

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

In re:)	Chapter 11
)	
RC SOONER HOLDINGS, LLC, <u>et al.</u> , ¹)	Case No. 10- <u>10528</u> ()
)	
Debtors.)	(Jointly Administered)
)	
)	
)	

**MOTION OF THE DEBTORS FOR INTERIM AND FINAL ORDERS
UNDER SECTION 366 OF THE BANKRUPTCY CODE (A) PROHIBITING
UTILITY PROVIDERS FROM ALTERING, REFUSING OR
DISCONTINUING SERVICE, (B) DEEMING UTILITIES ADEQUATELY
ASSURED OF FUTURE PAYMENT, AND (C) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

RC Sooner Holdings, LLC, (“RC Sooner” or “Company”) and the above-captioned debtors and debtors in possession (collectively, the “Debtors”), hereby move this Court for entry of interim and final orders (a) prohibiting utility providers from altering, refusing or discontinuing service, (b) deeming utility providers adequately assured of payment, and (c) establishing procedures for determining adequate assurance of future payment (the “Motion”).

In support of this Motion, the Debtors respectfully state as follows:

¹ The Debtors and the last four digits of their taxpayer identification numbers are: RC Sooner Holdings, LLC (7904); RC Brixton Square Owner, LLC (8002); RC Cedar Crest Owner, LLC (7914); RC Fulton Plaza Owner, LLC (8011); RC Magnolia Owner, LLC (7998); RC Pomeroy Park Owner, LLC (7939); RC Salida Owner, LLC (7947); RC Savannah South Owner, LLC (7983); RC Southern Hills Owner, LLC (7958); Brixton Square Apartments, LLC (1844); CC Apartments, LLC (1798); Fulton Plaza Apartments, LLC (4344); Magnolia Manor Apartments, LLC (4486); Pomeroy Park Apartments, LLC (1649); Salida Apartments, LLC (1915); Savannah South Apartments, LLC (8586); and Southern Hills Villa Apartments, LLC (1721). The business address for each of the Debtors where notices should be sent is 1515 Broadway, 11th Floor, New York, New York 10036-8901.

Jurisdiction

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

2. The statutory predicates for the relief requested herein are sections 105(a) and 366 of title 11 of the United States Code (the “Bankruptcy Code”).

Background

3. On or about February 22, 2010 (the “Petition Date”), each of the Debtors filed their respective voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code. The Debtors thereafter have continued to manage their business and properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtors own, operate and maintain a portfolio of 796 multi-family residential units divided among eight (8) separate apartment complexes (collectively, the “Apartments”) for lease in Tulsa, Oklahoma. RC Sooner is the direct parent of eight (8) Oklahoma limited liability companies (collectively, the “RC LLCs”², and together with RC Sooner, the “Purchasers”) that were formed in October 2009 for the purpose of acquiring 100% of the membership interests of eight (8) existing Oklahoma limited liability companies that own the Apartments (collectively, the “Apartment LLCs”³). The purchase price of the acquisition

² The RC LLCs consist of the following co-debtor subsidiaries of RC Sooner: RC Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC and RC Southern Hills Owner, LLC. RC Sooner is also the direct parent of non-filing entity RC Old South Owner, LLC, whose real estate assets are not subject to loans held by the Federal National Mortgage Association.

³ The Apartment LLCs consist of the following co-debtor indirect subsidiaries of RC Sooner: Brixton Square Apartments, LLC; CC Apartments, LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC and Southern Hills Villa Apartments, LLC. RC Sooner is also the ultimate parent of non-filing entity Old South Apartments, LLC, whose loan is not held by the Federal National Mortgage Association.

included the assumption of approximately \$27 million in outstanding loans and mortgages (the "Loans and Mortgages") currently held by the Federal National Mortgage Association ("Fannie Mae").

