

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

In re:

SUGARFINA, INC., *et al.*,

Debtors.¹

Chapter 11

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

Re: D.I. 62, 214, 257, 268

Hearing Date: October 24, 2019 at 10:30 a.m. (ET)

Objection Deadline: October 21, 2019 at 4:00 p.m. (ET)

**LANDLORD BP PRUCENTER ACQUISITION LLC'S OBJECTION TO
DEBTORS' POTENTIAL ASSUMPTION AND ASSIGNMENT OF LEASE IN
CONNECTION WITH SALE OF DEBTORS' ASSETS**

NOW COMES BP Prucenter Acquisition LLC (the "Landlord") and hereby files this objection (the "Objection") to the above-captioned Debtors' potential assumption and assignment of the Landlord's lease in connection with the sale of the Debtors' assets to Sugarfina Acquisition Corp. (the "Stalking Horse Bidder"), or to another bidder to be determined after an auction (the "Successful Bidder").

In support of this Objection, the Landlord respectfully states as follows:

BACKGROUND

A. Background Regarding the Landlord and the Lease.

1. The Landlord leases retail space to the Debtor, Sugarfina, Inc. (the "Tenant"), within the shopping center known as "The Prudential Center," located in Boston, Massachusetts (the "Shopping Center"). The Shopping Center is one of Boston's premier shopping destinations. Its exclusive and unique tenant mix consists of high-end retail stores, restaurants and eateries, and other attractions.

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) Sugarfina, Inc., a Delaware corporation (4356), (2) Sugarfina International, LLC, a Delaware limited liability company (1254) and (3) Sugarfina (Canada), Ltd. (4480). The location of the Debtors' corporate headquarters is 1700 E. Walnut Ave., 5th Floor, El Segundo, California 90245.

2. The Shopping Center is a “shopping center” as that term is used in Bankruptcy Code § 365(b)(3). Consequently, the Landlord is entitled to the protections that Bankruptcy Code § 365(b)(3) grants to landlords of shopping centers.

3. Prior to September 6, 2019 (the “Petition Date”), the Landlord entered into a lease agreement (the “Lease”) with the Tenant with respect to the space leased by the Tenant at the Shopping Center (the “Premises”).²

B. Background Regarding the Bankruptcy Cases and the Proposed Sale.

4. On the Petition Date, the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to act as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

5. On September 10, 2019, the Debtors filed a Motion for Entry of an Order: (I) (A) Approving Bidding Procedures and Protections in Connection With a Sale of Substantially All of Debtors’ Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; (B) Scheduling an Auction and Sale Hearing; (C) Approving the Form and Manner of Notice Thereof; (D) Approving Procedures for the Assumption and Assignment of Contracts and Leases; and (E) Granting Related Relief and (II) (A) Authorizing and Approving the Sale of Substantially All the Debtors’ Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances; (B) Authorizing and Approving the Assumption and Assignment of Certain Contracts and Leases; and (C) Granting Related Relief [Dkt. No. 62] (the “Sale Motion”).

6. After filing the Sale Motion, the Debtors accepted a new bid from Sugarfina Acquisition Corp. as their Stalking Horse Bidder. The Debtors wish to sell substantially all of

² Copies of the Lease, including all related agreements, are available upon request.

the Debtors' assets (the "Proposed Sale") to the Stalking Horse Bidder, or to another Successful Bidder to be determined after an auction.

7. On October 15, 2019, the Court entered an Order (A) Approving Bidding Procedures and Protections in Connection With a Sale of Substantially All of Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; (B) Scheduling an Auction and Sale Hearing; (C) Approving the Form and Manner of Notice Thereof; (D) Approving Procedures for the Assumption and Assignment of Contracts and Leases; and (E) Granting Related Relief [Dkt. No. 268] (the "Bidding Procedures Order").

8. In the Bidding Procedures Order, the Court approved certain bidding procedures (the "Bidding Procedures")³ and certain procedures governing the Debtors' assumption and assignment of executory contracts and unexpired leases to the Stalking Horse Bidder or the Successful Bidder.

C. The Debtors' Potential Assumption and Assignment of the Landlord's Lease.

9. On October 14, 2019, the Debtors filed an Amended Notice of Assumption and Cure Cost With Respect to Executory Contracts or Unexpired Leases Potentially to be Assumed and Assigned in Connection With Sale of Debtors' Assets [Dkt. No. 257] (the "Assumption/Assignment Notice").⁴ In the Assumption/Assignment Notice, the Debtors list certain executory contracts and unexpired leases which the Debtors may assume and assign to the Stalking Horse Bidder or to the Successful Bidder. The Assumption/Assignment Notice also includes proposed cure amounts associated with the contracts and leases listed thereon.

