GARY E. KLAUSNER (STATE BAR NO. 69077)
MARGRETA M. MORGULAS (STATE BAR NO. 224950), and
MICHAEL S. NEUMEISTER (STATE BAR NO. 274220), Members of
STUTMAN, TREISTER & GLATT PROFESSIONAL CORPORATION
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067
Telephone: (310) 228-5600
Telecopy: (310) 228-5788
Email: gklausner@stutman.com
mmorgulas@stutman.com
mneumeister@stutman.com

Reorganization Counsel
for Debtors and Debtors in Possession

Debtors' Mailing Address:
Colorep, Inc. and Transprint USA, Inc.
100 Pleasant Valley Road
Harrisonburg, VA 22801-9790
Attn: Robert Katz, [Proposed] CRO

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re COLOREP, INC., a California corporation, *et al.*, Debtors. Tax I.D. Nos. 94-3055026 (Colorep, Inc.) and 54-1200596 (Transprint USA, Inc.)	Case No. 13-bk-27689-WB Chapter 11 (Jointly Administered) **DEBTORS' OMNIBUS RESPONSE TO OBJECTIONS FILED BY VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER [DOCKET NO. 72] AND COLUMBIA GAS OF VIRGINIA, INC. [DOCKET NO. 88] TO AMOUNT AND SCOPE OF ADEQUATE ASSURANCE THAT CERTAIN UTILITIES ARE ENTITLED TO UNDER BANKRUPTCY CODE SECTION 366** **Hearing Date** Date: August 28, 2013 Time: 10:00 a.m. Location: Courtroom 1475 255 East Temple Street Los Angeles, CA 90012

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Colorep, Inc. and Transprint USA, Inc., the debtors and debtors in possession in the above-captioned bankruptcy proceedings (collectively, the "Debtors"), hereby submit this omnibus response to the *Objection of Virginia Electric and Power Company d/b/a Dominion Virginia Power to the Emergency Motion for Order: (I) Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures for Determining Requests for Additional Assurance Pursuant to Bankruptcy Code Section 366* [Docket No. 72] (the "Dominion Objection"), filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Dominion"), and the *Objection of Columbia Gas of Virginia, Inc. to Debtors' Proposed Adequate Assurance of Payment for Utility Service Pursuant to 11 U.S.C. § 366(c)(3)* [Docket No. 88] (the "Columbia Objection"), filed by Columbia Gas of Virginia, Inc. ("Columbia", and together with Dominion, the "Utilities").

The Debtors respectfully request the Court, except as otherwise specifically stated herein, to overrule the Utilities' objections and leave unaltered the Court's *Order Granting Emergency Motion for Order: (I) Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures for Determining Requests for Additional Assurance Pursuant to Bankruptcy Code Section 366* [Docket No. 54] (the "Utilities Order"). As explained below, such relief is required under the plain language of the Bankruptcy Code and applicable precedent from within the Ninth Circuit.

I.

INTRODUCTORY STATEMENT

Dominion and Columbia provide electricity and gas services for the Debtors at the Debtors' factory in Harrisonburg, Virginia (the "Harrisonburg Factory"). The Harrisonburg Factory provides a primary source of income for, and is a key asset of, the Debtors. Accordingly, the Harrisonburg Factory and its continued operations are essential to the Debtors' bankruptcy proceedings as the Debtors seek to sell their assets and maximize recoveries for creditors. Were the Harrisonburg Factory to cease operations, as a result of terminated utility services or for any other reason, the Debtors' estates would lose substantial value, and the jobs of close to 100 employees would be put at risk. Largely for this reason, and to ensure the Debtors have sufficient cash to fund operations through the closing of sale of their assets, the Debtors reached an agreement with

Meserole, LLC ("Meserole") to receive up to $2.5 million in debtor in possession financing (the "DIP Financing"), which was approved by the Court on August 16, 2013 [Docket No. 134].

At issue before the Court are the objections of Dominion and Columbia to the terms of the Court's Utilities Order. Specifically, Dominion and Columbia have both raised objections to the amount of "adequate of assurance of payment" they have been provided under the Utilities Order. The Debtors, through good faith negotiations with Columbia and its counsel, have resolved Columbia's objection on this point. However, Dominion continues to press its objection, demanding more than a 500% increase in the amount of adequate assurance provided to it under the Utilities Order. In doing so, Dominion does not address the circumstances of these cases, or the Debtors' arguments in the Utilities Motion as to why the amount and form of adequate assurance it has provided to Dominion is sufficient. Rather, Dominion focuses its argument on mistaken procedural points that are inconsistent with the record in these cases and with precedent from within this district. Accordingly, the Debtors request the Court to leave unmodified the amount and form of adequate assurance provided to utilities, except with respect to Columbia which has reached agreement with the Debtors on terms described below.

Finally, both Dominion and Columbia also object to paragraph 2 of the Utilities Order, which provides that the "Debtors' utility service providers . . . are prohibited from altering, refusing, discontinuing service to, or discriminating against the Debtors" (the "Stay Provision"). As explained below, the Stay Provision merely reiterates what the automatic stay under Bankruptcy Code section 362(a) already provides. Specifically, if a utility believes it has cause to terminate its agreement to provide utility services to the Debtors postpetition (*i.e.*, due to postpetition arrearages), such utility must first obtain relief from the Court to do so.

In their oppositions, the Utilities argue that the Court did not have authority to enter the Stay Provision. However, as explained below, Columbia's argument is dependent on non-binding case law that contradicts existing Ninth Circuit precedent, and relies on an interpretation of Bankruptcy Code section 366 that is contrary to well-established canons of statutory interpretation. Moreover, Dominion focuses its opposition to the Stay Provision on the mistaken contention that, procedurally, the Court should not have entered the Stay Provision because this provision constitutes

an injunction that can only be obtained by way of an adversary proceeding. As explained below, this procedural argument also falls flat. For these reasons, the Debtors respectfully request the Court leave the Stay Provision unmodified in the Utilities Order.

II.

