

**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 (KBO)

(Joint Administration Requested)

**MOTION PURSUANT TO SECTIONS 105 AND 366
OF THE BANKRUPTCY CODE FOR ENTRY OF INTERIM AND FINAL ORDERS (I)
PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR
DISCONTINUING SERVICES TO, OR DISCRIMINATING AGAINST, THE
DEBTORS, (II) DETERMINING THAT THE UTILITY COMPANIES ARE
ADEQUATELY ASSURED OF POSTPETITION
PAYMENT AND (III) ESTABLISHING PROCEDURES FOR RESOLVING
REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), by their undersigned counsel, hereby move (the “Motion”) the Court for the entry of interim and final orders, the proposed form of which are attached hereto, pursuant to sections 105(a) and 366 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”), (i) prohibiting utility service providers from altering, refusing or discontinuing services to, or discriminating against, the Debtors as a result of the commencement of these cases or on account of prepetition invoices, (ii) approving the Debtors’ proposed form of adequate assurance, (iii) establishing procedures for resolving adequate assurance objections by utility providers, and (iv) scheduling a final hearing to consider the relief requested herein on a final basis (the “Final Hearing”). In support of this Motion, the Debtors rely on *Declaration of Lance Miller in Support*

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.

of *First Day Motions* (the “First Day Declaration”). In further support of this Motion, the Debtors submit as follows:

JURISDICTION, VENUE AND PREDICATES FOR RELIEF

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157 (b)(2).

2. The statutory predicates for the relief requested herein are sections 105(a) and 366 of the Bankruptcy Code.

BACKGROUND

3. On September 6, 2019 (the “Petition Date”), each of the Debtors filed with the Court a voluntary petition under chapter 11 of the Bankruptcy Code, commencing the above-captioned chapter 11 cases. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No creditors’ committee has been appointed in these cases. No trustee or examiner has been appointed.

5. A full description of the Debtors’ business operations, corporate structures, capital structures, and reasons for commencing these cases is set forth in the First Day Declaration, which was filed contemporaneously with this Motion and which is incorporated herein by reference. Additional facts in support of the specific relief sought are set forth herein.

RELIEF REQUESTED

6. Utility services—power, telephone, cable, internet, fax and other similar utility services (collectively the “Utility Services”)—are essential to the ability of the Debtors to sustain

their operations while their chapter 11 cases are pending and, therefore, to the success of the Debtors' reorganization or liquidation. Any interruption of the Utility Services, even for a brief period, would severely disrupt the Debtors' business operations and would be extremely harmful to their customer relationships, revenues, profits, and ultimately their ability to maximize the recovery for their stakeholders, whether through a reorganization, sale, or a liquidation. It is therefore critical that all Utility Services continue to be provided to the Debtors on an uninterrupted basis.

7. By this Motion, the Debtors seek entry of interim and final orders, the proposed form of which are attached hereto: (i) prohibiting the Utility Companies (as defined below) from altering, refusing or discontinuing services to, or discriminating against, the Debtors as a result of the commencement of these cases or on account of prepetition invoices; (ii) approving the Debtors' proposed form of adequate assurance; (iii) establishing procedures for resolving adequate assurance objections by the Utility Companies; and (iv) scheduling the Final Hearing.

A. The Utility Companies and Services Provided

8. In the normal course of their businesses, the Debtors obtain Utility Services provided by several entities (each a "Utility Company" and collectively, the "Utility Companies"), including those identified in the nonexclusive list attached hereto as Exhibit A (the "Utilities List").² The Utility Companies do not include parties that are obligated to provide services to the Debtors pursuant to the terms of a contract.

² For each Utility Company, Exhibit A identifies: (a) the name and address of the Utility Company; (b) the service provided and to which Debtor; (c) the account number under which the Utility Company provides the service; and (d) the average amount due to each Utility Company per month. The inclusion of any entity on, as well as any omission of any entity from, Exhibit A is not an admission by the Debtors that such entity is, or is not, a utility within the meaning of section 366 of the Bankruptcy Code, and the Debtors reserve all rights with respect thereto. In addition, the Debtors are requesting that this Motion apply to all of the Debtors' Utility Companies, whether or not such Utility Company is included on Exhibit A. The Debtors have proposed a procedure for supplementing the list of Utility Companies on Exhibit A.

9. The Debtors pay the Utility Companies, on average, approximately \$3,660.00 per month for services rendered. To the best of their knowledge, prior to the commencement of these cases, the Debtors generally were current or no more than one month in arrears with respect to undisputed invoices for Utility Services.

B. The Proposed Adequate Assurance

10. Based upon cash flow from operations, the Debtors expect to have ample liquidity to pay timely all postpetition obligations owed to the Utility Companies.

