satisfactory to it, the Debtors propose that the following procedures (the "Adequate Assurance Procedures") be adopted:

- a. Any Utility Company desiring assurance of future payment for utility service beyond the Proposed Adequate Assurance must serve a request (an "Additional Assurance Request") so that it is received by the Debtors by the Request Deadline at the following addresses: Gordon, Arata, McCollam, Duplantis & Eagan, LLC (Attn: Ryan J. Richmond), One American Place, 301 Main Street, Suite 1600, Baton Rouge, LA 70801-1916.
- b. Any Additional Assurance Request must (i) be made in writing; (ii) set forth the location(s) for which utility services are provided and the relevant account number(s) and the Debtor; (iii) describe any deposits, prepayments or other security currently held by the requesting Utility Company and (iv) explain why the requesting Utility Company believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment.

- c. Upon the Debtors' receipt of an Additional Assurance Request at the addresses set forth above, the Debtors shall have twenty-eight (28) days from the receipt of such Additional Assurance Request (the "Resolution Period") to negotiate with the requesting Utility Company to resolve its Additional Assurance Request. The Resolution Period may be extended by agreement of the Debtors and the applicable Utility Company.
- d. The Debtors, in their discretion, may resolve any Additional Assurance Request by mutual agreement with the requesting Utility Company and without further order of the Court, and may, in connection with any such resolution, in their discretion, provide the requesting Utility Company with additional adequate assurance of future payment in a form satisfactory to the Utility Company, including, but not limited to, cash deposits, prepayments and/or other forms of security, if the Debtors believe such additional assurance is reasonable.
- e. If the Debtors determine that an Additional Assurance Request is not reasonable, and are not able to resolve such request during the Resolution Period, the Debtors, during or immediately after the Resolution Period, will request a hearing before this Court to determine the adequacy of assurances of payment made to the requesting Utility Company (the "Determination Hearing"), pursuant to section 366(c)(3)(A) of the Bankruptcy Code.
- f. Pending the resolution of the Additional Assurance Request at a Determination Hearing, the Utility Company making such request shall be restrained from discontinuing, altering or refusing service to the Debtors on account of unpaid charges for pre-petition services.
- g. Any Utility Company that does not comply with the Adequate Assurance Procedures is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering or refusing service on account of any unpaid prepetition charges, or requiring additional assurance of payment (other than the Proposed Adequate Assurance).

23. As an additional form of adequate assurance (and for the purposes of efficiency), the Debtors request authority to pay undisputed pre-petition amounts that may be due and owing to Utility Companies. First, the Utility Companies may have an administrative expenses claim under Bankruptcy Code § 503(b)(9). Second, if the Debtors are not authorized to pay such pre-petition amounts, the Utility Companies may apply all or a portion of any Utility Deposit against pre-petition amounts, which in turn may cause the Utility Companies request a post-petition

deposit as a form of adequate assurance. Thus, both the Debtors and the Utility Companies would end up in the same place as if the Debtors were authorized to pay pre-petition amounts that may be due. Thus efficiency and economy support the Debtors request for authority to pay pre-petition amounts as a form of adequate assurance.

24. The Debtors request a final hearing on this Motion to be held within twenty-five (25) days of the Petition Date to ensure that, if a Utility Company argues it can unilaterally refuse service to the Debtors on the 31st day after the Petition Date, the Debtors will have the opportunity, to the extent necessary, to request that the Court make such modifications to the Procedures in time to avoid any potential termination of utility service.

The Utility Companies Will not be Prejudiced by the Relief Requested

25. On a monthly basis, the Debtors receive hundreds of individual invoices for Utility Services from its Utility Companies, with whom the Debtors may have multiple utility accounts. To the best of the Debtors' knowledge, there are no material defaults or arrearages with respect to undisputed Utility Service invoices, other than payment interruptions that may be caused by commencement of these chapter 11 cases.

26. The Debtors' proposed method of furnishing adequate assurance of payment for post-petition Utility Service is not prejudicial to the rights of any Utility Company, and is in the best interest of the Debtors' estates.

27. Because uninterrupted utility service is vital to the continued operation of the Debtors' businesses and, consequently, to the success of these chapter 11 cases, the relief requested herein is necessary and in the best interests of the Debtors estates and their creditors.

28. Such relief ensures that the Debtors' business operations will not be disrupted, as well as providing Utility Companies and the Debtors with an orderly, fair procedure for

determining "adequate assurance." Based upon the foregoing, the Debtors submit that the Motion should be granted.

Subsequent Modifications of Utility Service List

29. It is possible that, despite the Debtors' efforts, certain Utility Companies have not been identified by the Debtors or included on the Utility Service List. To the extent that the Debtors identify additional Utility Companies, the Debtors will file amendments to the Utility Service List, and shall serve copies of the Interim Order and Final Order (when and if entered) on such newly-identified Utility Companies. The Debtors request that the Interim and Final Orders be binding on all Utility Companies, subject to their rights to the Proposed Adequate Assurance and to request additional adequate assurance, upon service of the Interim Order and Final Orders upon said Utility Companies as may be added to the Utility Service List.

Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers

30. The Debtors have sufficient funds to remit undisputed pre-petition amounts that may be owed to Utility Companies in the ordinary course of business by virtue of expected cash flows from ongoing business operations and anticipated access to debtor-in-possession financing. Also, under the Debtors' existing cash management system, the Debtors have made arrangements to readily identify checks or wire transfer requests as relating to an authorized payment in respect of the Utility Companies. Accordingly, the Debtors believe that checks or wire transfer requests, other than those relating to authorized payments, will not be honored inadvertently and the Court should authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested herein.

Reservation of Rights

31. Nothing contained herein is intended or shall be construed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver of the Debtors' or any party in interest's rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under Bankruptcy Code § 365. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently. Finally, the relief requested herein shall not oblige the Debtors to accept any services, to accept the shipment of goods, or prevent the Debtors from returning or rejecting goods.

Notice

32. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the Western District of Louisiana; (b) Atalaya Capital Management LP and its counsel of record; (c) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; (d) the managing member of Piccadilly Investments, LLC; (e) the Utility Companies identified on Exhibit A hereto. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the forms attached hereto as Exhibit B (interim) and Exhibit C (final), granting the relief requested in this Motion, and granting such other and further relief as may be just and proper.

**GORDON, ARATA, MCCOLLAM,
DUPLANTIS & EAGAN, LLC**

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