BACKGROUND FACTS

A. The Debtors Properly Obtained the Relief Requested in the Utilities Order.

On July 10, 2013, the Debtors commenced the above-captioned bankruptcy proceedings by commencing voluntary cases under chapter 11 of the Bankruptcy Code (the "Petition Date"). The next day, on July 11, 2013, the Debtors filed the *Emergency Motion for Order: (I) Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures for Determining Requests for Additional Assurance Pursuant to Bankruptcy Code Section 366* [Docket No. 8] (the "Utilities Motion"). The Utilities Motion was supported by the *Declaration of Mark A. Fox in Support of Emergency First Day Motions* [Docket No. 13] (the "Fox Declaration"). The Debtors attached a proposed form of the Utilities Order as Exhibit "1" to the Utilities Motion.

On the same the same date the Utilities Motion was filed, the Court set a hearing to consider the Utilities Motion, and other emergency motions, the following week on July 15, 2013 at 2:00 p.m. PST (the "First Day Hearing"). The Debtors filed and served a notice of the First Day Hearing on July 11, 2013 (the "Notice of First Day Hearing"). The Notice of First Day Hearing, Utilities Motion, and Fox Declaration (the "Utility Pleadings") were served by overnight mail on the Utilities at the following addresses:[1]

Dominion Va Power Attn: Barbara Smith P.O. Box 26666 Richmond, VA 23261-6666	Dominion Virginia Power P.O. Box 26019 Richmond, VA 23260-6019	Columbia Gas GTS Account P.O. Box 742529 Cincinnati, OH 45274-2529

[1] *See Proof of Service of (1) First Day Motions (2) Omnibus Notice of Hearing for Debtors' First Day Motions and (3) Declaration of Mark A. Fox in Support of Emergency First Day Motions* [Docket No. 29].

Accordingly, the Utilities should each have received hard-copies of the Utility Pleadings on or about July 12, 2013. Notably, the "P.O. Box 26666" address used to serve Dominion by overnight mail is the address "For correspondence" included on Dominion's website.[2]

In addition, the Utilities were served with the Utility Pleadings by email on July 11, 2013 as follows: (i) Dominion received the Utility Pleadings, c/o Barbara Smith, at Barbara.ann.smith@dom.com; and (ii) Columbia received the Utility Pleadings, c/o Keith Martin at kmartin@nisource.com and Sandra Crew at Slcrew2@nisource.com.[3] Accordingly, the Utilities each received copies of the Utility Pleadings, including a proposed form of the Utilities Order, as early as July 11, 2013–four (4) days prior to the First Day Hearing. The Debtors obtained the email addresses either from existing records or by directly contacting the Utilities themselves.[4]

The Court considered the Utilities Motion at the First Day Hearing on July 15, 2013. No objections were filed with respect to the relief requested in the Utilities Motion, and, specifically, none were filed by Dominion or Columbia. The Court approved the Utilities Motion at the First Day Hearing, which ruling was memorialized in the Utilities Order entered July 18, 2013.

B. The Utilities Order.

Under the Utilities Order, the Court found that notice of the Utilities Motion was appropriate, and that the relief requested in the Utilities Motion was supported by sufficient cause. More specifically, and relevant to the Utilities' pending objections, the Court held that the Debtors' creation of an escrow account in favor of their known utility providers, "in an amount equal to an average, based upon historical payments made by the Debtors to each [utility provider] from July 1, 2012 through June 30, 2013, of two (2) weeks worth of payments to each [utility provider]," would constitute "adequate assurance of payment" to the Debtors' known utility providers under

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[2] *Declaration of Pam Kiracofe in Support of Debtors' Omnibus Response to Objections Filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power [Docket No. 88] to Amount and Scope of Adequate Assurance That Certain Utilities are Entitled to Under Bankruptcy Code Section 366* (the "Kiracofe Declaration"), filed contemporaneously herewith.

[3] *Proof of Service of (1) First Day Motions (2) Omnibus Notice of Hearing for Debtors' First Day Motions and (3) Declaration of Mark A. Fox in Support of Emergency First Day Motions* [Docket No. 30].

[4] *See* Kiracofe Declaration, at ¶ 3.

Bankruptcy Code section 366.[5] As explained in the Utilities Motion, and evidenced by the Fox Declaration, this required a deposit of $22,595.[6] The Debtors have established an escrow account for the benefit of their utility providers, with a deposit of $22,595 (the "Escrow Account").[7]

The Utilities Order also includes the Stay Provision, stating that the "Debtors' utility service providers . . . are prohibited from altering, refusing, discontinuing service to, or discriminating against the Debtors."[8]

Finally, the Utilities Order sets specific procedures for the Debtors' utility providers to object to the Court's "determination that the Debtors have provided adequate assurance."[9] Specifically, any objecting utility provider must present to the Court and the Debtors:

> (1) the location for which the Utility Services are provided[;]
>
> (2) the average monthly usage for the most recent twelve (12) month period[;]
>
> (3) the prepetition amount alleged to be due and owing[;]
>
> (4) the amount of any deposit made by the Debtors prior to the Petition Date[;] and
>
> (5) the requested additional assurance and the alleged justification therefore.[10]

C. The Dominion Objection.

On July 26, 2013, Dominion filed its objection to the Utilities Motion. However, because the Court has already approved the Utilities Motion through the Utilities Order, the Debtors request the Court treat Dominion's objection as an objection to the Utilities Order and the relief granted therein.[11] Dominion's objection raises a litany of incorrect, technical arguments, all of which

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[5] Utilities Order, p. 2: 14–18.

[6] In calculating this amount, the Debtors divided their average monthly usage by 2. Because there are more than 4 weeks in most months, this calculation actually provides the Debtors' utility providers with adequate assurance in excess of 2-weeks' monthly average as approved by the Court.

[7] *See Declaration of Robert D. Katz in Support of Debtors' Omnibus Response to Objections Filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power [Docket No. 88] to Amount and Scope of Adequate Assurance That Certain Utilities are Entitled to Under Bankruptcy Code Section 366* (the "Katz Declaration"), filed contemporaneously herewith.

