

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

In re:	)	Chapter 11
	)	
SUGARFINA INC. <sup>1</sup>	)	Case No. 19-11973 (MFW)
	)	Jointly Administered
Debtors.	)	
	)	<b>Re: D.I. 62 and 257</b>

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**OBJECTION/RESERVATION OF RIGHTS OF DISNEY CONSUMER PRODUCTS,  
INC. AND TWENTIETH CENTURY FOX LICENSING AND MERCHANDISING TO  
SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND THE  
ASSUMPTION AND ASSIGNMENT OF LICENSE AGREEMENTS**

Disney Consumer Products, Inc. (“DCP”) and Twentieth Century Fox Licensing and Merchandising (“TCF,” and together with DCP, the “Disney Entities”) file this preliminary objection/reservation of rights in response to 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* [D.I. 62] (the “Sale Motion”) and 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 Sale of Debtors' Assets* [D.I. 257] (the “Cure Notice”).

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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 number, 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.

### **Background**

DCP and TCF each is a party to various merchandise license agreements with debtor Sugarfina Inc. (“Sugarfina”) pursuant to which DCP and TCF granted to Sugarfina non-exclusive, non-transferable, non-sublicensable licenses to design, develop, market and sell specified merchandise based on designated movies or movie characters owned and/or administered by DCP or TCF (“Licensed Products”) pursuant to the terms and conditions provided for in the relevant written licenses, which require Sugarfina to make certain royalty payments and to pay certain advances or guarantees.

Sugarfina and its affiliated debtors (collectively, the “Debtors”) filed voluntary petitions with this Court under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) on September 6, 2019. On September 10, 2019, the Debtors filed the Sale Motion, seeking an order approving procedures for conducting a post-petition sale process for the sale of substantially all of the Debtors’ assets to either Candy Cube Holdings, LLC (the “Stalking Horse Bidder”) or a bidder that submits a higher or otherwise better bid, and approval of an eventual sale. 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* [D.I. 268] (the “Sale Procedures Order”).

Pursuant to the Sales Procedure Order, the Debtors were required to file a notice identifying the specific contracts the Debtors may seek to assume and assign. On October 14, 2019, the Debtors filed the Cure Notice. The Cure Notice identified the following purported license

agreements with the Disney Entities:

Counter Party	Title/Description of Contract	Cure Amount
Disney Consumer Products	Disney Consumer Products Product Integrity Questionnaire for Prospective Licensees	\$18,000.00
Disney Consumer Products, Inc.	Contract 1657018579 Short Title: Bento Box and Cubes	\$-
Twentieth Century Fox Licensing & Mdsg	Promotion License Agreement	\$-

Notwithstanding the Debtors' identification of various license agreements with the Disney Entities in the Cure Notice, the Disney Entities are presently counterparties to only two (2) active contracts with Sugarfina:

1. A License Agreement between DCP and Sugarfina, with an effective date of June 1, 2017, and a termination date of March 31, 2020, Contract No. 1657018579 (the "DCP Agreement"); and

2. A Promotion License Agreement between TCF and Sugarfina, dated April 4, 2019, and with a termination date of December 31, 2020, Contract No. 50782 (the "TCF Agreement," and together with the DCP Agreement, and all amendments, schedules, and attachments thereto, the "Disney Entity License Agreements").

### **Objection/Reservation of Rights**

The Disney Entities do not generally oppose the sale of the Debtors' assets. They do, however, assert the following objections and reservations of rights with respect to the potential assumption and assignment of the Disney Entity License Agreements:<sup>2</sup>

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<sup>2</sup> To the extent the Debtors seek to assume and assign any contracts with any Disney Entity or affiliate other than the Disney Entity License Agreements, the Disney Entities object to such proposed assumption and assignment on the basis that no such contracts exist and are in effect, and to the extent any such contracts exist and are presently in effect, for the reasons set forth herein, to the extent applicable to such contracts, and because the Debtors' attempt to do so at this time would violate the Sale Procedures Order, which required Debtors to identify all such contracts in the Cure Notice.

(1) The Cure Notice fails to accurately reflect the amounts Sugarfina would be required to pay to effectuate the assumption and assignment of the Disney Entity License Agreements (“Cure Costs”). Specifically:

(A) The Cure Notice reflects that the Cure Costs for the TCF Agreement are \$0. In fact, Sugarfina presently owes TCF \$5,000 pursuant to the TCF Agreement on account of the initial licensing fee that was due within 30 days of the date of the TCF Agreement and yet remains unpaid. Accordingly, the Cure Costs required to be paid for any potential assumption or assignment of the TCF Agreement are \$5,000.

