

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

In re:	)	Chapter 11
	)	
SUGARFINA INC., <i>et al.</i> ,	)	Case No. 19-11973 (MFW)
	)	
Debtors. <sup>1</sup>	)	Objection Deadline: October 21, 2019 @ 4:00 p.m.
	)	Hearing Date: October 24, 2019 @ 10:30 a.m.
	)	<b>Related to Docket Nos. 62 and 257</b>

**OBJECTION BY WESTFIELD, LLC AND CERTAIN AFFILIATES TO  
PROPOSED FORM OF SALE ORDER, PROPOSED PROCEDURES  
FOR RETAINED CONTRACTS, AND PROPOSED CURE COSTS**

WESTFIELD, LLC and its landlord affiliates listed on Schedule A hereto (collectively, the “Westfield Landlords”), hereby submit this Objection (the “Objection”) to the Debtors’ proposed form of sale order (Docket No. 62-2, the “Proposed Sale Order”), the proposed procedures for Retained Contracts,<sup>2</sup> and the proposed Cure Costs, and in support thereof, state as follows:

**A. BACKGROUND**

1. On September 6, 2019 (the “Petition Date”), the above-captioned debtor (the “Debtor”) filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) with the United States Bankruptcy Court for the District of Delaware (the “Court”).

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms that are used, but not defined, herein shall have the meanings ascribed to such terms in 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 Sale Of Debtors’ Assets (Docket No. 257, the “Cure Notice”).

2. The Westfield Landlords are the landlords and the Debtor is the tenant pursuant to unexpired leases (collectively, the “Westfield Leases”) of nonresidential real property (collectively, the “Premises”) located at shopping centers around the United States.

3. Each of the Centers constitutes a “shopping center” as that term is used in 11 U.S.C. § 365(b)(3).

4. Pursuant to the Cure Notice, the Debtors seek, *inter alia*, to continue the process of potentially assuming and assigning the Westfield Leases, and have asserted proposed Cure Cost amounts that they believe are needed to cure all existing monetary defaults under the Westfield Leases and 11 U.S.C. § 365(b).

## **B. OBJECTIONS**

### **Objection to Certain Provisions of the Proposed Sale Order**

5. The Proposed Sale Order should be modified in the following ways, among others:

a. Paragraph W should be modified to make clear that the Court’s finding that “[t]he Contracts and Leases are assignable notwithstanding any provisions contained therein to the contrary” is limited to the assignment of such Contracts and Leases in this chapter 11 case. If any of the Westfield Leases are actually assumed and assigned in this case, the language in Paragraph W must be changed to make clear that the non-enforcement of “anti-assignment” clauses in Assigned Leases is limited to permitting the assignment of such leases from Debtors to Buyer in this chapter 11 case only.

b. Paragraph 40 should be modified to state that Cure Costs “shall” be paid by Buyer “on the Closing Date.”

c. Paragraph 47 (first sentence) should be modified to insert “upon their receipt of all such respective Cure Costs,” before “the non-Debtor counterparties . . .”

d. Paragraph 52 should be modified to clarify that the Bankruptcy Code renders contractual provisions restricting assignment unenforceable within a debtor’s bankruptcy case, and not thereafter. The first sentence in Paragraph 52 should include the limitation “in this bankruptcy case” after “unenforceable.” Similarly, the second sentence should be changed to states, as follows:

No sections or provisions of any Assumed Contract that purport to provide for additional payments, penalties, charges, or other financial accommodations in favor of the counterparty to the Assumed Contract as a result of the assignment shall have any force or effect with respect to the transactions contemplated by the Agreement and assignments authorized by this Sale Order, and such provisions constitute anti-assignment provisions that are not enforceable in this bankruptcy case under section 365(f) and section 365(e) of the Bankruptcy Code, and no assignment of any Assumed Contract pursuant to the terms of the Agreement in any respect constitutes a default under any Assumed Contract.

f. Paragraph 32 orders, in part, that:

in its sole and absolute discretion, the Buyer is authorized to assign . . . the Assumed Contracts to any Persons (affiliated or unaffiliated) . . . Upon any such assignment, the references in this Sale Order or the Agreement to Buyer shall also apply to any such assignee.

Paragraph 45 provides that:

Assumed Contracts shall be assumed by the Debtors and assigned to the Buyer effective upon (a) the Debtors filing a notice of such designation with the Bankruptcy Court (each, an “Assumption and Assignment Notice”) and (b) the counterparty to any such Assumed Contract being paid the applicable Cure Costs set forth on Exhibit B attached hereto.