[8] Utilities Order, p. 2:11–12.

[9] *Id.* at p. 2:19–20.

[10] *Id.* at p. 2:21–25.

[11] It appears the Utilities' objections are procedurally improper with respect to their challenge of the Stay Provision. If the Utilities wished to challenge the Stay Provision, they could have (i) filed

are addressed below. However, in substance, Dominion appears to seek two rulings from the Court. First, Dominion contends it is entitled to a "two-month deposit in the amount of $63,594 as adequate assurance of payment to Dominion."[12] Second, Dominion seeks modification of the Utilities Order so as to omit the Stay Provision. The Dominion Objection does not set forth the Debtors' monthly usage for the most recent twelve (12) month period, or the amount of any prepetition deposit made by the Debtors, as required under the Utilities Order. In fact, Dominion does not state at all which months it used to calculate its requested adequate assurance deposit.

Counsel for Dominion and the Debtors have attempted to resolve the Dominion Objection informally. However, the parties have been unable to reach a final agreement as to any of Dominion's objections.

D. The Columbia Objection.

On August 1, 2013, Columbia filed its objection to the Utilities Order. Columbia claimed that, as adequate assurance of payment for its utility services, it was entitled to a deposit of $41,866.75. This figure was determined by cherry-picking the Debtors' purportedly two highest utility usage months over the last twelve months.[13] The Debtors and Columbia settled the dispute as to the amount and form of adequate assurance to which Columbia is entitled. Under the parties' agreement, the Debtors shall deliver to Columbia a $12,000 deposit within five (5) days of any order on the Columbia Objection.

Columbia also objects to the propriety of the Stay Provision, contending that it is not permitted under Bankruptcy Code section 366. The parties have been unable to reach a final resolution as to this objection.

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an objection to the proposed order, *see* Local Bankruptcy Rule 9021-1(b)(3); (ii) filed a Notice of Appeal, *see* Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 8002; or (iii) filed a motion for reconsideration, *see* Bankruptcy Rules 7052, 9023. The Utilities failed to do any of these.

[12] *See* Dominion Objection, p. 5:12–14.

[13] Columbia Objection, ¶ 16.

III.

ARGUMENT

A. The Debtors Have Provided Dominion With Adequate Assurance of Payment Under the Utilities Order.

Under the Utilities Order, the Debtors have provided Dominion and other utility providers adequate assurance of future payment through the creation of the Escrow Account, which currently holds $22,595 for the benefit of the Debtors' utility providers. $12,660.14 of this amount is based on the two-week average for Dominion's utilities, and is currently being held in the Escrow Account for the benefit of Dominion. Under Bankruptcy Code section 366(c) and applicable case law, the Escrow Account constitutes adequate assurance of payment for Dominion and the Debtors' other utility providers.

1. The Escrow Account Constitutes "Assurance of Payment" Under Bankruptcy Code Section 366(c)(1)(A).

Under Bankruptcy Code section 366(c)(2), a utility may not "alter, refuse, or discontinue utility service" if the utility receives adequate assurance of payment for postpetition utility services. Bankruptcy Code section 366(c)(1)(A) defines the term "assurance of payment" as "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee."

Multiple courts have held that escrow accounts held by a debtor for the benefit of its utility providers constitutes "assurance of payment" under section 366(c)(1)(A). *S. Cal. Edison Co. v. Crystal Cathedral Ministries (In re Crystal Cathedral Ministries)*, 454 B.R. 124, 130 (Bankr. C.D. Cal. 2011); *Long Island Lighting Co. v. Great Atl. & Pac. Tea Co. (In re Great Atl. & Pac. Tea Co.)*, Case No. 11-CV-1338 (CS), 2011 U.S. Dist. LEXIS 131621, at *24–26 (S.D.N.Y. Nov. 14, 2011); *In re Circuit City Stores, Inc.*, Case No. 08-35653, 2009 Bankr. LEXIS 237, at *8 n.10 (Bankr. E.D. Va. Jan. 14, 2009). Such accounts are the equivalent of either a "cash deposit" or a "letter of credit," and therefore are consistent with the forms of "assurance of payment" required under Bankruptcy Code section 366(c)(1)(A). *In re Crystal Cathedral Ministries*, 454 B.R. at 130

(affirming a bankruptcy court's determination that the creation of a "segregated bank account" for the benefit of utilities constitutes a "cash deposit"); *In re Great Atl. & Pac. Tea Co.*, 2011 U.S. Dist. LEXIS at *26 (holding that a bankruptcy court "reasonably found that the Adequate Assurance Account was a cash deposit or akin to a letter of credit within the meaning of the Bankruptcy Code, and that there was no persuasive reason why the utility providers, rather than an escrow agent, needed to control it"); *In re Circuit City Stores, Inc.*, 2009 Bankr. LEXIS 237 at *9 n.10 (holding that a utility account funded by the debtors is "substantially similar to a letter of credit").

In its objection, Dominion contends that the Escrow Account is not a permissible form of "assurance of payment" because (a) it is not the "form of adequate assurance requested by Dominion; (b) not a form recognized by Section 366(c)(1)(A); (c) illusory because the Debtors do not have to fund it; and (d) an otherwise unreliable form of adequate assurance."[14] The Court should dismiss all of these "objections" on their face. First, as explained below, *infra* Section III.A.3, the Court has authority to determine the form of adequate assurance over an objection from a utility. *See, e.g., In re Crystal Cathedral Ministries*, 454 B.R. at 130 (approving the use of an escrow account over the objection of a utility that demanded a cash deposit). Second, multiple courts have recognized accounts similar to the Escrow Account as a permissible form of "assurance of payment" under Bankruptcy Code section 366(c)(1)(A). Third, the Debtors have funded the Escrow Account. Thus, Dominion's "illusory" allegation is not supported by the facts of these cases. Fourth, Dominion's contention that the Escrow Account is an "unreliable form of adequate assurance" is not supported by any facts or supporting precedent. Such a cursory allegation is not sufficient to prove that the Escrow Account is not a valid form of "assurance of payment" under the Bankruptcy Code.

