

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:

hhgregg, Inc., *et al.*,¹

Debtors.

Chapter 11

Case No. 17-01302-11

(Joint Administration Requested)

DEBTORS' FIRST DAY MOTION FOR INTERIM AND FINAL ORDERS, PURSUANT TO SECTIONS 105(a) AND 366 OF THE BANKRUPTCY CODE (I) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING, OR DISCONTINUING UTILITY SERVICES; (II) DEEMING UTILITY COMPANIES ADEQUATELY ASSURED OF FUTURE PAYMENT; (III) ESTABLISHING PROCEDURES FOR DETERMINING ADDITIONAL ADEQUATE ASSURANCE OF PAYMENT; AND (IV) SETTING A FINAL HEARING RELATED THERETO

hhgregg, Inc. and its above-captioned affiliated debtors and debtors in possession (collectively, the "Debtors") hereby submit this motion (the "Motion") for the entry of interim and final orders, substantially in the form attached hereto as Exhibits A and B (the "Proposed Interim Order" and the "Proposed Final Order," respectively), pursuant to sections 105(a) and 366(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"): (i) prohibiting the Debtors' utility service providers from altering, refusing, or discontinuing utility services on account of unpaid pre-petition invoices; (ii) deeming the Debtors' utility service providers adequately assured of future payment; (iii) establishing procedures for determining additional adequate assurance of future payment and authorizing the Debtors to provide additional adequate assurance of future payment to the Debtors' utility service providers; and (iv) setting a final hearing related thereto. The facts and circumstances supporting this

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: hhgregg, Inc. (0538); Gregg Appliances, Inc. (9508); HHG Distributing LLC (5875). The location of the Debtors' corporate headquarters is 451 E. 96th Street, Indianapolis, Indiana 46240.

Motion are set forth in the concurrently filed *Declaration of Kevin J. Kovacs in Support of the Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration").² In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Standing Order of Reference* from the United States District Court for the Southern District of Indiana, dated July 11, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105(a) and 366 of the Bankruptcy Code.

BACKGROUND

I. General

2. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Concurrently with this Motion, the Debtors have also filed certain other motions and applications seeking certain "first day" relief.

3. The Debtors have continued in possession of their properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No request has been made for the appointment of a trustee or examiner, and no official committee has been established in these chapter 11 cases.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

5. Additional information about the Debtors' business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

II. Utility Companies and Utility Services

6. In connection with the operation of their business, the Debtors have various utility companies (each, a "Utility Company" and, collectively, the "Utility Companies") that provide natural gas, electricity, water, sewer, waste disposal, telecommunications or other similar services (collectively, the "Utility Services") to the Debtors. The Debtors' accounts with these Utility Companies are serviced by a third-party administrator, Ecova Inc. ("Ecova").³ Attached to the Proposed Interim Order as Schedule 1 is a list (the "Utility Service List") of Utility Companies providing services to the Debtors as of the Petition Date.⁴

7. The Utility Companies serve the Debtors' headquarters, distribution centers, and store locations, among other places. The Debtors could not operate their business or serve their customers in the absence of continuous Utility Services. Thus, any interruption in such services would severely disrupt the Debtors' day-to-day operations and be extremely harmful to their business.

8. In general, the Debtors have established a good payment history with many of their Utility Companies, making payments on a regular and timely basis. Historically, the

³ Ecova pays the Utility Companies on the Debtors' behalf and is reimbursed by the Debtors on a monthly basis. Ecova ensures timely payments, monitors account activity, and reviews the Debtors' utility bills to ensure they are accurate and correct. The fee for Ecova's services averages approximately \$5,600 per month. Given that Ecova is the Debtors' primary intermediary with the Utility Companies, it is critical that the Debtors continue to receive the benefits that Ecova provides to ensure that the Debtors' stores operate without disruption. Accordingly, the Debtors seek authority to satisfy any prepetition amounts outstanding to Ecova in the ordinary course of business.

