



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed April 23, 2021


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

<p>In re:</p> <p>FRESH ACQUISITIONS, LLC, <i>et al.</i>,¹</p> <p style="text-align: center;">Debtors.</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>Chapter 11</p> <p>Case No. 21-30721 (SGJ)</p> <p>(Jointly Administered)</p> <p>Re: Docket No. 12</p>
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**INTERIM ORDER (I) APPROVING THE DEBTORS’
PROPOSED ADEQUATE ASSURANCE OF PAYMENT
FOR FUTURE UTILITY SERVICES, (II) PROHIBITING UTILITY
COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING SERVICES,
(III) APPROVING THE DEBTORS’ PROPOSED PROCEDURES FOR RESOLVING
ADEQUATE ASSURANCE REQUESTS, AND (IV) GRANTING RELATED RELIEF**

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: Alamo Fresh Payroll, LLC (1590); Fresh Acquisitions, LLC (2795); Alamo Ovation, LLC (9002); Buffets LLC (2294); Hometown Buffet, Inc. (3002); Tahoe Joe’s Inc. (7129); OCB Restaurant Company, LLC (7607); OCB Purchasing, Co. (7610); Ryan’s Restaurant Group, LLC (7895); Fire Mountain Restaurants, LLC (8003); Food Management Partners, Inc. (7374); FMP SA Management Group, LLC (3031); FMP-Fresh Payroll, LLC (8962); FMP-Ovation Payroll, LLC (1728); and Alamo Buffets Payroll, LLC (0998). The Debtors’ principal offices are located at 2338 N. Loop 1604 W., Suite 350, San Antonio TX, 78248, United States.

This matter coming before the Court on the motion (the “Motion”)² for entry of an order (this “Order”): (i) approving the Debtors’ proposed form of adequate assurance of postpetition payment to the Utility Companies; (ii) establishing procedures for resolving any objections by the Utility Companies relating to the Proposed Adequate Assurance; and (iii) prohibiting the Utility Companies from altering, refusing, or discontinuing service to, or discriminating against, the Debtors solely on the basis of the commencement of these cases, a debt that is owed by the Debtors for services rendered prior to the Petition Date, or on account of any perceived inadequacy of the Debtors’ Proposed Adequate Assurance, all as further described in the Motion; and upon consideration of the First Day Declaration; and this Court having jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. § and 1334; and this Court having found that this is a core proceeding under 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing were adequate and appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration establish just cause for the relief granted herein; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis as set forth herein.

² Capitalized terms used but not otherwise defined in this Order shall have the meanings ascribed to them in the Motion.

2. The final hearing (the “Final Hearing”) on the Motion shall be held on May 6, 2021, at 9:30 a.m., prevailing Central Time. Any objections or responses to entry of a final order on the Motion shall be filed on or before 5:00 p.m., prevailing Central Time, on May 4, 2021.

3. The Debtors shall cause a copy of the Motion and this Order to be served on each Utility Company listed on the Utility Service List no later than three (3) business days after the date this Order is entered.

4. Within five (5) business days of the date hereof, the Debtors shall cause the Adequate Assurance Deposit, in the amount of \$32,241.81, to be segregated within the Debtors’ existing cash management system for the benefit of the Utility Companies, subject to the Debtors’ right to terminate or discontinue the applicable Utility Services.

5. Nothing in this Order affects or otherwise modifies the rights of the Utility Companies under 11 U.S.C. § 366(c)(4).

6. The Adequate Assurance Deposit, the Prepetition Deposits, and the Debtors’ ability to pay for future utility services in the ordinary course of business shall constitute adequate assurance of future payment as required under section 366 of the Bankruptcy Code and no Utility Company shall discontinue Utility Services without complying with the following Adequate Assurance Procedures:

- a. If a Utility Company is not satisfied with the Proposed Adequate Assurance and seeks additional adequate assurance of payment, it must serve within thirty (30) days from the Petition Date an Adequate Assurance Request upon (i) the Debtors, c/o Mark Shapiro, proposed chief restructuring officer, 3500 Maple Avenue, Suite 420, Dallas, TX 75219 (mshapiro@brileyfin.com); (ii) proposed counsel to the Debtors, Gray Reed, 1601 Elm Street, Suite 4600, Dallas, Texas 75201, Attn: Jason S. Brookner (jbrookner@grayreed.com) and Amber M. Carson (acarson@grayreed.com); (iii) the Office of the United States Trustee for the Northern District of Texas, Earle Cabell Federal Building, 1100 Commerce Street, Room 976, Dallas, TX 75242, Attn: Meredyth A. Kippes, (meredyth.a.kippes@usdoj.gov); (iv) counsel to any statutory committee

appointed in these chapter 11 cases; and (v) counsel to the DIP Lender, Attn: J. Michael Sutherland (msutherland@CCSB.com) (collectively, the “Notice Parties”).