2. The Amount of the Escrow Account Provides Dominion with Sufficient "Adequate Assurance of Payment."

While bankruptcy courts are generally given broad discretion in determining whether a utility has been provided "adequate assurance of payment," courts have recognized that "adequate assurance of payment . . . is not to be confused with actual payment or an absolute guarantee of

[14] Dominion Objection, p. 15:2–5 (emphasis omitted).

payment." *In re Crystal Cathedral Ministries*, 454 B.R. at 131. Bankruptcy courts are "not required to give a utility company the equivalent of a guarantee of payment, but must only determine that the utility is not subject to any unreasonable risk of non-payment for postpetition services." *Steinebach v. Tucson Elec. Power Corp. (In re Steinebach)*, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) (quoting *In re Adelphia Bus. Solutions*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002)).

In assessing whether a utility has been provided with "adequate assurance of payment," courts may consider a number of factors, including a debtor's "postpetition finances" and the existence of a DIP facility, and the "burden an additional" deposit would impose on an operating debtor. *In re Crystal Cathedral Ministries*, 454 B.R. at 131; *In re Great Atl. & Pac. Tea Co.*, 2011 U.S. Dist. LEXIS at *20–21.

As explained in the Utilities Motion, several courts have approved, as adequate assurance, a deposit equal to one half of a debtor's estimated monthly utility costs. *See In re Mondrian TTL, L.L.C.*, Case No. 10-14140, 2010 Bankr. LEXIS 6002, at *3 (Bankr. D. Ariz. May 14, 2010) (approving, as adequate assurance, a deposit equal to 50% of the Debtors' estimated monthly utility costs); *In re Great Atl. & Pac. Tea Co., Inc.*, 2011 U.S. Dist. LEXIS 131621 at *20–22 (upholding bankruptcy court ruling that a deposit equal to the average cost of two weeks' utility charges was "adequate assurance of payment" under Bankruptcy Code section 366); *In re Circuit City Stores, Inc.*, 2009 Bankr. LEXIS 237 at *8 n.9, 22–23 (same).

The district court's decision in *Great Atlantic* is particularly relevant to the present matter. In *Great Atlantic*, a district court affirmed a bankruptcy court's decision to approve, as adequate assurance, the creation of an escrow account with a deposit equal to the average cost of two weeks' utility charges of the debtor. *In re Great Atl. & Pac. Tea Co., Inc.*, 2011 U.S. Dist. LEXIS 131621 at *20–22. In doing so, the district court approved the bankruptcy court's consideration of a number of factors, including: (i) that the debtors had more credit to pay utilities postpetition than it did prepetition as a result of cash flow and the presence of a "DIP Facility"; (ii) the burden that increased deposits would have on the debtors' bankruptcy proceeding, recognizing that it was not sensible to "put up cash that [the debtor] could otherwise be using to run its business just to sit there"; (iii) an escrow account was created for the sole benefit of the utilities, decreasing the risk of

non-payment; (iv) that utilities were given an opportunity to come back to court to seek additional assurance if circumstances changed; and (v) the utilities were seeking "assurances that were more than necessary" (*i.e.*, the utilities were looking for an "absolute" not required under section 366). *Id.* at *20–21.

Through the Fox Declaration, the Debtors provided evidence in support of the relief requested in the Utilities Motion.[15] Specifically, the Fox Declaration demonstrates that the amount of adequate assurance provided under the Utilities Order is reasonable, and based on one half of the Debtors' average monthly utility usage. As explained in the Fox Declaration, the unilateral termination of the Debtors' utilities or the insistence of additional security could disrupt the Debtors' ability to operate their business, thereby damaging the Debtors' going concern value.

Moreover, the record in these cases since the entry of the Utilities Order only buttresses the fact that the Escrow Account, as established, is "adequate." Specifically, as in *Great Atlantic*, the Court recently approved the Debtors' proposed $2.5 million of DIP Financing, which should provide the Debtors with sufficient cash flow to fund its operations through the closing of a sale. The DIP Financing must be used pursuant to a set budget, which includes specific allocations for the timely payment of the Debtors' postpetition utilities. Requiring the Debtors to transfer over $63,000 just to sit in Dominion's account would significantly cut into the Debtors' cash flow, and jeopardize the Debtors' ability to preserve the value of their assets. Accordingly, as was found in *Great Atlantic*, Dominion is seeking adequate assurance that is "more than necessary."

Courts have made clear that "adequate assurance of payment" does not require that utilities be guaranteed of full payment, which is what Dominion appears to be seeking. Rather, utilities must only be prevented from suffering an "unreasonable risk of non-payment for postpetition services." The "assurance of payment" provided under the Utilities Order satisfies this standard, and Dominion has not proven to the contrary.

[15] Fox Declaration, ¶¶ 35–40.

3. The Utilities Order is Valid, and Was Entered After Notice and Hearing.

The bulk of the Dominion Objection appears premised on the argument that the Utilities Order was entered improperly, and that Dominion was not provided with notice of the First Day Hearing. Both arguments are inconsistent with applicable law and the record in these cases.

According to Dominion, Bankruptcy Code section 366(c)(2) requires a chapter 11 debtor to provide its utility providers with adequate assurance in the form and amount demanded by such utilities.[16] Then, "[i]f a debtor believes the amount of the utility's request needs to be modified, . . . the debtor can file a motion under [s]ection 366(c)(3) requesting the court to modify the amount of the utility's request under [s]ection 366(c)(2)."[17] In other words, Dominion seems to contend that a bankruptcy court does not have authority to enter an order setting the required adequate assurance of payment to be provided to a debtor's utilities, until a utility has made a demand for adequate assurance and the debtor has objected to such demand as being excessive. As explained recently by a district court from the Central District of California, Dominion's interpretation of Bankruptcy Code section 366(c) is "'unworkable' and 'could lead to absurd results . . . .'" *In re Crystal Cathedral Ministries*, 454 B.R. at 129.

