

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)**

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| In re | * | Case No. 05-____ () through |
| | * | 05-____ () |
| The Boyds Collection, Ltd., et al.¹ | * | |
| Debtors. | * | Chapter 11 |
| | * | (Jointly Administered under |
| | * | Case No. 05-____ ()) |
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**DEBTORS’ EMERGENCY MOTION FOR ENTRY OF AN ORDER
(A) DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE
PERFORMANCE AND (B) ESTABLISHING A PROCEDURE FOR DETERMINING
ADEQUATE ASSURANCES PURSUANT TO 11 U.S.C. § 366**

The Boyds Collection, Ltd., *et al.*, the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), by counsel, file this Emergency Motion for Entry of an Order (A) Deeming Utilities Adequately Assured of Future Performance and (B) Establishing a Procedure for Determining Adequate Assurances Pursuant to 11 U.S.C. § 366 (the “Motion”), and in support thereof states:²

Jurisdiction

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 366 of title 11 of the United State Code (the “Bankruptcy Code”).

¹ The Debtors in the proposed jointly administered cases include: The Boyds Collection, Ltd.; The Boyds Collection, Ltd., LP; Boyds Operations Inc.; The Boyds Collection - Pigeon Forge, LLC; The Boyds Collection - Myrtle Beach, LLC; The Boyds Collection - Branson, LLC; J&T Designs and Imaginations, Inc.; HC Accents & Associates, Inc.; and Boyds Bear and Company, LP.

² The facts and circumstances supporting this Motion are set forth in the Affidavit of Jan L. Murley in Support of First Day Motions filed contemporaneously herewith.

Background

3. On the date hereof (the “Commencement Date”), the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (collectively, the “Reorganization 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. Contemporaneously herewith, the Debtors requested an order for the joint administration of the Reorganization Cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

4. The Boyds Collection, Ltd. (“Boyds”) is a leading designer, marketer and distributor of high-quality, hand-crafted collectibles, gift and other specialty products. Boyds was founded in 1979 and is the parent company, holding direct or indirect ownership interests in eight (8) domestic subsidiaries and four (4) foreign subsidiaries.³

5. Boyds operates in two segments: a wholesale gift business and a retail gift/entertainment business. Boyds’ wholesale business designs, imports and distributes plush animals, resin figurines and other specialty giftware via a global network of independent retailers and distributors. Boyds imports substantially all of its products from manufacturers in China through buying agencies. Boyds’ retail business sells plush animals, resin figurines and specialty giftware products and provides a unique interactive entertainment experience at its Gettysburg, Pennsylvania and Pigeon Forge, Tennessee retail stores.

6. As set forth in the Form 10-Q filed by Boyds on August 12, 2005, as of June 30, 2005, the Debtors’ consolidated books and records reflected assets totaling approximately \$66.9 million and liabilities totaling approximately \$101.7 million. For the three months ended June 30, 2005, Boyds reported revenues of approximately \$17.1 million and net losses of approximately \$101.3 million.

³ None of the foreign subsidiaries are Debtors.

7. The significant indebtedness of Boyds consists of: (i) approximately \$56.5 million in aggregate principal amount under a senior secured credit agreement, dated as of February 23, 2005 (the “Pre-Petition Credit Agreement”) and (ii) approximately \$34.4 million in aggregate principal amount pursuant to certain 9% senior subordinated notes due in 2008.

8. During 2001, Boyds’ financial results began to deteriorate significantly as a consequence of industry-wide and company-specific factors. Over a period of several years, retail sales of plush toys shifted from small independent retailers, in which Boyds had a leading presence, to large regional and national retailers and mass merchandisers, in which Boyds did not have a meaningful presence. Moreover, the large retailers competed with Boyds’ product line at lower price points. This shift in distribution channels coincided with a general cooling of consumer demand for “collectible” products. As a result, the retail sales of Boyds and its direct industry competitors were negatively affected.

9. In response, during 2004 Boyds began to implement various operational restructuring and cost reduction programs. Such programs focused on (i) redirecting sales efforts towards larger regional and national channels, (ii) developing products specifically targeted to these channels, (iii) selectively expanding distribution to include direct in-home marketing initiatives and (iv) developing co-branding campaigns with well-recognized brands such as NASCAR, Coca-Cola, Crayola and M&Ms. Unfortunately, despite the efforts of Boyds’ management to reposition the business in response to the changing industry sales dynamics, Boyds was not able to increase sales in the new channels quickly enough to offset the decline in sales from the company’s traditional core-market of independent retailers.

10. By the fall of 2005, it had become apparent that Boyds could not avoid a financial restructuring. From September to the Commencement Date, Boyds engaged in discussions with the lenders (the “Pre-Petition Lenders”) under the Pre-Petition Credit Agreement regarding the terms of a comprehensive plan to restructure Boyds’ operations and existing debt obligations. Though Boyds and the Pre-Petition Lenders made substantial progress in these negotiations, as of the Commencement Date, negotiations were still ongoing. The Pre-Petition Lenders were

unwilling to extend the waiver or commit to providing any further liquidity outside of a reorganization. On the Commencement Date, the Debtors, in the exercise of their prudent business judgment, determined that it was in the best interest of all their stakeholders to commence the Reorganization Cases, continue negotiations with the Debtors' creditor constituencies and consummate a restructuring under the auspices of this Court.