⁴ The Debtors have endeavored to identify all of the Utility Companies and list them on Schedule 1 to the Interim Order. However, inadvertent omissions may have occurred, and the omission of any entity providing Utility Services to the Debtors shall not be construed as an admission, waiver, acknowledgement, or consent that section 366 of the Bankruptcy Code does not apply to such entity. In addition, the Debtors reserve the right to argue that any of the entities now or hereafter included on the Utility Service List are not "utilities" within the meaning of section 366(a) of the Bankruptcy Code.

Debtors have paid on average approximately \$1.4 million per month on account of the Utility Services. The Debtors have provided security deposits for ninety-one (91) accounts in the aggregate amount of approximately \$737,000. To the best of the Debtors' knowledge, there are no material defaults or arrearages of any significance with respect to the Debtors' undisputed Utility Services invoices, other than payment interruptions that may be caused by the commencement of these chapter 11 proceedings.

RELIEF REQUESTED

9. By this Motion, the Debtors request that the Court enter the Proposed Interim Order and the Proposed Final Order: (i) prohibiting the Utility Companies from altering, refusing, or discontinuing the Utility Services on account of pre-petition invoices, including the making of demands for security deposits or accelerated payment terms; (ii) determining that the Debtors have provided each of the Utility Companies with "adequate assurance of payment" within the meaning of section 366 of the Bankruptcy Code ("Adequate Assurance"), based, among other things, on the Debtors' establishment of a segregated account in the amount of \$503,000, which is equal to approximately two weeks of the Debtors' estimated aggregate utility expenses, net of prepetition security deposits held by Utility Companies for accounts holding security deposits (the "Secured Utilities"); (iii) establishing procedures for determining additional adequate assurance of future payment, if any, and authorizing the Debtors to provide additional adequate assurance of future payment to the Utility Companies (the "Assurance Procedures"); and (iv) setting a final hearing (the "Final Hearing") on the proposed Adequate Assurance and Assurance Procedures.

BASIS FOR RELIEF

I. Request for Relief in Connection with Utility Services

10. The termination or cessation (even if only temporary) of any of the Utility Services will result in substantial disruption to the Debtors' business, as well as loss of revenue and profits. Any interruption of the Utility Services would substantially diminish or impair the Debtors' efforts to preserve and maximize the value of their estates and to successfully prosecute these chapter 11 cases. It is, therefore, critical that the Utility Services continue uninterrupted.

11. Section 366(c) of the Bankruptcy Code provides that, in a chapter 11 case, during the initial thirty (30) days after the commencement of the case, utilities may not alter, refuse, or discontinue service to, or discriminate against, a debtor solely on the basis of the commencement of its case or the existence of pre-petition debts owed by the debtor. In a chapter 11 case, following the thirty-day period under section 366(c) of the Bankruptcy Code, utilities may discontinue service to the debtor if the debtor does not provide adequate assurance of future payment of its post-petition obligations in a form that is satisfactory to the utility, subject to the Court's ability to modify the amount of adequate assurance.

12. The Debtors intend to pay undisputed post-petition charges for the Utility Services when due in the ordinary course of business. Nonetheless, to provide adequate assurance of payment for future services to the Utility Companies under section 366 of the Bankruptcy Code, the Debtors propose to deposit a sum of \$503,000 (the "Utility Deposit"), which equals 50% of the Debtors' estimated monthly payment to Utility Companies, net of prepetition security deposits held by the Secured Utilities, into a segregated account (the "Utility Deposit Account") within twenty (20) days of the Petition Date to be maintained during the pendency of these chapter 11 cases in the manner provided for herein and in the Proposed

Interim Order and the Proposed Final Order. For Secured Utilities, the Utility Deposit will reflect amounts currently held by such Secured Utilities as security deposits.