The Debtors acknowledge that some bankruptcy courts have adopted the interpretation of section 366 advocated by Dominion. *See In re Lucre, Inc.*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). However, Dominion's interpretation has been rejected by numerous other courts, including the California district court in *Crystal Cathedral*, as being contrary to the plain language of Bankruptcy Code section 366(c) and inconsistent with the realities of a chapter 11 bankruptcy case. *E.g.*, *In re Crystal Cathedral Ministries*, 454 B.R. at 129–30; *In re Circuit City Stores, Inc.*, 2009 Bankr. LEXIS 237 at *17 (Bankruptcy Code section 366 "does not prohibit a court from making a determination about the adequacy of an assurance payment until only after a payment 'satisfactory to the utility' has been received from the debtor under [section] 366(c)(2)."); *In re Great Atl. & Pac. Tea Co.*, 2011 U.S. Dist. LEXIS 131621 at *13 (joining "'a number of courts' [that] have

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[16] *See* Dominion Objection, p. 13:16–22.

[17] *Id.* (emphasis omitted).

rejected [Dominion's] interpretation as 'contrary to the clear language of the statute and underlying policy of section 366'").[18]

Accordingly, a majority of courts have rejected Dominion's interpretation of Bankruptcy Code section 366(c), and have recognized that a proper interpretation of section 366(c) allows a court to enter an order setting "adequate assurance of payment" on the motion of a debtor "prior to a utility provider receiving what it demands." *In re Crystal Cathedral Ministries*, 454 B.R. at 130. As the district court in *Crystal Cathedral* explained:

> In addition to giving effect to the plain language of the statute, this interpretation best balances the protections afforded debtors and utility providers by providing substantial protection to a utility while at the same time providing an avenue of relief for debtors, who believe a utility's request is unreasonable and unworkable.

Id. (quotations omitted).

Dominion's contention that it did not receive adequate notice of the Utilities Motion should similarly be disregarded. The relief requested in the Utilities Motion, as explained in more detail below, was properly sought through a motion and a hearing. As required under Bankruptcy Rule 9014, the Debtors provided Dominion with "reasonable notice and opportunity for hearing . . . ." Specifically, the Debtors served the Utility Pleadings, including the Notice of First Day Hearing, on Dominion by overnight mail and electronic mail. In doing so, the Debtors used contact information they either have used in the past in correspondence with the Utilities, or that was specifically provided by Dominion as the proper contact for service. Moreover, the address to which the Debtors mailed the Utility Pleadings is that provided on Dominion's own website. Accordingly, the Utilities Order was not entered on an *ex parte* basis, as Dominion misleadingly alleges. Rather, the Utilities Order was entered after valid notice and a hearing. And even if Dominion was not provided with notice as specifically required under the Bankruptcy Rules, which it was, Dominion received actual notice of the Utility Pleadings and the First Day Hearing, which is sufficient to

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[18] *See also In re Beach House Prop., LLC*, Case No. 08-11761-BKC-RAM, 2008 Bankr. LEXIS 1091 (Bankr. S.D. Fla. Apr. 8, 2008) ("An interpretation of [section] 366 that precludes court intervention unless a debtor posts whatever amount is demanded could lead to absurd results and cannot be what Congress intended. Instead, the Court finds that it has the authority to determine the form and amount of adequate assurance if the parties cannot reach agreement . . . .").

overrule Dominion's notice allegations. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010); *In re Great Atl. & Pac. Tea Co.*, 2011 U.S. Dist. LEXIS 131621 at *35–36.

B. The Stay Provision in the Utilities Order is Consistent with Bankruptcy Code Sections 362 and 366.

The Utilities both contend that the Stay Provision in the Utilities Order, which states that "[t]he Debtors' utility service providers . . . are prohibited from altering, refusing, discontinuing service to, or discriminating against the Debtors," is improper. Both Utilities contend that Bankruptcy Code section 366(a) affirmatively grants utilities the right, without first obtaining relief from the automatic stay, or otherwise obtaining any court order, to terminate a postpetition utility service agreement for any reason, other than the fact that a debtor filed for bankruptcy protection, or that a debtor owes the utility provider a prepetition debt.[19] In other words, the Utilities contend that, notwithstanding the language in Bankruptcy Code section 362, they have the right to terminate a chapter 11 debtor's utility services for untimely postpetition payments and presumably any other postpetition breach of the service agreement, no matter how minor, so long as the termination is not based on the debtor's bankruptcy filing or the existence of a prepetition debt. As explained below, in support of this position, the Utilities rely on either (i) mistaken procedural arguments, (ii) non-Ninth Circuit cases that are unpersuasive, distinguishable, or incorrect, and/or (iii) an interpretation of Bankruptcy Code section 366 that expands its scope beyond its plain language.

For the foregoing reasons, the Stay Provision in the Utilities Order is proper. The Utilities should not be permitted to terminate services to the Debtors for any reason without first obtaining relief from stay from this Court.

1. The Automatic Stay Enjoins Parties from Exercising Control Over Property of the Debtors' Estates and From Unilaterally Terminating an Agreement with the Debtors.

The Stay Provision is wholly consistent with section 362 of the Bankruptcy Code. Section 362(a)(3) enjoins any act to exercise control over property of the estate. 11 U.S.C. § 362(a)(3). Of course, the automatic stay imposed by section 362 arises automatically, and without

[19] *See* Columbia Objection, ¶¶ 23–27; Dominion Objection, p. 5:3–4.

any action by the court. *See* 11 U.S.C. § 362(a). Among other things, the automatic stay promotes the fundamental policy of chapter 11, which is to permit the successful rehabilitation of the debtor, by ensuring that the debtor may utilize its property in exercising its right to reorganize. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984).

The bankruptcy court is granted broad jurisdiction to promote that policy, and equitable powers to protect that jurisdiction. To that end, the bankruptcy court, through the district court, is granted "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). Moreover, because the bankruptcy court has exclusive jurisdiction over a debtor's property, including contract rights, "[t]he requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court." *In re Crown Vantage, Inc.*, 421 F.3d 963, 971 (9th Cir. 2005).