Relief Requested

11. Pursuant to sections 105(a) and 366 of the Bankruptcy Code, the Debtors request an order (a) prohibiting their utility companies (the "Utility Companies") from discontinuing, altering or refusing service and (b) establishing a procedure for determining adequate assurance.

Basis for Relief

12. In the operation of their facilities, the Debtors incur utility expenses for, among other things, water, sewer service, electricity, gas, local telephone service, long-distance telephone service and waste disposal in the ordinary course of business. These utility services are provided by numerous Utility Companies. A non-exhaustive list of these Utility Companies is attached hereto as Exhibit A.⁴ The Debtors estimate that the average aggregate monthly cost of the services provided by the Utility Companies is approximately \$92,980.11.

13. Uninterrupted utility services are essential to the Debtors' ongoing operations and, therefore, to the success of the Debtors' reorganization. As reflected on Exhibit A, utility services are provided to the Debtors in numerous states. The Debtors maintain approximately 46 accounts with the Utility Companies. Should one or more of the Utility Companies refuse or discontinue service even for a brief period, the Debtors' operations would be severely disrupted. Such an interruption would damage customer relationships, revenues and profits and would

⁴ While the Debtors do not believe that they have any direct obligations to any utilities not listed on Exhibit A, they reserve the right, pursuant to the terms and conditions of this Motion and without further Court order, to amend Exhibit A if any Utility Company has been inadvertently omitted from this list and to request that the relief requested herein apply to all such entities.

ultimately adversely affect the Debtors' restructuring efforts. It is, therefore, critical that utility services continue uninterrupted.

14. Section 366(a) of the Bankruptcy Code prohibits utilities from altering, refusing, or discontinuing service to a debtor solely on the basis of the commencement of its case or the existence of pre-petition debts owed by the debtor for the first twenty (20) days of a bankruptcy case (the "Stay Period"). See In re Cole, 104 B.R. 736, 737 (Bankr. D. Md. 1989) (noting that section 366(a) prohibited the utility company from terminating the debtor's electrical services within the first twenty days of the debtor's petition, despite the debtor's pre-petition delinquency). Upon expiration of the Stay Period, however, section 366(b) of the Bankruptcy Code provides that a utility company may (but need not) terminate services if a debtor has not furnished adequate assurance of future payment.⁵ In this case, the Stay Period will expire on or about November 3, 2005, unless extended.

15. As of the Commencement Date, the Debtors are generally current in the payment of invoices received from the Utility Companies. Additionally, the Utility Companies are further protected by their entitlement to an administrative expense priority under section 503 of the Bankruptcy Code for any unpaid post-petition utility services. The Debtors, therefore, submit that no additional adequate assurances of payment of post-petition utility services are warranted.

16. Accordingly, the Debtors seek entry of an order providing, among other things, that:

- (a) absent any further order of this Court, the Utility Companies shall not discontinue, alter or refuse service on account of any unpaid pre-petition charges, or require payment of a deposit or receipt of other security in connection with any unpaid pre-petition charges;
- (b) the Debtors will serve the order granting this Motion (the "Order") on the Utility Companies within five (5) business days of the date the Order is entered by the Court (the "Date of Entry");

⁵ The Debtors reserve the right to declare that any of the entities listed on Exhibit A are not utilities within the meaning of section 366(a) of the Bankruptcy Code.

- (c) a Utility Company may request additional assurances of payment in the form of deposits or other security within thirty (30) days of the Date of Entry of the Order (an “Additional Assurance Request”), and if the Debtors believe the Additional Assurance Request is unreasonable, the Debtors will promptly schedule a hearing to determine if additional assurances are necessary (the “Determination Hearing”);⁶
- (d) any Additional Assurance Request must (i) be made within the time required herein, (ii) be made in writing, (iii) set forth the location for which utility services are provided, and (iv) include a summary of the Debtors’ payment history relevant to the affected account(s), including any security deposits;
- (e) pending resolution of any such Determination Hearing, any objecting Utility Company shall be restrained from discontinuing, altering or refusing service to the Debtors on account of unpaid charges for pre-petition services; and
- (f) if a Utility Company makes an Additional Assurance Request under section 366 of the Bankruptcy Code that the Debtors believe is reasonable, then the Debtors shall be entitled to comply with such request, as contemplated in this Motion, without further order of the Court.

17. This Court has the authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides that the Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105 (2004). The purpose of section 105(a) of the Bankruptcy Code is “to assure the bankruptcy courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” 2 Collier on Bankruptcy ¶ 105.01, at 105-5 to 105-6 (15th ed. rev. 2001).