Paragraph 32, when paired with Paragraph 45, creates a process whereby the Buyer can cause Assumed Contracts, including the Westfield Leases, to be assumed and assigned to itself or its designee, when only the Buyer has been vetted for adequate assurance purposes. Buyer’s ability

to designate lease assignments to anyone its chooses must not be authorized by this Court. The Proposed Sale Order purports to authorize Buyer to assign the Assumed Contracts, including the Westfield Leases, to one or more unknown designees (“Unknown Designees”), by issuing an Assumption and Assignment Notice and paying the cure, without a process for complying with landlords’ adequate assurance and other rights under the Bankruptcy Code. The Debtor does not have the authority or right, and should not have the ability, to sell to Buyer the right, to designate leases for assignment to Unknown Designees. The Court should require all Unknown Designees to come before the Court, provide adequate assurance of future performance of the leases for which it seeks assignment, and otherwise comply with the requirements for assignment of leases under the Bankruptcy Code.

### **Objection to Proposed Procedures for Retained Contracts**

6. The Proposed Sale Order seeks to establish a procedure by which the Buyer can direct the Debtors to assign Westfield Leases to an Unknown Designee without incorporating the landlord protections specifically set forth in the Bankruptcy Code regarding lease assignments.

7. Before assuming a lease of a shopping center that is in default, a debtor must, inter alia, provide adequate assurance of future performance to the landlord. 11 U.S.C. § 365(b)(1).<sup>3</sup> Bankruptcy Code section 365(b)(3) states:

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), 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

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<sup>3</sup> Bankruptcy Code section 365(b)(1) provides that “[i]f there has been a default in an ... unexpired lease of the debtor, the trustee may not assume such ... lease unless, at the time of assumption of such ... lease, the trustee - (A) cures, or provides adequate assurance that the trustee will promptly cure such default ... (B) compensates, or provides adequate assurance that it will promptly compensate ... [the landlord] for any actual pecuniary loss ... resulting from such default, and (C) provides adequate assurance of future performance under such ... lease.”

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.

8. Because the Westfield Landlords do not know the identity of the possible Unknown Designees, the Westfield Landlords object to the proposed assumption and assignment of the Westfield Leases for lack of adequate assurance of future performance.

**The Debtors Have Not Provided Adequate Assurance of Future Performance of Lease Terms**

9. The Westfield Landlord objects to any attempts by the Debtors, the Buyer, or its Unknown Designee to modify the Westfield Leases or any of the Westfield Landlords' rights thereunder. The Westfield Leases must be assumed and assigned without modification, with all of their benefits and burdens, as expressly provided in 11 U.S.C. §365(b)(3)(C). *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134 (1946); *In re Jamesway Corp.*, 201 B.R. 73, 76 (Bankr. S.D.N.Y. 1996); *Rockland Center Assoc. v. TSW Stores of Nanuet, Inc. (In re TSW Stores of Nanuet, Inc.)*, 34 B.R. 299, 304 (Bankr. S.D.N.Y. 1985).

10. Furthermore, "[t]he Bankruptcy Code imposes heightened restrictions on the assumption and assignment of leases for shopping centers." *In re Joshua Slocum Ltd.*, 922 F.2d at 1086. "Congress recognized that unlike the usual situation where a lease assignment affects only the lessor, an assignment of a shopping center lease to an outside party can have a

significant detrimental impact on others, in particular, the center's other tenants." *Id.* "Where the leased premises are in a shopping center, the assignee must meet the heightened definition of adequate assurance of future performance in section 365(b)(3) to ensure that [t]he essential terms of a debtor's lease in a shopping center [are] not . . . changed in order to facilitate assignment." *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 299 (3rd Cir. 2000), cert. denied, 121 U.S. 924 (1999) (citation omitted).

11. Specifically, the Debtors should not be permitted to limit the Westfield Landlords' rights under the Westfield Leases to assert claims against the Buyer for accrued but as yet unbilled adjustments for such items as common area maintenance charges and taxes ("Adjustments"). The Buyer will receive the benefit of any Adjustments in the tenant's favor under the Westfield Leases and thus the Buyer should be required to accept the burdens of any Adjustment in the Westfield Landlords' favor.