The Ninth Circuit Court of Appeals has repeatedly held that a debtor's contract rights fall within the statutory definition of estate "property" under section 541, and that a counterparty's right to unilaterally terminate contracts with the debtor is, therefore, stayed under section 362(a)(3). For example, the court held in *In re Computer Commc'ns, Inc.*, 824 F.2d 725, 728–31 (9th Cir. 1987) that a prepetition purchase agreement was property of the estate and that the counterparty's unilateral termination of that agreement violated the automatic stay. The Ninth Circuit stated:

> 11 U.S.C. § 362 provides that the filing of a bankruptcy petition automatically stays "any act to obtain possession of property of the estate . . . ." The courts below held that the automatic stay prohibited Codex from unilaterally terminating the Agreement. We agree. Even if Codex had a valid reason for terminating the Agreement, it still was required to petition the court for relief from the automatic stay under § 362(d).

Id. at 728 (citing 11 U.S.C. § 362(a)(3)).

Similarly, the court held in *In re Carroll*, 903 F.2d 1266 (9th Cir. 1990) that a postpetition management agreement involving the debtor was property of the estate and that the counterparty could not unilaterally terminate that agreement without obtaining relief from the automatic stay. *Id.* at 1270 ("Since we find the agreement to be property of the estate, it was

protected by the automatic stay, and Tri-Growth was required to seek relief from the stay before terminating the agreement."); *see also In re Minoco Group of Cos., Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986) (prepetition insurance contract is estate property); *In re MCEG Productions, Inc.*, 133 B.R. 232, 234 (Bankr. C.D. Cal. 1991) ("The Ninth Circuit's decision in *Carroll* leaves no doubt that the [postpetition] agreement here constituted property of the estate."); *In re National Envtl. Waste Corp.*, 191 B.R. 832, 834 (Bankr. C.D. Cal. 1996) (same).

The Ninth Circuit Court of Appeals explained the policy underlying these decisions in *Computer Communications:*

> [T]he stay is intended to be broad in scope. Congress designed it to protect debtors and creditors from piecemeal dismemberment of the debtor's estate. The automatic stay statute itself provides a summary procedure for obtaining relief from the stay. All parties benefit from the fair and orderly process contemplated by the automatic stay and judicial relief procedure. Judicial toleration of an alternative procedure of self-help and post hoc justification would defeat the purpose of the automatic stay.

In re Computer Commc'ns, Inc., 824 F.2d at 731.

The authority discussed above makes clear that the Debtors' right to receive utility services under its service agreements with the Utilities is property of the Debtors' estates. As such, the automatic stay enjoins the Utilities from unilaterally terminating services to the Debtors. Additionally, any act of the Utilities to terminate services to the Debtors would necessarily be an act to exercise control of the Debtors' physical assets. The Utilities provide services to the Debtors' Harrisonburg Factory, which requires the operation of substantial machinery and equipment in order to maintain operations and generate cash flow. Without the services provided by the Utilities, the Debtors would have to close their doors, negatively impacting the value of the Debtors and their assets, and harming the approximately 100 employees of the Debtors, who might have to be turned away in the absence of an operational Harrisonburg Factory. By terminating services to the Debtors, the Utilities would therefore deny the Debtors control over their property and threaten the Debtors' ability to reorganize or liquidate with recoveries to creditors. Such resort to self-help violates the automatic stay and would deny "[a]ll parties [the] benefit from the fair and orderly process

contemplated by the automatic stay and judicial relief procedure." *In re Computer Commc'ns, Inc.*, 824 F.2d at 731.

2. Bankruptcy Code Section 366 Does Not Limit the Debtors' Rights Under the Bankruptcy Code or the Bankruptcy Court 's Authority to Protect the Reorganization Process.

The plain text of Bankruptcy Code section 366 affords both debtors and their utility providers limited rights and protections. As explained by the Third Circuit, this section "deals specifically with utility service to the debtor and provides specific protections for both debtor and creditor." *Begley v. Phila. Elec. Co.*, 760 F.2d 46, 48 (3d Cir. 1985) (emphasis added). Specifically, Bankruptcy Code section 366(a) provides that:

> [A] utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under the title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

Thus, section 366(a) protects a debtor in possession from having its utilities terminated by a utility provider due to it having filed for bankruptcy protection or for owing such utility a prepetition debt.

Bankruptcy Code sections 366(b) and (c), however, provide utilities with specific rights and protections which further the policy of "not forcing the utility to provide services for which it may never be paid." *See Begley*, 760 F.2d at 48. These sections give utilities the right to terminate or alter utility services under discrete circumstances. Specifically, Bankruptcy Code section 366(b) states that a "utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date." Similarly, Bankruptcy Code section 366(c) provides that:

> With respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue 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.

Accordingly, the plain text of Bankruptcy Code section provides utilities with the right to terminate utility service if a debtor does not provide such utilities with "adequate assurance of payment" for future services.

Section 366 says nothing of a utility's right to discontinue service for non-payment of a postpetition debt, or for any other reason. Moreover, nothing in section 366 purports to abrogate any rights afforded to the debtor under other provisions of the Bankruptcy Code or to disturb the broad authority conveyed upon the bankruptcy court by the Code. Put simply, there is no statutory authority to support the Utilities' contention that, notwithstanding the automatic stay, they may terminate utility services without first obtaining relief from stay, as any other creditor would have to do in order to terminate an agreement with the debtor. *See, e.g., In re Computer Commc'ns, Inc.*, 824 F.2d at 728.