5. Unbeknownst to the Purchasers, however, the sellers of the Apartment LLCs and their brokers had engaged in a pattern of intentional misconduct and fraudulent misrepresentation from the very outset of negotiations for the sale of the Apartments and the Apartment LLCs, which misrepresentations included the failure to inform the Purchasers that the Loans and Mortgages had been in default since approximately September 2, 2009, and remained in default as of the closing on or about October 29, 2009.

6. Fannie Mae was not informed of the Purchasers' purchase of the Apartment LLCs until late January, 2010, and the Company was not made aware of the existence of the defaults under the Loans and Mortgages until that same time, the sellers having actively concealed such facts from both Fannie Mae and the Company as recently as the final week of January, 2010.

7. Upon learning of the purchase of the Apartment LLCs, Fannie Mae declared a non-monetary default on account of the transfer of the Loans and Mortgages to the Company without Fannie Mae's consent. Fannie Mae subsequently initiated state court actions in Oklahoma against the Apartment LLCs and certain of the sellers petitioning for foreclosure and the appointment of a receiver against all the Apartments. Hearings for the appointment of a receiver with respect to the Apartment LLCs have been scheduled for February 23, 2010.

8. Due to the imminent threat of Fannie Mae's state court actions, the Debtors commenced these cases on the Petition Date in order to provide sufficient time for them to, among other things, pursue claims against the sellers and their brokers and negotiate a

resolution of the Loan and Mortgage defaults with Fannie Mae, all of which efforts will enable the Debtors to preserve and maximize the value of their business for the benefit of their creditors and other interested parties.

9. Additional factual background regarding the Debtors, including their current and historical business operations and the events precipitating these chapter 11 filings, is set forth in detail in the Affidavit of Daniel Gordon in Support of Chapter 11 Petitions and First Day Pleadings, and is incorporated herein by reference.

10. No trustee, examiner, or committee has been appointed in any of the Debtors' cases.

The Debtors' Utility Providers

11. In the ordinary course of business, the Debtors use gas, water, electric, telecommunications and other services provided by various utility companies (collectively, the "Utility Providers").⁴ Continued and uninterrupted utility service is essential to the Debtors' ability to sustain operations during these chapter 11 cases. Any interruption of utility service would severely disrupt the Debtors' business operations. Attached hereto as **Exhibit A**, and incorporated herein by reference, is a non-exhaustive list of the Utility Providers that provide utility services to the Debtors as of the Petition Date.⁵ The Debtors estimate that aggregate monthly payments to their Utility Providers average approximately \$90,000.00.

⁴ As is standard practice in the multi-family residential unit rental industry, the Debtors pay all of the utility bills for electricity, gas, and water for all of their rental units.

⁵ Neither the omission from, or inclusion in, Exhibit A is dispositive as to whether a particular party is or is not a utility company, but simply represents the Debtors' attempt to be conservative and inclusive as to the status of such party. The Debtors reserve all rights to further address the characterization of any particular entities listed on Exhibit A as a utility company within the meaning of section 366(a) of the Bankruptcy Code. The relief requested herein is with respect to all Utility Providers and is not limited to only those identified in Exhibit A.

Relief Requested

12. By this Motion, pursuant to sections 105(a) and 366 of the Bankruptcy Code, the Debtors seek entry of an order by this Court: (a) prohibiting the Utility Providers from altering, refusing or discontinuing service, (b) deeming the Utility Providers adequately assured of future payment, and (c) establishing procedures for determining adequate assurance of future payment.

13. To provide adequate assurance of payment for future services to their Utility Providers, the Debtors propose to deposit a sum equal to approximately 50% of its estimated cost of monthly utility consumption, \$45,000.00, into an interest-bearing, segregated account (the "Utility Deposit Account") within ten (10) days after the entry of an order granting this Motion, with such Utility Deposit Account to be held in escrow, pending further order of the Court, for the purpose of providing each Utility Company with adequate assurance of payment of its postpetition date services to the Debtors.

