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6 **UNITED STATES BANKRUPTCY COURT**
7 **CENTRAL DISTRICT OF CALIFORNIA**
8 **LOS ANGELES DIVISION**

8 In re:

9 COLOREP, INC.,
10 a California corporation, *et al.*,
11 Debtors,

CASE NO. 2:13-bk-27689-WB

CHAPTER 11

(Jointly Administered)

**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;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION IN
SUPPORT THEREOF**

DATE: TBD
TIME: TBD
PLACE: Courtroom 1375
255 East Temple St.
Los Angeles, CA 90012

23 Virginia Electric and Power Company d/b/a Dominion Virginia Power (“Dominion”), by
24 counsel, hereby objects¹ to the Debtors’ *Emergency Motion For Order: (I) Deeming Utilities*
25 *Adequately Assured Of Future Performance; and (II) Establishing Procedures For Determining*
26

27 _____
28 ¹ The Declaration of Sherry Ward in support of Dominion’s Objection is attached hereto as Exhibit “A.”

1 *Requests For Additional Assurance Pursuant To Bankruptcy Code Section 366; Memorandum of*
2 *Points and Authorities In Support Thereof* (the “Utility Motion”) [BR Docket No. 8.] , and sets
3 forth the following:

4 **A. INTRODUCTION**

5 In 2005, Congress amended Section 366 of the Bankruptcy Code to add, among other
6 things, Section 366(c) to address adequate assurance of payment requests in Chapter 11 cases.
7 Prior to 2005, Section 366(b) governed adequate assurance of payment determinations in all
8 bankruptcy cases. Section 366(b), which has not been modified, provides, in pertinent part:

9
10 On request of a party in interest and after notice and a hearing, the court may order
11 reasonable modification of the amount of the deposit or other security necessary to
12 provide adequate assurance of payment.

13 As set forth above, courts had the authority under Section 366(b) to modify the amount of
14 the deposit or other security that was necessary to provide adequate assurance of payment,
15 which is significantly broader than the legal standard established in Sections 366(c)(2) and
16 (3).

17 Sections 366(c)(2) and (3) of the Bankruptcy Code provide:

18 (2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter
19 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility
20 service, if during the 30-day period beginning on the date of the filing of the
21 petition, the utility does not receive from the debtor or the trustee adequate
22 assurance of payment for utility service that is satisfactory to the utility;

23 (3)(A) On request of a party in interest and after notice and a hearing, the court
24 may order modification of the amount of an assurance of payment under paragraph
25 (2).

26 The significant difference between the two provisions is the pre-2005 standard required a
27 court to focus on whether or not to “order reasonable modification of the amount of the deposit
28 or other security necessary to provide adequate assurance of payment” and Section 366(c) now
requires a court to focus on whether or not to “order modification of the amount of an assurance

1 of payment under paragraph (2).” The amount of assurance of payment under paragraph (2)
2 (Section 366(c)(2)) in these jointly-administered cases is the two-month deposit requested by
3 Dominion herein. Accordingly, under the foregoing legal standard, it is the Debtors’ burden to
4 present evidence to demonstrate, why, if at all, the amount of Dominion’s deposit request should
5 be modified. *See In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979)
6 (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of
7 proof); *see also Great Atlantic & Pacific Tea Company, Inc.*, 2011 WL 5546954 at page 5
8 (Bankr. S.D.N.Y. 2011). Courts that have found that the courts retain the same discretion as
9 under Section 366(b), or allow the debtor to pick the form and/or amount of security, simply
10 refuse to follow the plain language of the statute.
11

12 In addition to changing the legal standard, Section 366(c) also changes the adequate
13 assurance of payment determination as follows: (1) The statute provides the Debtors with 30
14 days to provide adequate assurance of payment instead of 20 days;(2) Section 366(c)(1) defines
15 the forms of adequate assurance of payment, which was not included in Section 366(b); and (3)
16 Section 366(c)(1)(B) and (c)(3)(B) limit what the Court can consider.
17

18 In complete contravention of the express requirements of Section 366 of the Bankruptcy
19 Code and Dominion’s due process rights, the Debtors sought and obtained an *ex parte* hearing on
20 the Utility Motion on the fifth day of the case without proper notice of the hearing to Dominion,
21 even though Section 366(c) clearly provides that: (a) such a hearing can only be set upon notice
22 and a hearing; and (b) the Debtors have 30 days to address the issue of adequate assurance of
23 payment with Dominion and the Debtors’ other utility providers. In addition, the Debtors
24 obtained a Utility Order that was entered on July 18, 2013 [Docket No. 54] that violates Section
25 366 of the Bankruptcy Code and Dominion’s due process rights (the “Interim Utility Order”).
26 Moreover, any purported adequate assurance of payment set forth in the Interim Utility Order is
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1 illusory because it is within the Debtors' sole discretion to provide their proposed form of
2 adequate assurance of payment.