Unsurprisingly, the Utilities do not focus their argument on the text of Bankruptcy Code section 366, but rather rely exclusively on a few non-Ninth Circuit cases which are wholly unpersuasive with respect to the present matter.[20]

Columbia's objection relies on two non-chapter 11 cases in support of its position that this Court had no authority to issue the Stay Provision in the Utilities Order.[21] Specifically, Columbia relies in part on *Weisel v. Dominion People Gas Co. (In re Weisel)*, 428 B.R. 185 (W.D. Pa. 2010) and *Jones v. Boston Gas Co. (In re Jones)*, 369 B.R. 745 (B.A.P. 1st Cir. 2007), for the proposition that utilities, without first obtaining relief from stay, may unilaterally terminate an agreement to provide utilities to a debtor in the event the debtor accrues postpetition arrearages. However, unlike the present chapter 11 cases, both *Weisel* and *Jones* involved individual chapter 13 debtors. The protection offered by the automatic stay to a corporate debtor seeking to reorganize under chapter 11 is necessarily broader than the protection offered to individual debtors. As the

[20] Dominion does not actually cite to a single case in support of its position that, through the Utilities Order, the Debtors "improperly seek[] injunctive relief from the Court to enjoin the Debtors' utilities from terminating post-petition utility service, for any reason, without first obtaining permission from the Bankruptcy Court." *See* Dominion Objection, p. 4:19–22. To the extent Dominion attempts to brief this issue in its reply brief, the Debtors reserve the right to seek a continuance of the hearing on the Dominion Objection so that the Debtors have sufficient opportunity to respond to any arguments that Dominion might raise for the first time.

[21] *See* Columbia Objection, ¶ 26.

Ninth Circuit explicitly held in the chapter 11 case of *Minoco*, contract rights become property of the estate "because the debtor's estate is worth more with them than without them." *In re Minoco Group of Companies, Ltd.*, 799 F.2d at 519. Unlike the individual debtor cases cited by Columbia, where the disconnection of utility service to a personal residence did not impact the value of the estate, the Debtors' estates are clearly worth more with continuing utility service than they would be without. In fact, the value of the Debtors' estates would plummet without these services, and all creditors would suffer as a result. The same is not true of the individual debtors in *Weisel* and *Jones*.

More concerning, however, is the fact that *Weisel* and *Jones*, the sole authority offered by the Utilities in support of their interpretation of Bankruptcy Code section 366, fail to go into any real analysis of the plain text of Bankruptcy Code section 366, but rather rely on a "small body of case law" that generally flows from a common source—the Third Circuit's decision in *Begley*. *See In re Jones*, 369 B.R. at 748; *see also In re Weisel*, 428 B.R. at 188.

In *Begley*, the Third Circuit recognized that "[s]ection 366 is silent . . . as to the utility's right to terminate where . . . adequate assurance was posted initially, but subsequent obligations in excess of the amount of assurance were unpaid." 760 F.2d at 49. Nonetheless, the Third Circuit engaged in an analysis of the text of section 366(a) that contradicts ordinary canons of statutory interpretation, and fails to account for other sections of the Bankruptcy Code. Specifically, the court in *Begley* reasoned as follows:

> The restriction on termination in section 366(a) bars only those terminations which issue "solely on the basis" that a debt incurred prior to the bankruptcy order, was not paid when due. **Thus, by implication, termination for failure to pay post-petition bills would not seem barred by section 366(a)**.

Id. (emphasis added and omitted). In coming to this conclusion, the Third Circuit failed to even acknowledge the effect that Bankruptcy Code section 362 and the automatic stay might have on the analysis. Accordingly, the court's decision in *Begley* should not be read as do the courts in *Jones* and *Weisel* as holding that a utility need not first obtain relief from stay before terminating utility services.

Equally troubling is the fact that neither the Third Circuit nor *Begley's* progeny engaged in any in-depth analysis of statutory construction prior to reaching its holding "by

implication." It is well settled that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). If either the Third Circuit in *Begley* or those courts that blindly follow its holding had adhered to this canon of statutory interpretation, these courts would have recognized that their interpretation of the term "solely" contradicts the use of that term in at least one other section of the Bankruptcy Code.

Like section 366(a), Bankruptcy Code section 365(e)(1) also includes the term "solely." However, if a court were to apply the term "solely" in section 365(e)(1) as did the court in *Begley*, the result would be nonsensical and violate well established principles of bankruptcy law.

Bankruptcy Code section 365(e)(1) generally governs the treatment of *ipso facto* clauses with respect to executory contracts and unexpired leases, and provides as follows:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor **may not be terminated or modified**, **and any right or obligation under such contract or lease may not be terminated or modified**, at any time after the commencement of the case **solely** because of a provision in such contract or lease that is conditioned on—
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

11 U.S.C. § 365(e)(1) (emphasis added). Under *Begley*'s interpretation of the term "solely," a counterparty to an executory contract or unexpired lease, "by implication," would be permitted to terminate such agreement due to a debtor's nonperformance without first obtaining relief from the automatic stay. Such a result, however, would contradict the well established principle that even if a contract counterparty "ha[s] a valid reason for terminating the agreement," it may not unilaterally terminate such agreement without first obtaining relief from the automatic stay. *In re Computer Commc'ns*, 824 F.2d at 728; *accord* 3 Collier on Bankruptcy ¶ 365.06[3][d] (16th ed. 2013) ("[T]he automatic stay prohibits any nondebtor party to a contract or lease from unilaterally terminating the agreement."). Accordingly, *Begley*'s application of the term "solely" is inconsistent with the use of that term in other sections of the Bankruptcy Code.

Further, by interpreting section 366(a) to permit a utility to terminate utility service without first seeking relief from stay, *Begley* and its progeny create an exception to the automatic stay where one does not exist in the plain text of Bankruptcy Code section 362(b). In cases where Congress intended to allow a contract counterparty to exercise a contractual right without having to first seek relief from stay, Congress included specific exceptions in Bankruptcy Code section 362(b). For example, Bankruptcy Code section 560 provides:

> The exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365(e)(1) of this title . . . **shall not be stayed, avoided, or otherwise limited by operation of any provision of this title** or by order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 560 (emphasis added). In order to make clear that the automatic stay did not preempt a swap participant's rights under Bankruptcy Code section 560, Congress included a corresponding provision in Bankruptcy Code section 362(b)(17), which provides that the filing of a bankruptcy petition "does not operate as a stay" "of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement . . . ." Thus, Congress recognized that nondebtor counterparties to swap agreements should not be stayed from exercising contractual termination rights, and made this result clear in the text of the Bankruptcy Code. Congress did not do so in the context of Bankruptcy Code section 366(a).