- b. Each Adequate Assurance Request must (i) be made in writing; (ii) set forth the amount and form of additional assurance of payment requested; (iii) set forth the type of Utility Services, any account numbers, and the location for which Utility Services are provided; (iv) set forth whether the Utility Company holds any deposits or other security, and if so, in what amount; and (v) set forth why the Utility Company believes the Proposed Adequate Assurance is not sufficient adequate assurance of payment.
- c. Upon the Debtors’ receipt of an Adequate Assurance Request, the Debtors shall have twenty (20) days from the receipt of such Adequate Assurance Request (the “Resolution Period”) to negotiate with the Utility Company to resolve its Adequate Assurance Request; *provided* that the Debtors and the applicable Utility Company may extend the Resolution Period by mutual agreement.
- d. The Debtors may resolve any Adequate 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 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. The Debtors may reduce the amount of the Adequate Assurance Deposit by any amount allocated to a particular Utility Company to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtors and the affected Utility Company.
- e. If the Debtors determine that an Adequate Assurance Request is not reasonable or they are not able to resolve such request during the Resolution Period, the Debtors may request a hearing before the Court (the “Determination Hearing”) to determine the adequacy of assurances of payment made to the requesting Utility Company, pursuant to section 366(c)(3) of the Bankruptcy Code. Pending resolution of such dispute at a Determination Hearing, the relevant Utility Company shall be prohibited from altering, refusing, or discontinuing service to the Debtors on account of: (i) unpaid charges for prepetition services; (ii) a pending Adequate Assurance Request; or (iii) any objections filed in response to the Proposed Adequate Assurance.

7. The Utility Companies are prohibited from requiring additional adequate assurance of payment other than pursuant to the Adequate Assurance Procedures.

8. Notwithstanding anything to the contrary in any other order of this Court, including any DIP financing order, no creditor, including the DIP Lender, shall have any interest in or lien on the Adequate Assurance Deposit.

9. If an amount relating to the Utility Services that a Utility Company has provided postpetition is unpaid and remains unpaid beyond any applicable grace period, such Utility Company may request a disbursement from the segregated Adequate Assurance Deposit funds by giving notice to the Notice Parties. The Debtors shall honor such request within five (5) business days after the date the Debtors receive the request, subject to the Debtors' and any such requesting Utility Company's ability to resolve any dispute regarding such request without further order of the Court.

10. The Adequate Assurance Deposit (including any additional amount deposited upon request of any applicable Utility Company) shall be segregated until the earlier of: (a) entry of an order of the Court authorizing or directing the return of or termination of the Adequate Assurance Deposit; (b) reconciliation and payment by the Debtors of the Utility Company's final invoice in accordance with applicable nonbankruptcy law following the Debtors' terminating the Utility Services from such Utility Company; *provided* that amounts will not be removed from the Adequate Assurance Deposit to the extent there exists a dispute as to the postpetition amounts owed to such Utility Company; (c) the date upon which a sale of all or substantially all of the Debtors' assets is consummated; or (d) the effective date of any chapter 11 plan confirmed in these chapter 11 cases.

11. Unless and until (a) the Debtors, in their discretion, agree to an alternative assurance of payment, or (b) this Court enters an order after a Determination Hearing requiring that additional adequate assurance of payment be provided to a Utility Company, such Utility Company shall be:

(y) deemed to have received adequate assurance of payment “satisfactory” to such Utility Company in compliance with section 366 of the Bankruptcy Code; and (z) forbidden from (i) discontinuing, altering, or refusing services to, or discriminating against, the Debtors on account of any unpaid prepetition charges, the commencement of these chapter 11 cases, or any perceived inadequacy of the Proposed Adequate Assurance, and (ii) requiring additional assurance of payment other than the Proposed Adequate Assurance.

12. To the extent the Debtors identify new or additional Utility Companies or discontinue services from existing Utility Companies, the Debtors are authorized to add or remove such parties from the Utility Services List; *provided, however*, that the Debtors shall provide notice of any such addition or removal to the Notice Parties. To the extent that there is any dispute as to the postpetition amounts owed to a Utility Company, such Utility Company shall not be removed from the Utility Services List, and no funds shall be removed from the Adequate Assurance Deposit, until such dispute has been resolved. For any Utility Company that is subsequently added to the Utility Services List, the Debtors shall serve to such Utility Company a copy of this Order, and provide such Utility Company two weeks’ notice to object to the inclusion of such Utility Company on the Utility Services List. The Debtors shall promptly increase the Adequate Assurance Deposit by an amount equal to approximately two (2) weeks of the estimated monthly utility expense for each additional Utility Company, unless such Utility Company agrees in writing to a lesser amount, is paid in advance for Utility Services, or holds a deposit equal to or greater than such amount. The terms of this Order and the Adequate Assurance Procedures shall apply to any subsequently identified Utility Company, regardless of when such Utility Company was added to the Utility Services List.

13. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, whether such checks or other requests were submitted prior to, or after, the Petition Date, and all such banks and financial institutions are authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved by this Order.

14. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with the relief granted herein.

15. Nothing in this Order constitutes a finding that any entity is or is not a Utility Company hereunder or under section 366 of the Bankruptcy Code, notwithstanding whether such entity is listed on the Utility Company List.

16. Notwithstanding the relief granted in this Order, any payment made by the Debtors pursuant to the authority granted herein shall be subject to and in compliance with the Approved Budget, the Court's *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief*, and any final order entered by the Court in connection therewith.

17. This Order is without prejudice to the rights of the Debtors and their estates to contest the validity, priority, or amounts of any obligations relating to the Utility Companies on

any grounds they deem appropriate, and any rights of the Debtors and their estates with respect to such matters shall be reserved.

18. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on, property of the Debtors' estates; (g) a waiver or limitation of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection, or seek avoidance of, all such liens.

19. The requirements of Bankruptcy Rule 6003(b) for emergency relief are satisfied.

20. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion, and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

21. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and provisions of this Order shall be immediately effective and enforceable upon its entry.

22. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

23. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

Submitted by:

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