

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

In re

SUGARFINA INC., et al.,¹

Debtors.

Chapter 11

Case No. 19-11973 (MFW)

(Jointly Administered)

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

Obj. Due: Oct. 21, 2019 at 4:00 p.m. (ET)

Related to Docket No. 257

**OBJECTION OF FEDERAL REALTY INVESTMENT TRUST AND
THE RELATED COMPANIES TO AMENDED NOTICE OF
ASSUMPTION AND CURE COST WITH RESPECT TO EXECUTORY CONTRACTS
OR UNEXPIRED LEASES POTENTIALLY TO BE ASSUMED AND ASSIGNED IN
CONNECTION WITH THE SALE OF DEBTORS' ASSETS**

Federal Realty Investment Trust and the Related Companies (the “Landlords”) hereby file this objection (the “Objection”) to the Amended Notice of Assumption and Cure Cost with Respect to Executory Contracts or Unexpired Leases Potentially to be Assumed and Assigned in Connection with the Sale of Debtors’ Assets (the “Cure Notice”),² and respectfully represent as follows:

I. BACKGROUND FACTS

1. Sugarfina Inc., and affiliated co-debtors (collectively, the “Debtors”), filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on

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 Terms not otherwise defined here shall have the meanings ascribed to them in the Sale Motion, Bidding Procedures, Cure Notice, and accompanying documents.

September 6, 2019 (the “Petition Date”). Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.³

2. The Debtors lease retail space (the “Premises”) from the Landlords pursuant to unexpired leases of nonresidential real property (individually, a “Lease,” and collectively, the “Leases”) at the locations (the “Centers”) set forth in detail on the attached Schedule A. The Leases are leases “of real property in a shopping center” as that term is used in Section 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

3. On September 10, 2019, the Debtors filed the *Debtors’ 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 of 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* (the “Sale Motion”) [D.I. 62].

4. In connection with the Sale Motion, on October 15, 2019, the Court entered the *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* [D.I. 268]. On October 14, 2019, the Debtors filed the Cure Notice [D.I. 257], which identifies, *inter alia*, certain executory contracts and/or unexpired leases that the Debtors may seek to assume and assign in connection with any sale of the Debtors’ assets, along with the amount that must be paid to cure any defaults existing under such

³ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

executory contracts or unexpired leases as of the Petition Date, based upon the Debtors' books and records.

5. The amounts set forth in the Cure Notice do not reflect all outstanding balances due and owing to Landlords under the Leases, and the proposed cure amounts do not account for accrued but unbilled charges which may come due in the future. The cure amounts set forth by the Debtors must be modified to reflect the additional charges owing, as well as recognize the liability for accruing charges due under the Leases, as set forth herein.

II. CURE OBJECTION

A. The Debtors' proposed cure amounts as set forth in the Cure Notice fail to provide for the payment of all obligations due under the Leases.

6. The Landlords' cure, as compared to the Debtors' cure is summarized below, and those charges comprising the Landlords' cure are more fully detailed in Exhibits 1 through 3, which are attached hereto and incorporated into this Objection by this reference:

Landlord	Center	Store No.	Debtors' Cure	Landlords' Cure⁴	Cure Exhibit
Related	The Shops at Columbus Circle	10008	\$40,912.00	\$75,781.21	1
Federal	Santana Row	6	\$19,410.18	\$26,944.95	2
Federal	The Point	11	\$46,140.52	\$37,693.72	3

7. In addition to the current outstanding rent and other monthly charges due under the Leases, in determining what must be paid as cure pursuant to Section 365(b), the charges referenced below must also be taken into consideration and paid by the Debtors, either as cure or when properly billed under the Leases.

⁴ The Landlords' Cure does not include charges that are billed or come due after the filing of this Objection or charges that are billed directly to the Debtors, including in some cases, real estate taxes. To the extent Landlords are later billed for any amount due to the Debtors' failure to pay, Landlords reserve the right to amend the Objection to include such amounts. The Debtors must timely pay all rent and other lease charges as they come due under the Leases, and the Landlords reserve the right to payment (and amend this Objection to the extent necessary) for any amounts that come due under the Leases through the date of any cure payment.