14. In addition, the Debtors seek to establish reasonable procedures (the "Procedures") by which Utility Providers may request additional adequate assurance of future payment, in the event that any Utility Provider believes that the Utility Deposit Account does not provide it with satisfactory, adequate assurances. Such Procedures would provide that:

a. Except in accordance with the procedures set forth below, and absent further order of this Court, the Utility Providers may not (a) alter, refuse or discontinue service to, or discriminate against the Debtors solely on account of the commencement of these chapter 11 cases or on account of any unpaid prepetition charges, or (b) require the payment of any additional deposit or other security in connection with any unpaid prepetition charges;

b. the Debtors will serve this Motion and the order granting this Motion (the "Adequate Assurance Order"), if granted by the Court, via first-class mail, within

two (2) business days after the date that the Adequate Assurance Order is entered by the Court on all Utility Providers identified on Exhibit A attached hereto;

c. If a Utility Provider is not satisfied with the assurance of future payment provided by the Debtors in the Motion, a Utility Provider may request additional assurance of payment within thirty (30) days after the Petition Date (an “Additional Assurance Request”) by submitting an Additional Assurance Request to counsel for the Debtors: Ballard Spahr LLP, 919 N. Market Street, 12th Floor, Wilmington, DE 19801, Attention: Tobey M. Daluz, Esquire, Christopher S. Chow, Esquire, and Joshua E. Zugergerman, Esquire;

d. any Additional Assurance Request must (i) be made in writing; (ii) include a summary of the Debtors’ payment history relevant to the affected account(s); and (iii) an explanation of why the Utility Deposit is inadequate assurance of payment;

e. if a Utility Provider makes a timely Additional Assurance Request that the Debtors believe is reasonable, then the Debtors shall be authorized in their sole discretion to comply with such request without further order of the Court;

f. if the Debtors believe the Additional Assurance Request is unreasonable, the Debtors will schedule a hearing to determine the necessity and extent of additional assurance of payment to such Utility Provider at the next omnibus hearing scheduled in these cases (the “Determination Hearing”);

g. pending resolution of that issue at any such Determination Hearing, any Utility Provider making an Additional Assurance Request shall be prohibited from altering, refusing or discontinuing service to the Debtors; and

h. any Utility Provider that fails to make a timely Additional Assurance Request shall be deemed to have adequate assurance of payment, i.e., that the Utility

Deposit supplies adequate assurance of payment, unless and until a future order of this Court is entered requiring further adequate assurance of payment.

15. Although the Debtors believe that the list of Utility Providers included on Exhibit A hereto is a complete list, the Debtors reserve the right, without further order of the Court, to supplement the list if the Debtors determine that any Utility Provider has been inadvertently omitted. If the Debtors supplement the list subsequent to entry of the Adequate Assurance Order, the Debtors will promptly serve a copy of this Motion and the signed Adequate Assurance Order on any Utility Provider that is added to the list by such a supplement. Concurrently with such service, the Debtors will file with the Court a supplement to Exhibit A adding the name of the Utility Provider so served. Such an added Utility Provider shall have thirty (30) days from the date of service of this Motion and the Adequate Assurance Order to make an Additional Assurance Request. If such an Additional Assurance Request is made, the Debtors shall abide by the procedures set forth above, as applicable. Pending resolution of any Determination Hearing relating to an Additional Assurance Request, the Debtors seek an order prohibiting any such Utility Provider from altering, refusing or discontinuing utility services to the Debtors.

Basis For Relief

16. Section 366(a) of the Bankruptcy Code protects a debtor against the immediate termination of utility services after it files for bankruptcy. Pursuant to that section, a utility may not, during the first thirty (30) days of the case, alter, refuse, or discontinue services to a debtor in a chapter 11 case solely because of the commencement of the case or due to unpaid prepetition amounts. *See* 11 U.S.C. § 366(a), (c). However, the utility may do so thereafter unless the debtor furnishes “adequate assurance” of payment, in the form of a deposit or

otherwise, for postpetition services in a form satisfactory to the utility within thirty (30) days of the Petition Date. *See* 11 U.S.C. § 366(c).