13. While the form of adequate assurance of payment may be limited to the types of security enumerated in section 366(c)(1)(A) of the Bankruptcy Code,⁵ the determination of the amount of the adequate assurance is within the discretion of the Court. See e.g., *In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63, 81 (Bankr. S.D.N.Y. 2002); *Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co.*, 271 B.R. 626, 644-45 (N.D. Cal. 2002); *Marion Steel Co. v. Ohio Edison Co.*, 35 B.R. 188, 195 (Bankr. N.D. Ohio 1983). It is well established that the requirement that a utility receive adequate assurance of payment does not require a guarantee of payment. See e.g., *In re Steinebach*, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) (“Adequate assurance of payment is not, however, absolute assurance. . . . [A] Bankruptcy Court is not required to give a [Utility Company] the equivalent of a guarantee of payment . . .”). Instead, the protection granted to a utility under section 366 of the Bankruptcy Code is intended to avoid exposing the utility to an unreasonable risk of nonpayment. *Id.* (“[A Bankruptcy Court] must only determine that the utility is not subject to any unreasonable risk of non-payment for postpetition services.”) (internal citations omitted). The Debtors submit that the Utility Deposit constitutes sufficient Adequate Assurance to the Utility Companies. However, the Debtors propose to establish the Assurance Procedures, pursuant to which a Utility Company may request additional adequate assurance of payment. If any Utility Company believes additional assurance is required, it may request such additional assurance pursuant to the Assurance Procedures. The Assurance Procedures are as follows:

⁵ Section 366(c)(1)(A) provides that “assurance of payment” may be in the form of a cash deposit, letter of credit, certificate of deposit, surety bond, prepayment of utility consumption, or another form of security that is mutually agreed on between the utility and the debtor. 11 U.S.C. § 366(c)(1)(A).

- (a) Any Utility Company desiring assurance of future payment for utility service beyond the Adequate Assurance must serve a request (an “Additional Assurance Request”) so that it is received by the Debtors at the following addresses: (i) hhgregg, Inc., 451 E. 96th Street, Indianapolis, Indiana 46240 (Attn: Candace Bankovich); (ii) proposed co-counsel to the Debtors, Morgan Lewis & Bockius LLP, 101 Park Avenue, New York, New York 10178 (Attn: Neil Herman, Esq.) and 1701 Market Street, Philadelphia, Pennsylvania 19103 (Attn: Rachel Jaffe Mauceri, Esq.), and Ice Miller LLP, One American Square, Suite 2900, Indianapolis, IN 46282 (Attn: Jeff Hokanson, Esq.); and (iii) counsel to the agent for the DIP Lender, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110 (Attn: Sean M. Monahan).
- (b) Any Additional Assurance Request must: (i) be made in writing; (ii) specify the amount and nature of assurance of payment that would be satisfactory to the Utility Company; (iii) set forth the location(s) for which Utility Services are provided and the relevant account number(s); (iv) describe any deposits, prepayments, or other security currently held by the requesting Utility Company; and (v) explain why the requesting Utility Company believes the Adequate Assurance is not sufficient adequate assurance of future payment.
- (c) Upon the Debtors’ receipt of an Additional Assurance Request at the addresses set forth above, the Debtors shall have thirty (30) days from the date of receipt of such request (collectively, the “Resolution Period”) to negotiate with the requesting Utility Company to resolve its Additional Assurance Request. The Debtors and the applicable Utility Company also may agree to extend the Resolution Period.
- (d) The Debtors, in their discretion, and in consultation with the DIP Agent, may resolve any Additional Assurance Request by mutual agreement with the requesting Utility Company and without further order of the Court, and may, in connection with any such resolution, in their discretion, and in consultation with the DIP Agent, provide the requesting Utility Company with additional assurance of future payment in a form satisfactory to the Utility Company, including, but not limited to, cash deposits, prepayments, and/or other forms of security, if the Debtors believe such additional assurance is reasonable. Without the need for any notice to, or action, order, or approval of, the Court, the Debtors may reduce the amount of the Utility Deposit by any amount allocated to a particular Utility Company to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtors and the affected Utility Company.
- (e) If the Debtors determine that an Additional Assurance Request is not reasonable or are not able to resolve such request during the Resolution Period, the Debtors, during or promptly after the Resolution Period, will

request a hearing before the Court to determine the adequacy of assurances of payment made to the requesting Utility Company (the “Determination Hearing”), pursuant to section 366(c)(3)(A) of the Bankruptcy Code.