i. Year-end Adjustments and Reconciliations

8. In addition to rent and related monthly charges, attorneys' fees, costs and interest, some charges for which the Debtors bear responsibility under the Leases have not yet been reconciled and/or adjusted from pre-petition (or even post-petition) periods. By way of example, the Debtors occupy retail space at the Centers pursuant to triple-net leases, where they typically pay rent and related lease charges in advance for each month. The Debtors pay fixed minimum rent, along with a pro-rata share of expenses such as real property taxes, insurance, common area maintenance ("CAM") fees, annual percentage rent, and the like. Certain charges, such as CAM and property taxes are estimated prospectively, billed to and paid by the tenant during the year, and then reconciled after year-end. The reconciliation compares the amounts estimated and paid against actual charges incurred at the respective Center. To the extent the estimated payments exceed actual charges, the result is a credit to the tenant. To the extent the estimated payments do not cover actual charges incurred under the Leases, the result is an additional amount (or debit) for which the tenant is liable. In some instances, year-end reconciliations and adjustments for previous years for the Premises may not yet be complete (i.e., year-end reconciliations and adjustments that accrued through 2018 may not yet have been billed at certain locations, and such charges that are accruing for 2019 will not be billed until 2020). In other instances, certain charges may be paid in arrears, and cannot be calculated (in some cases) until a year or more after year-end. Since these accrued, but unbilled, charges are not yet due under the Leases, they do not create a current default that gives rise to a requirement of cure by the Debtors at this time.

9. Nevertheless, Debtors remain responsible for all accrued or accruing charges under the Leases, and must pay such charges when they come due under the Leases. The Debtors (or any successful bidder) assumes and assigns the Leases subject to their terms, and must assume and assign all obligations owing under the Leases, including obligations that have accrued but may not yet have been billed under each Lease. Any final assumption or sale order should clearly state that the Debtors (or any successful bidder) will assume these lease obligations and pay them when due, regardless of whether they relate to the period prior to, or

after, the closing of the Sale. In addition, any provision in the sale order that purports to release the Debtors (or any successful bidder) of further liability based upon a payment of cure amounts, must specify that such release does not apply to obligations to pay accrued or accruing, but unbilled, charges that come due under the Leases.

10. In addition, the Leases require the Debtors (or any successful bidder) to indemnify and hold the Landlords harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Leases, examples of which may include such claims as personal injuries at the Premises and damage to the Premises or Centers by the Debtors, the successful bidder or their agents. Any assumption or assumption and assignment of the Leases must be subject to the terms of the Leases, including the continuation of all indemnification obligations, regardless of when they arose.⁵ In the alternative, the Debtors must provide (by insurance or otherwise) that they can satisfy the indemnification obligations under the Leases for any claims that relate to the period prior to assumption or assumption and assignment of the Leases. Nothing in any sale order should preclude the Landlords from pursuing the Debtors, their insurance, or any other party that may be liable under the Leases, and the Landlords request that any order specifically preserve their right to pursue such rights irrespective of any resolution of cure amounts herein.

ii. Attorneys' Fees, Costs, and Interest

11. The Leases contain provisions for recovery of attorneys' fees, costs, and interest in the event the Landlords are required to take legal action to protect their interests. The Debtors are obligated to cure all defaults under the Leases, and compensate the Landlords for their actual pecuniary losses as a result of defaults under the Leases. *See* 11 U.S.C. § 365(b)(1)(A) and (B). The principle is well-recognized. In re LCO Enterprises, 12 F.3d 938, 941 (9th Cir. 1993); Elkton Associates v. Shelco Inc. (Matter of Shelco), 107 B.R. 483, 487 (Bankr. D. Del. 1989) (debtors allowed to assume lease provided it cured *all pre-petition defaults*).

⁵ Any ability to assume and assign the Leases is subject to the protections provided by Section 365(b) and (f). Therefore, any assumption must be in accordance with all provisions of the Leases.

12. The Debtors (or any successful bidder) takes the Leases *cum onere* – subject to existing burdens. The Debtors cannot assume the favorable portions, and reject the unfavorable provisions, of its Leases. In re Washington Capital Aviation & Leasing, 156 B.R. 167,172 (Banks. E.D. Va. 1993). If forced to continue in the performance of the Leases, the Landlords are entitled to the full benefit of the bargain under their Leases with the Debtors. *See* Matter of Superior Toy and Mfg. Co., Inc., 78 F.3d 1169 (7th Cir. 1996). The “full benefit of the bargain” principle has been held to require payment of interest. “The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy. One of the purposes of Section 365 is to permit the debtors to continue in a beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtor’s assumption of the contract.” In re Entertainment, Inc., 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) (citation omitted; bankruptcy court allowed interest at 18%). Interest on pre-petition lease charges continues to run from the filing of the Debtors’ petition and must be paid as a condition of the assumption of the Leases. *See* In re Skylark Travel, Inc., 120 B.R. 352055 (Bankr. S.D.N.Y. 1990). Interest calculations are therefore not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlords for the Debtors’ default under the Leases, and thus to properly assume the Leases. Finally, post-petition interest is allowable where such interest is provided for under the terms of the Leases. Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 853 (9th Cir. 2001).