17. Under section 366(c) of the Bankruptcy Code, in a chapter 11 case, a utility company may alter, refuse, or discontinue utility service if, during the 30 days after the commencement of the chapter 11 case, the utility company does not receive adequate assurance in a form that is “satisfactory” to the utility company, subject to the Court’s ability to modify the amount of adequate assurance. Further, under section 366(c), in making a determination of whether an assurance of payment is adequate, the Court may not consider (i) the absence of security before the petition date, (ii) the debtor’s history of timely payment or (iii) the availability of an administrative expense priority to the utility company. *See* 11 U.S.C. § 366(c).

18. While the form of adequate assurance of payment may be limited under new subsection 366(c) to the types of security enumerated in subsection 366(c)(1)(A), the amount of the deposit or other form of security remains fully within the reasonable discretion of the Court. It has been 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 subjecting the utility to an unreasonable risk of nonpayment. *See In re New Rochelle Tel. Corp.*, 397 B.R. 633, 639 (E.D.N.Y. 2008); *In re Astle*, 338 B.R. 855, 861 (D. Id. 2006) *In re Adelpia Business Solutions. Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002). The heart of the Court’s inquiry is an examination of the totality of the circumstances in making an informed judgment as to whether utilities will be subject to an unreasonable risk of nonpayment. *Adelpia*, 280 B.R. at 82-83; *see also Virginia Elec. & Power Co. v. Caldor, Inc.-NY*, 117 F.3d 646, 650 (2d Cir. 1997) (“In deciding what constitutes adequate assurance in a given case, a bankruptcy court must focus upon the need of the utility for assurance, and to

require that the debtor supply *no more than that*, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.”) (emphasis in original) (citing *In re Penn Jersey Corp.*, 72 B.R. 981, 985 (Bankr. E.D. Pa. 1987).

19. Here, the Debtors propose to establish the Utility Deposit Account in order to provide adequate assurance to the Utility Providers. Under the circumstances of this case, the Debtors believe that the establishment of this substantial cash reserve, relative to the Debtors’ estimated monthly consumption, constitutes adequate assurance of payment under section 366(c) of the Bankruptcy Code.

20. In addition, the Debtors propose to protect the Utility Providers further by establishing the Procedures provided for herein, whereby any Utility Provider can request additional adequate assurance in the event that it believes there are facts and circumstances with respect to its provision of postpetition services to the Debtors that would merit greater protection.

21. This Court also has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code which provides that the Court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The basic purpose of section 105(a) is “to assure the bankruptcy courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” 2 COLLIER ON BANKRUPTCY ¶ 105.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2009). In fairly protecting the Debtors and the Utility Providers, the proposed Procedures carry out section 366 in a manner fully consistent therewith and are an appropriate exercise of this Court’s authority under section 105(a) of the Bankruptcy Code.

WHEREFORE, the Debtors respectfully request that this Court enter interim and final orders, substantially in the form attached hereto, granting the relief requested herein and such other and further relief as this Court deems appropriate.

Dated: February 22, 2010
Wilmington, Delaware

Respectfully Submitted,
BALLARD SPAHR LLP

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Proposed Counsel for the Debtors and Debtors in
Possession

⁶ Admitted in Maryland. Admission to Delaware pending. A motion seeking *pro hac vice* admission in this case will be filed.

Exhibit A

Utility Providers (Oklahoma)	Description
City of Tulsa	Water/Sewer
City of Owasso	Water/Sewer
Oklahoma Energy Source	Natural Gas
Oklahoma Natural Gas	Natural Gas
At&T	Phone
EasyTEL Communications	Phone
Public Service of Oklahoma	Electricity