³ The Bidding Procedures are attached to the Bidding Procedures Order as "Exhibit 1."

⁴ The Assumption/Assignment Notice appears to supersede a prior notice filed by the Debtors on October 10, 2019 [Dkt. No. 239].

10. The Lease is listed on "Exhibit A" to the Assumption/Assignment Notice. The Debtors' proposed cure amount with respect to the Lease is \$32,119.36.

11. A hearing to consider the Sale Motion is scheduled for October 24, 2019 at 10:30 a.m. Objections to the Debtors' proposed (a) assumption and assignment of unexpired leases in connection with the Proposed Sale, including objections based on adequate assurance of future performance related to the Stalking Horse Bidder, and (b) cure amounts related thereto are due by October 21, 2019.

12. The Landlord objects to the Debtors' potential assumption and assignment of its Lease as set forth below.

LANDLORD'S OBJECTIONS TO ASSUMPTION AND ASSIGNMENT OF LEASE

A. Objections Regarding Adequate Assurance of Future Performance.

13. The Landlord is entitled to adequate assurance of future performance by the Stalking Horse Bidder or the Successful Bidder. Pursuant to Bankruptcy Code § 365(b)(3), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance:

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing

agreement, or master agreement relating to such shopping center;
and

(D) that assumption or assignment of such lease will not disrupt
any tenant mix or balance in such shopping center.

14. On October 12, 2019, the Debtors (through their Claims Agent) provided landlords with the Stalking Horse Bidder's adequate assurance materials (the "SH AA Materials").

15. After reviewing the SH AA Materials, the Landlord asserts that the SH AA Materials are insufficient to demonstrate adequate assurance of future performance under the Lease. As a result, the Landlord is unable to conclude that the Stalking Horse Bidder will be able to perform the Tenant's obligations under the Lease if the Lease is assigned to the Stalking Horse Bidder. In sum, the SH AA Materials do not contain adequate information from which the Landlord can assess the Stalking Horse Bidder's ability to operate "a first-class, high quality gourmet candy boutique gift store" at the Premises as is required under the Lease, or, more generally, to operate a retail store in a shopping center.

16. The only financial information contained in the SH AA Materials consists of a pro-forma balance sheet and pro-forma income statement as of the fourth quarter of 2019 and with projections through the fourth quarter of 2020. The Landlord reserves all of its rights regarding adequate assurance including, without limitation, issues regarding financial condition and ability.

17. In addition, the Lease contains specific use and exclusivity provisions. Bankruptcy Code § 365(b)(3) requires the Debtors to provide adequate assurance that any proposed assignee will remain subject to all these restrictions, including use restrictions. Any qualified assignee or purchaser must abide by the terms of the Lease, including those provisions

concerning use, exclusivity, rental obligations, tenant mix and balance, etc. Such critical lease terms are enforceable under Bankruptcy Code § 365(b).

B. Demand for Additional Security.

18. Under Bankruptcy Code § 365(l), a lessor may require a deposit or other security to ensure the purchaser's or assignee's performance under the lease, just as the landlord would have required upon the initial leasing to a similar tenant. See 11 U.S.C. § 365(l). The Landlord requires this protection in connection with the assignment of the Lease.

19. Based on the SH AA Materials provided to the Landlord and pursuant to Bankruptcy Code § 365(l), in the event that the Court overrules this Objection and allows the assignment of the Lease to the Stalking Horse Bidder or any other assignee, the Landlord demands either (a) a cash security deposit or a letter of credit equal to one-year of all obligations due under the Lease, or (b) unconditional parent guaranties from all top-level equity holders (or such other entities as agreed by the Landlord) with assets sufficient to satisfy all obligations due under the remaining term of the Lease.

20. Had the Stalking Horse Bidder approached the Landlord and requested to enter into a new lease for the Premises, in light of its nonexistent operating history and lack of financial statements or projections, the Landlord would have required, at a minimum, one of the aforementioned forms of additional security.

C. Objections Regarding Proposed Cure Amount.

i. Cure Amount.

21. As set forth on "Exhibit A" to the Assumption/Assignment Notice, the Debtors' proposed cure amount with respect to the Lease is \$32,119.36.