13. Attorneys’ fees and costs incurred in enforcement of the covenants, obligations, and conditions of a lease are also proper components of a cure claim, and the Debtors (or any successor) must satisfy these lease charges as part of the assumption or assumption and assignment of the Leases. Entertainment, Inc., 223 B.R. at 152 (citation omitted). There is no logical distinction for purposes of Section 365 between attorneys’ fees incurred in connection with pre-petition defaults and fees incurred with post-petition defaults. Id. 154. The fact that a landlord uses bankruptcy procedures to enforce a lease should not preclude recovery of attorneys’ fees and costs for such enforcement activity (particularly where the Bankruptcy Court

is the exclusive forum where the landlord can obtain any relief, being foreclosed from state court relief by the automatic stay). Id., *see also*, In re Crown Books Corporation, 269 B.R. 12 (Bankr. D. Del. 2001) (Landlords' fees and costs are recoverable as a component of cure under 11 U.S.C. § 365(b)(1)); Urban Retail Properties v. Loews Cineplex Entertainment Corporation, et al., 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002) (where lease "provides for recovery of attorneys' fees and interest, their receipt deserves the same priority under Section 365(d)(3) as any of the debtors' other obligations that arise postpetition"); Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Incorporated), 167 F.3d 843, 850 (4th Cir. 1999). The Supreme Court has upheld the enforceability of such attorneys' fees clauses, ruling that pre-petition attorneys' fee clauses were enforceable with respect to issues peculiar to bankruptcy law. Travelers Casualty & Surety Co. Of America v. Pacific Gas & Electric, 127 S. Ct. 1199, 1206 (2007).

iii. The Cure Amounts Serve Only As Estimates.

14. Landlords can only provide the information presently available regarding amounts owing by the Debtors, while reserving the right to amend the Objection as necessary to include any additional or unknown charges that arise, including but not limited to subsequent rent defaults, attorney fees, costs, interest, and year-end adjustments and reconciliations. There is no basis to impose upon the Landlords the equivalent of an administrative bar date, limiting their recourse to recover charges to which they are entitled under the Leases.

iv. The Debtor Or Any Assignee Must Pay Undisputed Cure Amounts Immediately.

15. Section 365(b)(1)(A) requires that the Debtors promptly cure outstanding balances due under the Leases upon assumption or assumption and assignment. To the extent there is a dispute over the total cure obligation for any Lease, all undisputed cure amounts should be paid immediately. Debtors should escrow disputed amounts, and the Court should set a status conference within thirty (30) days of the assumption or assumption and assignment of the Leases to deal with any disputes that remain unresolved after such period.

III. JOINDER IN OBJECTIONS RAISED BY OTHER LANDLORDS

16. To the extent consistent with the objections expressed herein, Landlords also join in the objections of other shopping center lessors to the Debtors' proposed relief.

IV. CONCLUSION

The Landlords respectfully request that any sale or assumption order (i) allow the cure amounts (subject to adjustment by the Landlords) in the amounts set forth herein, (ii) order payment of all undisputed cure amounts, with an escrow established that is sufficient to pay any remaining disputed cure amounts, when resolved by the parties or this Court, and (iii) grant such further relief as the Court deems proper..

Dated: October 21, 2019
Wilmington, Delaware

Respectfully submitted,

/s/ Leslie C. Heilman

Leslie C. Heilman, Esquire (DE No. 4716)

Laurel D. Roglen, Esquire (DE No 5759)

BALLARD SPAHR LLP

919 N. Market Street, 11th Floor

Wilmington, DE 19801

Telephone: (302) 252-4465

Facsimile: (302) 252-4466

E-mail: heilmanl@ballardspahr.com

roglenl@ballardspahr.com

and

Dustin P. Branch, Esquire (Cal. Bar No. 174909)

BALLARD SPAHR LLP

2029 Century Park East, Suite 800

Los Angeles, CA 90067-3012

Telephone: (424) 204-4354

Facsimile: (424) 204-4350

E-mail: branchd@ballardspahr.com

*Counsel to Federal Realty Investment Trust
and The Related Companies*

SCHEDULE A

Federal Realty Investment Trust		
Store No. 6	Santana Row	San Jose, CA
Store No. 11	The Point	El Segundo, CA
The Related Companies		
Store No. 10008	The Shops at Columbus Circle	New York, NY