3 In the Utility Motion, the Debtors ask this Court to ignore the plain language and
4 requirements of Section 366 on an expedited basis on the fifth day of the Debtors' bankruptcy
5 cases, and only four days after the Utility Motion was filed. Furthermore, the Utility Motion
6 does not set forth any evidentiary basis in support of the Debtors' adequate assurance request to
7 avoid providing Dominion with any meaningful post-petition security. Proofs of Service filed by
8 the Debtors indicate that they supposedly served Dominion with the Utility Motion by mailing it
9 to a U.S. Post Office payment lock box on July 11, 2013, and not upon an officer, managing or
10 general agent authorized to receive service, in contravention of the express requirements of Rule
11 7004(b)(3) of the Federal Rules of Bankruptcy Procedure. Because Dominion was not properly
12 served with the Utility Motion prior to the *ex parte* hearing or provided with any proper notice of
13 the expedited hearing on the Utility Motion that took place on July 15, 2013, Dominion did not
14 participate in the *ex parte* hearing. As such, Dominion does not know whether the Court held an
15 evidentiary hearing on the Utility Motion or whether the Debtors presented any evidence to the
16 Court in support of the Utility Motion.

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18
19 Dominion has also been denied due process in that the Utility Motion improperly seeks
20 injunctive relief from the Court to enjoin the Debtors' utilities from terminating post-petition
21 utility service, for any reason, without first obtaining permission from the Bankruptcy Court.
22 Specifically, even though Section 366(a) of the Bankruptcy Code only precludes a utility from
23 altering, refusing or discontinuing service "on the basis of the commencement of a case under
24 this title or that a debt owed by the debtor to such utility for service rendered before the order
25 for relief was not paid when due," the Debtors sought and obtained injunctive relief in
26 paragraph 2 of the Interim Utility Order that prohibits utilities from "altering, refusing,
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1 discontinuing service to, or discriminating against the Debtors” for any reason, including post-
2 petition payment defaults. The seeking and granting of the foregoing injunctive relief in the
3 Interim Utility Order was improper because: (1) Section 366 does not support the requested
4 relief; (2) Rule 7001 of the Federal Rules of Bankruptcy Procedure requires the Debtors to
5 proceed via an adversary proceeding and not a Motion; (3) Service of the Motion was
6 improper; (4) There was no emergency justifying the grant of extraordinary injunctive relief
7 because Section 366(c) provides the Debtors with 30 days to address adequate assurance of
8 payment with their utilities; and (5) The Debtors fail to explain in the Utility Motion the need
9 for or justify the need for the Court to award them extraordinary injunctive relief.
10

11 For the reasons set forth herein, Dominion requests that this Court deny the Utility
12 Motion as to Dominion and (i) order the Debtors to provide Dominion with a two-month cash
13 deposit in the amount of \$63,594 as adequate assurance of payment to Dominion, and (ii) either
14 correct the Interim Utility Order or enter a Final Utility Order that tracks the express language of
15 Section 366(a) of the Bankruptcy Code and not grant the Debtors’ the extraordinary injunctive
16 relief that they sought in the Utility Motion and which is set forth in the Interim Utility Order.
17

18 **B. PROCEDURAL FACTS**

19 1. On July 10, 2013 (the “Petition Date”), the Debtors commenced their cases under
20 Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) that are now pending
21 with this Court. The Debtors continue to operate their businesses and manage their properties as
22 debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.
23

24 2. The Debtors’ cases are being jointly administered.
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1 **C. THE UTILITY MOTION**

2 3. On July 11, 2013, the Debtors filed the Utility Motion.

3 4. Also on July 11, 2013, the Debtors filed the *Omnibus Notice of Hearing For*
4 *Debtors' First Day Motions* ("Notice of Hearing) [BR Docket No. 14.] that set forth that the
5 hearing on the Utility Motion was scheduled to be heard on July 15, 2013.

6 5. The *Supplemental Proof of Service* [BR Docket No. 31] regarding service of the
7 Utility Motion and Notice of Hearing reflects that the Debtors supposedly served those pleadings
8 upon Dominion by mailing them to a U.S. Post Office payment lock box, to the attention of
9 Barbara Smith. Ms. Smith is not an officer, managing or general agent authorized to receive
10 service of the Utility Motion on behalf of Dominion. As such, pursuant to the express
11 requirements of Rule 7004(b)(3), Debtors failed to properly serve the Utility Motion upon
12 Dominion.
13

14 6. Because Dominion was not properly served with the Utility Motion and the
15 Debtors never attempted to contact Dominion regarding its adequate assurance request prior to
16 the filing of the Utility Motion, Dominion had no opportunity to respond to the Utility Motion or
17 otherwise be heard at the *ex parte* hearing on the Utility Motion that took place on June 15, 2013,
18 despite the fact that Section 366(c)(3) (presuming this was the statutory basis for the relief
19 sought by the Debtors) requires that there be "notice and a hearing" to Dominion.
20

21 7. In the Utility Motion, the Debtors sought to avoid the applicable legal standards
22 under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate
23 assurance of payment, which is a newly-created escrow account containing \$22,595 (the "Bank
24 Account") that is supposedly equal to two-weeks of utility charges. Utility Motion at p. 9. The
25 foregoing proposal is unacceptable to Dominion and should not be considered relevant by this
26 Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or
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1 amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the
2 Debtors are limited to modifying, if at all, the amount of the security sought by Dominion under
3 Section 366(c)(2).