22. The Landlord submits that additional amounts may also be due with regard to the pre-petition and post-petition periods, such as year-end adjustments to various items, including, but not limited to, real estate taxes and common area maintenance charges, as well as annual percentage rental obligations.

23. Bankruptcy Code § 365(b) requires that a debtor cure all defaults in conjunction with lease assumption. As a result, the Debtors and any proposed assignee must acknowledge, and any Order approving cure amounts and assumption and assignment must provide, that the proposed assignee (a) shall be liable for any and all unbilled charges whether those charges cover pre-petition or pre-assumption periods of time and (b) shall pay any and all year-end adjustments when due pursuant to the terms of the applicable lease.

24. The Landlord further asserts that it is entitled to be reimbursed as part of the cure payment for all of the Landlord's actual pecuniary losses, including, but not limited to, attorneys' fees and costs expended with regard to the Debtors' bankruptcy cases, the Debtors' defaults, and the potential assumption and assignment of the Lease in connection with the Proposed Sale.

ii. Post-Closing Designation Period.

25. Pursuant to the proposed Asset Purchase among the Debtors and the Stalking Horse Bidder [Dkt. No. 214] (the "SH APA"), no later than three (3) days prior to the sale closing (and after the scheduled sale hearing), the Stalking Horse Bidder may designate certain leases as "Retained Contracts" to be retained by the Debtors for a period of up to 90 days post-closing (the "Retained Contracts Period") pending a determination as to whether such Retained Contracts will be assumed and assigned to the Stalking Horse Bidder or ultimately rejected. SH APA § 5.10(a)(iii) and (v).

26. The SH APA further provides that the Stalking Horse Bidder will be solely responsible and directly pay for all costs related to the Retained Contracts during the Retained Contracts Period. SH APA § 5.10(a)(vi).

27. The Landlord reserves all rights regarding the proposed “Retained Contracts Period” under the SH APA, including, without limitation, the right to further argue that the Debtors’ attempt to “retain” the Lease post-closing constitutes a de facto assumption and assignment for which the Debtors or assignee must fully “cure” all defaults under the Lease and otherwise comply in all respects with Bankruptcy Code § 365.

D. Objections Related to Indemnification Obligations.

28. The Lease requires the Tenant to indemnify and hold the Landlord harmless with respect to, among other things, any claim arising as a result of the action or inaction of the Tenant and/or the Tenant’s agents. Any Order approving the assumption and assignment of the Lease must provide that the assignee remains subject to the terms of the Lease including, without limitation, that any assignee is and shall be bound by all such indemnification obligations regardless of when the claim or claims at issue arose.

RESERVATION OF RIGHTS

29. The Landlord reserves the right to amend this Objection as appropriate, and to supplement this Objection generally.

30. The Landlord reserves the right to further object to the Debtors’ proposed assumption and assignment of the Lease and adequate assurance, including, without limitation, issues regarding the financial condition and ability of the Stalking Horse Bidder and/or the Successful Bidder and to require any proposed assignee to comply with all lease terms.

31. The Landlord reserves the right to further object to the Debtors' proposed cure amount and to increase or further reconcile the cure claim with additional charges, obligations and costs (including attorneys' fees and expenses) which may arise under the Lease prior to the effective date of any assumption and assignment of the Lease.

32. In addition, the Landlord reserves the right to object to any proposed Order approving the Proposed Sale and/or the proposed assumption and assignment of the Lease in connection with the Proposed Sale.

33. The Landlord hereby joins in the objections filed by other landlords to the extent that the other landlords' objections supplement and are not otherwise inconsistent with this Objection.

WHEREFORE, the Landlord respectfully requests that this Court enter an Order:

- a. Sustaining the Objection and granting relief consistent with the Objection; and
- b. Granting the Landlord such other and further relief as is just.

Dated: October 21, 2019
Wilmington, DE

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CERTIFICATE OF SERVICE

I, Elihu E. Allinson III, do hereby certify I am not less than 18 years of age and that on this 21st day of October 2019, I caused copies of the within *Landlord BP Prucenter Acquisition LLC's Objection to Debtors' Potential Assumption and Assignment of Lease in Connection with Sale of Debtors' Assets* to be served upon the parties listed below via Electronic Mail and First Class U.S. Mail. All other parties who have signed up for electronic filing in this case will receive electronic notice via CM/ECF.

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October 21, 2019
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/s/ E.E. Allinson III
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