Accordingly, and contrary to the arguments raised by the Utilities in their objections, Bankruptcy Code section 366(a) does not operate as an exception to the automatic stay under section 362(a). As explained in Section III.B.1, the Stay Provision is consistent with the scope of the automatic stay, and section 366(a) does not alter such a result.

3. The Stay Provision is Not an Improper Injunction.

Rather than brief the merits of Dominion's cursory assertion that the Stay Provision is inconsistent with Bankruptcy Code section 366(a), Dominion spends a significant portion of its brief arguing that the Debtors were required to commence an adversary proceeding to obtain the relief

included in the Utilities Order.[22] Dominion's argument appears to be that, because the Stay Provision is purportedly inconsistent with section 366, the Stay Provision acts as an independent injunction enjoining utilities from taking an action they are otherwise entitled to without first obtaining relief from stay. And because Bankruptcy Rule 7001 includes, as an adversary proceeding, "a proceeding to obtain an injunction," Dominion contends that the Stay Provision is not effective unless obtained through the commencement of an adversary proceeding.[23]

Dominion's argument fails for the simple reason that the Stay Provision in the Utilities Order does not prohibit the Utilities from taking any action they were not already prohibited from taking under the automatic stay. The statutory injunction imposed by section 362 of the Bankruptcy Code is automatic, and does not require any proceeding to be effective. 3 Collier on Bankruptcy ¶ 362.02 (16th ed. 2013) ("The stay is effective automatically and immediately upon the filing of a bankruptcy petition . . . . Formal service of process is not required, and no particular notice need be given in order to subject a party to the stay."). The Stay Provision merely affirms the application of the automatic stay as it applies to the Debtors' utility providers. Accordingly, the Stay Provision in the Utilities Order does not constitute an improper injunction, and the Debtors proceeded within the confines of the Bankruptcy Rules by proceeding by way of the Utilities Motion.

Moreover, even if the Stay Provision constitutes an injunction, which it does not, the mere fact that the Stay Provision was obtained through motion practice does not necessarily render it invalid. As the Bankruptcy Appellate Panel for the Ninth Circuit has recognized, an injunction may be obtained upon a debtor's motion, without the need for a separate adversary proceeding. *See, e.g.*, *Parson v. Plotkin (In re Pac. Land Sales, Inc.)*, 187 B.R. 302, 315 (B.A.P. 9th Cir. 1995) (affirming bankruptcy court injunction upon debtor's motion). Furthermore, Dominion cannot complain of any prejudice, as it received adequate notice of the proposed language of the Utilities Order, as the Utilities Order was attached to the Debtors' Utilities Motion and served on Dominion by overnight mail and electronic mail prior to the First Day Hearing.

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[22] *See* Dominion Objection, pp. 15:22 – 16:24.

[23] *Id.* at p. 16:17–24.

4. Section 105(a) Granted the Bankruptcy Court Authority to Issue the Utilities Order.

Section 105(a) of the Bankruptcy Code provides:

> [A] court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

Courts have read section 105(a) to provide "broad equitable power for a Bankruptcy Court to maintain its own jurisdiction and to facilitate the reorganization process." *In re Adelphia Commc'ns. Corp.*, 345 B.R. 69, 85 (Bankr. S.D.N.Y. 2006). Particularly in chapter 11, courts have recognized that "section 105(a) powers may be exercised where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone." *Id.* at 85 ("A bankruptcy court may enjoin proceedings . . . when it is satisfied that such a proceeding would defeat or impair its jurisdiction with respect to a case before it.").

Thus, even in those cases where the automatic stay does not directly apply, the Ninth Circuit has held that section 105(a) permits the bankruptcy court to enjoin actions "that threaten the integrity of a bankrupt's estate." *In re Canter*, 299 F.3d 1150, 1155 (9th Cir. 2002) (citations and internal quotation marks omitted); *see also In re Family Health Servs.*, 105 B.R. 937, 943 (Bankr. C.D. Cal. 1989) ("Section 105 endows the court with ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case"); *cf. In re R. S. Pinellas Motel P'ship*, 2 B.R. 113, 119 (Bankr. M.D. Fla. 1979) (termination of license agreement could be enjoined under section 105 where the agreement was "indispensable to the economic survival of the debtor and its chances to obtain rehabilitation under the Code").

In *In re American Hardwoods*, 885 F.2d 621, 624 (9th Cir. 1989), the Ninth Circuit recognized that section 105 empowers the court to enjoin a creditor from taking action even against a

nondebtor prior to confirmation of a plan. (citing *In re A.H. Robins Co.*, 828 F.2d 1023, 1026 (4th Cir. 1987)).

As explained above, section 362 operates as an injunction against the Utilities' unilateral termination of the Debtor's gas and electricity. Even if that were not the case, however, this Court clearly had authority to issue the Stay Provision pursuant to section 105(a). The Stay Provision was issued to protect the integrity of the Debtors' estates. As the authorities cited above make clear, the Court has broad discretion to protect the administration of the Debtors' estates and to maintain its jurisdiction over the Debtors' property. *See, e.g., In re Canter*, 299 F.3d at 1155. In light of the likely overwhelming harm that would be caused to the Debtors' estates from termination of the Utilities' services at the Harrisonburg Factory, the Court had authority to enjoin the Utilities from taking action against the Debtors that would damage the Debtors' estates.

IV.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request the Court enter an order overruling the Objections in their entirety, except for with respect to the agreement between the Debtors and Columbia as to the form and amount of "adequate assurance of payment" that Columbia is to receive. The Utilities Order and all of its provisions are consistent with Bankruptcy Code section 366 and other applicable sections of the Bankruptcy Code, and was obtained under proper procedure and with adequate notice to interested parties.

Date: August 22, 2013

Respectfully submitted,

/s/ Michael S. Neumeister

GARY E. KLAUSNER,
MARGRETA M. MORGULAS, and
MICHAEL S. NEUMEISTER, Members of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION

Reorganization Counsel for Debtors and Debtors in Possession