11. However, to provide adequate assurance to the Utility Companies as required under section 366(c) of the Bankruptcy Code, the Debtors propose to reserve on account of each Utility Company listed on the Utilities List (as may be amended) an amount equal to the value of two (2) weeks of Utility Services provided by the Utility Company, based upon the Debtors' estimated average monthly bill as set forth in Exhibit A (each an "Adequate Assurance Deposit" and collectively, the "Adequate Assurance Deposits"). The Debtors respectfully submit that the Adequate Assurance Deposits, together with the Debtors' ability to pay for postpetition Utility Services in the ordinary course of business, constitutes sufficient adequate assurance to the Utility Companies.

C. Additional Adequate Assurance Procedures

12. In light of the severe consequences to the Debtors that would result from any interruption in Utility Services, but recognizing the right of the Utility Companies to evaluate the Adequate Assurance Deposits on a case-by-case basis, the Debtors propose that the Court approve and adopt the following procedures (the "Adequate Assurance Procedures"):

- (a) The Debtors will serve a copy of this Motion and the order approving this Motion on each Utility Company included in the Utilities List within three business days after entry of the interim order by the Court.

- (b) The Debtors will reserve on account of each Utility Company included in the Utilities List (as may be amended) its respective Adequate Assurance Deposit within 10 business days of entry of the order granting this Motion.
- (c) Any Company that is not satisfied with its Adequate Assurance Deposit must serve a request for additional adequate assurance (the “Additional Adequate Assurance Request”) upon: (a) Sugarfina, Inc., 1700 E. Walnut Ave., 5th Floor, El Segundo, California 90245 (Attn: Lance Miller) (b) counsel to the Debtors: Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington, Delaware 19801 (Attn: Brya Keilson) and Shulman Hodges & Bastian, 100 Spectrum Center Drive; Suite 600 Irvine, CA 92618 (Attn: Alan Friedman; and (c) counsel to any statutory committee appointed in these cases.
- (d) Any Additional Adequate Assurance Request must (a) be in writing; (b) set forth the locations for which Utility Services are provided; (c) include a summary of the Debtors’ payment history relevant to the affected account(s); (d) identify why the Utility Company believes its Adequate Assurance Deposit is insufficient; (e) set forth what the Utility Company would accept as satisfactory adequate assurance of payment; and (f) provide an address, telephone number, and email address for a Utility Company representative to whom the Debtors may respond.
- (e) Upon the Debtors’ receipt of any Additional Adequate Assurance Request, the Debtors shall have 30 days to negotiate with the Utility Company to resolve the request (the “Resolution Period”).
- (f) Without further order of the Court, the Debtors are authorized, but not directed, to enter into agreements granting additional adequate assurance to a Utility Company that served an Additional Adequate Assurance Request, if the Debtors, in their business judgment, determine that additional adequate assurance is necessary and such additional adequate assurance is reasonable.
- (g) If the Debtors determine that the Additional Adequate Assurance Request is not necessary or reasonable and are not able to reach an alternative resolution with the Utility Company during the Resolution Period, the Debtors, during or immediately after the Resolution Period, will request a hearing before the Court to determine the adequacy of assurances of payment with respect to a particular Utility Company (the “Determination Hearing”) pursuant to section 366(c)(3) of the Bankruptcy Code.

- (h) Pending resolution of any such Determination Hearing, the Utility Company submitting such Additional Adequate Assurance Request shall be prohibited from altering, refusing, or discontinuing service to the Debtors on account of unpaid charges for prepetition services, the commencement of these cases, or on account of any objections to its Adequate Assurance Deposit.
- (i) The Adequate Assurance Deposit shall be deemed adequate assurance of payment for any Utility Company that does not make an Additional Adequate Assurance Request.
- (j) To the extent that additional Utility Companies are identified by the Debtors, the Debtors shall file an amendment to the Utilities List and shall serve copies of this Motion and all orders approving this Motion on such newly identified Utility Companies. Any Utility Company subsequently added to the Utilities List must comply with these Adequate Assurance Procedures. If a newly identified Utility Company believes its Adequate Assurance Deposit is insufficient, it must make an Additional Adequate Assurance Request, in accordance with these Adequate Assurance Procedures, any orders approving this Motion, and the amended Utilities List.
- (k) All Adequate Assurance Deposits shall be released from reserve by the Debtors by no later than the earlier of five business days following the date upon which (a) a Chapter 11 plan is confirmed in these cases or these cases are dismissed, or (b) the Debtors provide notice to the Utility Companies that services provided to the Debtors by such Utility Company are no longer needed.

13. The Debtors propose that, absent compliance with the Adequate Assurance Procedures outlined above, the Utility Companies shall be prohibited from altering, refusing, or discontinuing service, or discriminating against the Debtors as a result of the commencement of these cases, unpaid prepetition invoices, or the Debtors' failure to provide additional adequate assurance of payment other than the Adequate Assurance Deposit, unless a final order of the Court is entered directing otherwise.