18. The Debtors submit that the Court should use its section 105 powers in these Reorganization Cases because the relief requested herein is necessary to continue the Debtors’ normal business operations and preserve the Debtors’ orderly restructuring of their businesses. If

⁶ For those Utility Companies that are subsequently added to Exhibit A, the Debtors shall serve a copy of the Order on such Utility Companies, along with an amended Exhibit A, and such subsequently added entities shall have thirty (30) days from service of the Order to make an Additional Assurance Request.

Utility Companies require deposits to secure continued services, the Debtors could face severe cash drains.⁷

19. Further, determinations of “adequate assurance” within the meaning of section 366 of the Bankruptcy Code are fully within this Court’s discretion. See Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646, 650 (2d Cir. 1997) (holding that “bankruptcy courts must be afforded reasonable discretion in determining what constitutes ‘adequate assurance’ of payment for continuing utility services”); see also In re Marion Steel Co., 35 B.R. 188, 198 (Bankr. D. Ohio 1983). In this regard, bankruptcy courts are not bound by state or local regulations governing what constitutes adequate assurance of payment for post-petition utility services. Id. at 199; In re Begley, 41 B.R. 402, 405-06 (Bankr. E.D. Pa. 1984). In analyzing whether a debtor has provided adequate assurance of post-petition payment, a court is not required to give utility companies the equivalent of a guaranty of payment; rather, it must determine that the utility is not subject to an unreasonable risk of non-payment for post-petition services. See, e.g., In re USG Corp., Case No. 01-2094 (RJN) (Bankr. D. Del. June 27, 2001) (debtors’ history of prompt and full payment for pre-petition utility services, debtors’ demonstrated ability to pay future services, administrative expense treatment afforded to post-petition utility claims and any existing security held by certain of the utility companies together constituted adequate assurance of future payment).

20. Whether utilities are subject to an unreasonable risk of nonpayment for post-petition services must be determined from the facts of each case. See generally In re Keydata Corp., 12 B.R. 156 (Bankr. D. Mass. 1981). “Section 366(b) requires the 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.’” In re Caldor, Inc.-NY, 199 B.R. 1, 3 (Bankr. S.D.N.Y. 1996) (citations omitted); In re Adelpia Bus. Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002). Indeed, courts have found deposits

⁷ Currently, none of the Utility Companies listed on Exhibit A are holding a deposit for utility services.

unnecessary in cases where, as here, the obligors under the utilities have maintained a good payment history with their utilities. See id. at 82; Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d at 650.

21. Courts have held that where, as here, debtors have generally timely paid their undisputed utility bills prior to the commencement of their chapter 11 cases, the administrative expense priority provided in sections 503(b) and 507(a)(1) of the Bankruptcy Code constitutes adequate assurance of payment, and no deposit or other security is required. See id. at 651 (“administrative priority may well be sufficient [to provide adequate assurance] if there appears to be little or no risk to the utility company and current payments are being met”) (quoting 3 Collier on Bankruptcy ¶ 366.03, at 366-4 (1997)); see also In re Rhythms Netconnections Inc., Case No. 01-14283 (Bankr. S.D.N.Y. Aug. 2, 2001) (history of prompt payment, ability to make future payments and administrative priority constitute adequate assurance).

22. Additionally, relief similar to that requested herein has been granted by this and other courts in other reorganization cases. See, e.g., In re Bond Transfer Co., Inc., Case No. 04-14910 (Bankr. D. Md. May 17, 2004); In re USGen New England, Inc., Case No. 03-30465 (Bankr. D. Md. July 14, 2003); In re MCSI, Inc., Case No. 03-80169 (Bankr. D. Md. June 10, 2003); In re Startec Global Commc’ns Corp., Case No. 01-25013 (Bankr. D. Md. Dec. 20, 2001); see also, e.g., In re Choice One Commc’ns Inc., Case No. 04-16433 (RDD) (Bankr. S.D.N.Y. Oct. 5, 2004); In re Cornerstone Propane, L.P., Case No. 04-13856 (RDD) (Bankr. S.D.N.Y. June 3, 2004).

23. Based on the foregoing facts and precedent, the Debtors believe that granting the relief requested will not prejudice the rights of the Utility Companies under section 366 of the Bankruptcy Code.

Memorandum of Law

24. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in

support of this Motion pursuant to Rule 9013-2 of the Local Bankruptcy Rules for the District of Maryland.

Notice

25. Notice of this Motion has been given to (a) the office of the United States trustee; (b) counsel to the Agent to the Debtors' Pre-Petition Lenders; (c) counsel for the indenture trustee for the Debtors' 9% Senior Subordinated Notes due 2008; and (d) each of the Debtors' top twenty (20) unsecured creditors.

No Prior Request

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

Conclusion

WHEREFORE, the Debtors respectfully request the entry of an order, substantially in the form attached hereto as Exhibit B, (i) deeming utilities adequately assured of future performance pending a further order of this Court, (ii) establishing a procedure for determining adequate assurances and (iii) granting such other and further relief as the Court deems appropriate.

Washington, D.C.
Dated: October 16, 2005

Respectfully submitted,

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EXHIBIT A

List of Utility Companies