- (f) Pending the resolution of the Additional Assurance Request at a Determination Hearing, the Utility Company making such request shall be restrained from discontinuing, altering, or refusing service to the Debtors on account of unpaid charges for pre-petition services, the commencement of these chapter 11 cases, or any objections to the Adequate Assurance, or requiring the Debtors to furnish any additional deposit or other security for the continued provision of services.
- (g) The Adequate Assurance shall be deemed adequate assurance of payment for any Utility Company that fails to make an Additional Assurance Request.

14. In addition to establishing the Assurance Procedures, the Debtors request a Final Hearing on this Motion to be held within twenty-five (25) days of the Petition Date to ensure that, if a Utility Company argues it can unilaterally refuse service to the Debtors on the thirty-first (31st) day after the Petition Date, the Debtors will have the opportunity, to the extent necessary, to request that the Court make such modifications to the Assurance Procedures in time to avoid any potential termination of the Utility Services.

15. It is possible that, despite the Debtors’ efforts, certain Utility Companies have not yet been identified by the Debtors and included on the Utility Service List (each an “Additional Utility Company” and, collectively, the “Additional Utility Companies”). Thus, promptly upon the discovery of an Additional Utility Company, the Debtors will increase the Utility Deposit by an amount equal to approximately two (2) weeks of the Debtors’ estimated utility expense for each Additional Utility Company subsequent to the Petition Date. In addition, the Debtors request that the Court provide that the Additional Utility Companies are subject to the terms of the Proposed Interim Order and the Proposed Final Order (including the Assurance Procedures) once entered by the Court.

16. Further, it is possible that during the course of these chapter 11 cases, certain utility accounts with the Utility Companies with respect to which funds have been contributed to the Utility Deposit will be closed (each, a “Closed Account”). The Debtors request that if any utility account with a Utility Company becomes a Closed Account during the course of these cases, the Debtors shall be authorized to decrease the amount of the Utility Deposit by withdrawing from the Utility Deposit Account the amount deposited with respect to such Closed Account.

17. The Debtors submit that their proposed method of furnishing adequate assurance of payment for post-petition Utility Services is not prejudicial to the rights of any Utility Company, and is in the best interests of the Debtors’ estates and creditors. Because uninterrupted Utility Services are vital to the Debtors’ business and, consequently, to the success of their chapter 11 cases, the relief requested herein is necessary and in the best interests of the Debtors’ estates and creditors. Such relief ensures that the Debtors’ business operations will not experience any unexpected or inopportune interruption during the pendency of these chapter 11 cases, and provides the Utility Companies and the Debtors with an orderly, fair procedure for determining “adequate assurance” of payment.

18. For the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interests of their estates and creditors.

II. Request for a Waiver of Bankruptcy Rule 6004(h)

19. Pursuant to Rule 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, any interruption of

the Utility Services would substantially diminish or impair the Debtors' efforts to preserve and maximize the value of their estates and to successfully prosecute these chapter 11 cases.

20. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable to the Proposed Interim Order and the Proposed Final Order.

III. Reservation of Rights

21. Nothing in the Proposed Interim Order, the Proposed Final Order, or this Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors or their estates; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority, or amount of any claim against the Debtors or their estates; (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to any and all claims or causes of action against a Utility Company; or (iv) shall be construed as a promise to pay a claim.

NOTICE AND NO PREVIOUS REQUEST

22. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) the Office of the United States Attorney for the Southern District of Indiana; (iii) the Internal Revenue Service; (iv) the Debtors' thirty (30) largest unsecured creditors; (v) the Prepetition Secured Parties; and (vi) counsel to the Agent for the Debtors' prepetition secured lenders and the lenders providing debtor in possession financing, c/o Sean M. Monahan, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule B-9013-3(d). In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

23. No previous request for the relief sought herein has been made to this or any other Court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Interim Order and the Proposed Final Order, granting the relief requested herein and such further relief as may be just and proper under the circumstances.

Respectfully submitted,

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