14. The Debtors submit that the proposed Adequate Assurance Deposits, in conjunction with the Debtors' ability to pay for postpetition utility services in the ordinary course of business, constitutes sufficient adequate assurance to the Utility Companies.

D. Final Hearing Date

15. Pursuant to section 366(c)(2) of the Bankruptcy Code, in chapter 11 cases a utility may alter, refuse or discontinue a debtor's utility service "if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility." 11 U.S.C. § 366(c)(2). Based on the 30-day period established by section 366(c)(2), the Debtors request that the Court schedule the Final Hearing no more than 25 days after the Petition Date so that it will be able to rule on the amount of adequate assurance to be provided to any objecting Utility Company.

BASIS FOR THE RELIEF REQUESTED

16. Section 366(a) of the Bankruptcy Code prevents utility companies from discontinuing, altering or refusing service to a debtor during the first twenty (20) days of a bankruptcy case. 11 U.S.C. § 366(a). A utility company, however, has the option of terminating its services thirty (30) days from the petition date pursuant to section 366(c)(2) of the Bankruptcy Code if a debtor has not furnished adequate assurance of payment. 11 U.S.C. § 366(c)(2). Section 366(c)(1) of the Bankruptcy Code defines "assurance of payment" to mean several enumerated forms of security (e.g., cash deposits, letters of credit, prepayment for utility service) while excluding from the definition certain other forms of security (e.g., administrative expense priority for a utility's claim). 11 U.S.C. § 366(c)(1). In addition, section 366(c)(3)(B) of the Bankruptcy Code provides that a court may not consider certain facts (e.g., a debtor's prepetition history of making timely payments to a utility) in making a determination of whether a utility has received adequate assurance of payment. 11 U.S.C. § 366 (c)(3)(B).

17. While section 366(c) of the Bankruptcy Code clarifies what does and does not constitute "assurance of payment" and what can be considered in determining whether such

assurance is adequate, Congress, in enacting that section, did not divest the Court of its power to determine what *amount*, if any, is necessary to provide adequate assurance of payment to a utility company. 11 U.S.C. § 366(c)(3)(A). Indeed, section 366(c) of the Bankruptcy Code not only fails to establish a minimum amount of adequate “assurance of payment,” but explicitly empowers the Court to determine the appropriate level of adequate assurance required in each case. *See* 11 U.S.C. § 366(c)(3)(A) (“On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment”).

18. Thus, there is nothing within section 366 of the Bankruptcy Code that prevents a court from ruling that, on the facts of the case before it, the amount required to adequately assure postpetition payment to a utility company is nominal, or even zero. Prior to the enactment of section 366(c) of the Bankruptcy Code, courts enjoyed precisely the same discretion to make such rulings pursuant to section 366(b) of the Bankruptcy Code, and frequently did so. *See Virginia Elec. & Power Co. v. Caldor, Inc.-NY*, 117 F.3d 646, 650 (2d Cir. 1997) (“Even assuming that ‘other security’ should be interpreted narrowly, we agree with the appellees that a bankruptcy court’s authority to ‘modify’ the level of the ‘deposit or other security,’ provided for under § 366(b), includes the power to require no ‘deposit or other security’ where none is necessary to provide a utility supplier with ‘adequate assurance of payment.’”).

19. Moreover, Congress has not changed the requirement that the assurance of payment only be “adequate.” Courts construing section 366(b) of the Bankruptcy Code have long recognized that adequate assurance of payment does not constitute an absolute guarantee of the debtor’s ability to pay. *See, e.g., In re Caldor, Inc.-N.Y.*, 199 B.R. 1, 3 (S.D.N.Y. 1996) (holding that section 366(b) requires a bankruptcy court “to determine whether the circumstances are sufficient to provide a utility with ‘adequate assurance’ of payment. The statute does not

require an ‘absolute guarantee of payment.’”) (citation omitted), *aff’d sub nom. Virginia Elec. & Power Co.*, 117 F.3d at 646; *Steinebach v. Tucson Elec. & Power Co. (In re Steinebach)*, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) (“Adequate assurance of payment is not, however, absolute assurance. . . . all § 366(b) requires is that a utility be protected from an unreasonable risk of non-payment”); *In re Adelpia Bus. Solutions. Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) (same); *In re Penn Jersey Corp.*, 72 B.R. 981, 982 (Bankr. E.D. Pa. 1987) (stating that section 366(b) of Bankruptcy Code “contemplates that a utility receive only such assurance of payment as is sufficient to protect its interests given the facts of the debtor’s financial circumstances”).³ Therefore, despite its language allowing a utility to take adverse action against the debtor should the debtor fail to provide adequate assurance of postpetition payment “satisfactory to the utility,” section 366 of the Bankruptcy Code does not require that the assurance provided be “satisfactory” once a party seeks to have the Court determine the amount of assurance that is “adequate.”