12. The Westfield Landlords also object to any attempt by the Debtors to assume the Westfield Leases free and clear of the Debtors' indemnity obligations (including, without limitation, accrued obligations for personal injury or negligence claims against the Debtors that could be asserted against the Westfield Landlord) under the Westfield Lease (collectively, the "Unliquidated Claims"). Again, 11 U.S.C. §365(b)(3) requires that the Westfield Leases be assumed "subject to all the provisions thereof." 11 U.S.C. §365(b)(3)(C). The Westfield Landlords' Unliquidated Claims under the Westfield Leases should be preserved and survive any order authorizing assumption and assignment of the Westfield Leases.

13. Accordingly, any requests by the Debtors to modify clauses in the Westfield Leases to suit the desires of the Buyer are without merit and inconsistent with the protections afforded by 11 U.S.C. §365(b)(3) to lessors of real property contained within a shopping center.

To the extent this Court authorizes assumption and assignment of the Westfield Lease, the Buyer must be required to accept all clauses in that Westfield Lease. *Id.*

**Adequate Assurance of Future Performance of Cure Obligations;**  
**Objection to Proposed Cure Costs**

14. In the event that any of the Westfield Leases are assumed, the Debtors shall be required to, among other things, cure all defaults under those Westfield Leases and compensate the Westfield Landlords for actual pecuniary loss as a result of such defaults. 11 U.S.C. § 365(b). As of the date of the filing of this Objection, but exclusive of any amounts that may become outstanding thereafter, the proper 11 U.S.C. § 365(b) “cure” amounts for each of the Westfield Leases is set forth summary in form and in greater detail on Exhibit 1 (the “Westfield Cure Amounts”).

15. As part of the Westfield Cure Amounts, pursuant to the terms of the Westfield Leases and 11 U.S.C. § 365(b), the Court should award the Westfield Landlords a reasonable amount for attorneys’ fees actually incurred as a result of the Debtors’ bankruptcy case in the amount of \$1,000.00 per Westfield Lease. *See, e.g., Travelers Cas. & Su. Co. of Am. v. Pacific Gas and El. Co.*, 127 S. Ct. 1199, 1203 (2007) (holding that a party is entitled to be reimbursed for its attorneys’ fees when there exists an “enforceable contract allocating attorneys’ fees”); *In re East 44<sup>th</sup> Realty, LLC*, No. 07 Civ. 8799, 2008 U.S. Dist. LEXIS 7337 (S.D.N.Y. 2008) (affirming bankruptcy court’s finding that a \$1.7 million settlement of attorneys’ fees to a landlord was reasonable); *In re Beltway Medical, Inc.*, 358 B.R. 448, 453 (Bankr. S.D. Fla. 2006) (“Where the trustee or debtor-in-possession fails to perform the primary obligation under the lease (i.e. to pay rent), and the landlord incurs legal fees seeking to obtain payment, it follows that the attorney’s fees, if authorized under the lease and linked to enforcement of the payment obligation, are

entitled to the same administrative priority as the rent obligation”); *In re Entertainment, Inc.*, 223 B.R. 141, 152-154 (Bankr. E.D. Ill. 1998) (interest and attorneys’ fees must be paid as provided for in the assumed lease); *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 978 (Bankr. W.D. Wash. 1994) (“the legislative history of [section 365(d)(3)] and the language of the section itself mandate that a lessor be paid interest, late fees, and legal fees incurred in the first 60 days of the bankruptcy case”).

16. To the extent not inconsistent herewith, the Westfield Landlords hereby join in the objections filed by other landlords to the relief requested in the sale motion, the Proposed Sale Order, and assumption, assignment, and designation of leases in this case.

WHEREFORE, the Westfield Landlords respectfully requests that this Court enter an order:

- a. Sustaining this Objection;
- b. Determining that the proper 11 U.S.C. § 365(b) “cure” amounts for the Westfield Leases are the Westfield Cure Amounts set forth in Exhibit 1, plus reasonable attorneys’ fees of \$1,000.00 per lease; and
- c. Granting the Westfield Landlords such other and further relief as the Court deems appropriate.

Dated: October 21, 2019

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Counsel to Westfield, LLC and its landlord  
affiliates listed on Schedule A

**SCHEDULE A**

<b>Landlord Affiliates of Westfield, LLC</b>	<b>Store Address</b>
Century City Mall, LLC	Los Angeles, CA
Santa Anita Shoppingtown LP	Santa Anita, CA
UTC Venture LLC	San Diego, CA
New WTC Retail Owner LLC	New York, NY