(B) The Cure Notice appears to reflect that the Cure Costs for the DCP Agreement are \$0.<sup>3</sup> However, Sugarfina presently owes \$36,000 pursuant to the DCP Agreement on account of two separate \$18,000 guaranteed payments due on or before April 1, 2019 and October 1, 2019, respectively, which have not been paid by Sugarfina. In addition, Sugarfina owes \$1,541.45 pursuant to a now-expired contract with The Walt Disney Company (Hong Kong) Limited, a DCP affiliate. Pursuant to a cross-default provision contained in the DCP Agreement, this past-due amount must be paid to DCP to cure this existing default under the DCP Agreement. Accordingly, the total Cure Costs required for any potential assumption or assignment of the DCP Agreement are at least \$37,541.45.

(2) More importantly, neither of the Disney Entity License Agreements can be assumed or assigned without the Disney Entities’ consent. Under controlling Third Circuit precedent, which has adopted the hypothetical test in construing Section 365(c)(1), *see In re West Electronics, Inc.*, 852 F.2d 79, 83 (3d. Cir. 1988), the Debtors can neither assume nor assign the Disney Entity

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<sup>3</sup> The Debtors’ description of “Contract 1657018579 Short Title: Bento Box and Cubes” on the Cure Notice appears to refer to the DCP Agreement. For the avoidance of doubt, there is no contract with DCP that matches the description on the Cure Notice of “Disney Consumer Products Product Integrity Questionnaire for Prospective Licensees,” which reflects proposed Cure Costs of \$18,000.

License Agreements, which are indisputably non-exclusive, without the Disney Entities' consent.<sup>4</sup> Nonexclusive licenses of patents and copyrights are "personal and assignable only with the consent of the licensor." *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 750 (9th Cir. 1999) (quoting *Everex Sys. v. Cadtrak Corp. (In re CFLC Inc.)*, 89 F.3d 673, 680 (9th Cir. 1996)), see also *In re Golden Books Family Entm't, Inc.*, 269 B.R. 300, 309 (Bankr. D. Del. 2001); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 45 (Bankr. D. Del. 1999). Even if for some reason that general rule regarding nonexclusive licenses did not apply here, the terms of the Disney Entity License Agreements make plain their personal nature. See 11 U.S.C. § 365(c)(1).

The Disney Entities are also entitled to "adequate assurance of future performance" with respect to the Disney Entity License Agreements. Here, that requires a showing not only of the financial means to perform under the license agreements, but also the expertise, the personnel, and adequate facilities to develop, sell and advertise the Licensed Products in a manner that complies with the license agreements and all applicable laws.

While the Disney Entities have no inherent objection to the assumption and assignment of the Disney Entity License Agreements, the sale has not been finalized, final identification of the buyer has not occurred, and the Disney Entities have not received adequate assurance of future performance; thus, the Disney Entities are not in a position to consent to the assumption and assignment of their agreements with the Debtors to the Stalking Horse Bidder (or to any other winning bidder) absent discussions with the winning bidder and satisfaction that the winning bidder can perform those agreements in a manner acceptable to the Disney Entities. The Disney Entities therefore reserve all their rights with respect to the assumption and assignment of the

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<sup>4</sup> The Disney Entity License Agreements are and should be treated as confidential, and, therefore, are not attached to this Objection. The Debtors should have a copy of each of the agreements and presumably made them available to the proposed buyer of the Debtors' assets. The Disney Entities will make the agreements available for *in camera* review should the Court so request.

Disney Entity License Agreements pending determination of the buyer, payment of all cure amounts and transfer fees, and adequate assurance of future performance.

**Further Reservation of Rights**

Nothing in this Objection is intended as or should be taken as a waiver of any right, claim, or defense that the Disney Entities or any of their respective affiliates may have with respect to the Disney Entity License Agreements or otherwise. The Disney Entities specifically reserve the right to exercise any and all options under the Disney Entity License Agreements, including their rights to terminate or to assert that termination has already occurred pursuant to the terms of those agreements.

Dated: October 22, 2019  
Wilmington, Delaware

**POTTER ANDERSON & CORROON LLP**

/s/ Jeremy W. Ryan

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