20. Given the foregoing, the Debtors submit that the proposed Adequate Assurance Deposits for the Utility Companies fully satisfy the requirements of section 366 of the Bankruptcy Code. Far from offering the Utility Companies nominal (or even no) additional assurance of payment, the Debtors propose to reserve on account of the Utility Companies significant cash deposits. Furthermore, the Debtors anticipate having sufficient resources to pay, and intend to pay, all valid postpetition obligations for Utility Services in a timely manner. In addition, the Debtors have a powerful incentive to stay current on their utility obligations because of their reliance on Utility Services for the operation of their business. These factors

³ Courts have recognized that “[i]n 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.’” *Caldor*, 117 F.3d at 650 (emphasis in original) (quoting *Penn Jersey*, 72 B.R. at 985).

significantly alleviate—if not eliminate—any honest concern of non-payment on the part of the Utility Companies, and is thus clearly “adequate” within the ambit of section 366 of the Bankruptcy Code.

21. Relief similar to that requested in this Motion has been granted in other chapter 11 cases in this District. *See, e.g., In re A123 Sys. Inc.*, Case No. 12-12859 (KJC) (Bankr. D. Del. Nov. 8, 2012); *In re Ritz Camera & Image, LLC*, Case No. 12-11868 (KG) (Bankr. D. Del. July 17, 2012); *In re NSA (USA) Liquidating Corp.*, Case No. 12-11817 (MFW) (Bankr. D. Del. July 3, 2012); *In re WP Steel Venture LLC*, Case No. 12-11661 (KJC) (Bankr. D. Del. June 18, 2012); *In re Capitol Infrastructure, LLC*, Case No. 12-11362 (KG) (Bankr. D. Del. May 15, 2012); *In re Appleseed's Intermediate Holdings LLC*, Case No. 11-10160 (KG) (Bankr. D. Del. Feb. 18, 2011); *In re Local Insight Media Holdings, Inc.*, Case No. 10-13677 (KG) (Bankr. D. Del. Dec. 10, 2010); *In re OTC Holdings Corp.*, Case No. 10-12636 (BLS) (Bankr. D. Del. Sept. 17, 2010); *In re NEC Holdings Corp.*, Case No. 10-11890 (PJW) (Bankr. D. Del. July 13, 2010); *In re MiddleBrook Pharmaceuticals, Inc.*, Case No. 10-11485 (MFW) (Bankr. D. Del. June 3, 2010); *In re Atrium Corp.*, Case No. 10-10150 (BLS) (Bankr. D. Del. Feb. 25, 2010).

22. The proposed relief requested in this Motion is necessary in these chapter 11 cases. If the Motion is not approved, the Debtors could be forced to address requests by their Utility Companies in a disorganized manner during the critical first weeks of these cases. Moreover, the Debtors could be blindsided by a Utility Company unilaterally deciding on or after the 30th day following the Petition Date that it is not adequately protected and subsequently discontinuing service or making an exorbitant demand for payment to continue service. Discontinuation of Utility Services could essentially shut down operations, and any significant disruption of operations could put these chapter 11 cases in jeopardy.

BANKRUPTCY RULE 6003

23. Bankruptcy Rule 6003 empowers a court to grant relief within the first 21 days after the Petition Date “to the extent that relief is necessary to avoid immediate and irreparable harm. The Debtors respectfully submit that the facts described herein demonstrate that the relief requested is necessary to avoid immediate and irreparable harm to business operations and the value of these estates. Bankruptcy Rule 6003 is therefore satisfied.

BANKRUPTCY RULES 6004(A) AND (H)

24. To successfully implement the relief requested in this Motion, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

25. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) holders of the 30 largest unsecured claims against the Debtors; (iii) counsel to the Debtors’ first lien lender, SFCC Loan Investors, LLC, Loeb & Loeb LLP, 345 Park Avenue, New York, NY 10154, Attn: Vadim J. Rubinstein, vrubinstein@loeb.com; and (iv) counsel to the Debtors’ second lien lender, Goldman Sachs Specialty Lending Group L.P., King & Spalding LLP, 1180 Peachtree Street, Northeast, Suite 1600, Atlanta, Georgia 30309, Attn: W. Austin Jowers, ajowers@kslaw.com. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

NO PRIOR REQUEST

26. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (a) enter interim and final orders substantially in the form annexed hereto as Exhibit B and Exhibit C granting the relief requested herein, and (b) grant to the Debtors such other and further relief as the Court may deem proper.

Dated: September 6, 2019

MORRIS JAMES LLP

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