4 8. The Debtors did not allege any evidentiary basis in the Utility Motion in support
5 of their proposed form/amount of adequate assurance of payment.

6 9. The Utility Motion did not address why this Court should consider modifying, if
7 at all, the amount of Dominion's adequate assurance request pursuant to Section 366(c)(2).
8

9 10. Furthermore, the Utility Motion does not address why the Bank Account would
10 be undercapitalized at a two-week deposit amount when the Debtors know that Dominion is
11 required by applicable state laws, regulations and/or tariffs to bill the Debtors monthly.

12 11. Because the Debtors filed a Motion and not an adversary proceeding, even if
13 Dominion was properly and timely served with the Utility Motion, which it was not, Dominion
14 would and should not have been on notice that Debtors were seeking injunctive relief prior to
15 entry of the Interim Utility Order.
16

17 **D. THE INTERIM UTILITY ORDER**

18 12. On July 18, 2013 the Court entered the Interim Utility Order.

19 13. Paragraph 2 of the Interim Utility Order provides:

20 "2. The Debtors' utility service providers (the "Utilities") are prohibited from
21 altering, refusing, discontinuing service to, or discriminating against the Debtors."
22

23 14. The Interim Utility Order further provides that "[t]he Debtors are authorized, in
24 the exercise of their business judgment and in their sole discretion" to create the Bank Account.
25 As such, the Interim Utility Order does not require the Debtors to provide any adequate
26 assurance of payment to their utility providers.
27
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1 15. Additionally, paragraph 4 of the Interim Utility Order completely and
2 inappropriately reverses the statutory requirements of Section 366(c) of the Bankruptcy Code.

3 **E. FACTS REGARDING THE DEBTORS**

4 16. Debtor Colorep, Inc. (“Colorep”) focuses on industrial printing applications.
5
6 *Declaration of Mark A. Fox In Support of Emergency First Day Motions* at ¶ 7 (hereinafter “Fox
7 Dec. at ¶ ___”).

8 17. At the end of 2007, Colorep acquired Debtor Transprint USA, Inc. (“Transprint”),
9 with headquarters and manufacturing facilities in Harrisonburg, Virginia. Transprint is a
10 supplier of transfer-printing paper. Fox Dec. at ¶ 10.

11 18. Transprint is the wholly-owned subsidiary of Colorep. Fox Dec. at ¶ 11.

12 19. The Debtors have not historically maintained separate books and records. Fox
13 Dec. at ¶ 12.

14 20. In 2011, the Debtors began experiencing significant cash flow constraints that
15 rendered the Debtors unable to acquire necessary raw materials to meet customer demands and
16 purchase parts and supplies required for the maintenance of their equipment and manufacturing
17 and production facility in Virginia. As a result, the quality and availability of the Debtors’
18 product began to shrink and their key vendor and customer relationships were harmed. Fox Dec.
19 at ¶ 13.

20 21. In or around June 2011, the Debtors entered into the Loan and Security
21 Agreement (as amended, supplemented and modified, the “Meserole Prepetition Loan
22 Agreement”) with Meserole, LLC (“Meserole”). Pursuant to the Meserole Prepetition Loan
23 Agreement, the Debtors had the ability to access up to \$25 million on the terms and conditions
24 set forth therein. In exchange, the Debtors granted Meserole a first-priority secured lien on
25 virtually all of their tangible and intangible assets. Fox Dec. at ¶ 15.
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1 22. The Meserole Loan and Security Agreement did not result in the stabilization of
2 the Debtors' operations. As such, through 2012, the Debtors continued to experience cash
3 shortages and were unable to purchase necessary raw materials and timely produce ordered
4 product. Furthermore, the Debtors were unable to sustain the quality of the product previously
5 produced as they lacked the capital necessary to improve or even perform necessary service and
6 repairs to the equipment utilized in their production process. The Debtors' inability to timely
7 meet demand and resolve the increasing quality control issues resulted in material cancellations
8 and a shrinking customer base. Fox Dec. at ¶ 15.

10 23. The Debtors' working capital constraints also resulted in their inability to meet
11 their obligations to their employees in a timely and consistent manner. That resulted in
12 significant morale issues and ultimately in the loss of many key employees in 2012 which further
13 diminished the Debtors' capacity to fulfill customer orders and meet obligations to vendors. Fox
14 Dec. at ¶ 16.

16 24. By the end of 2012, the situation had worsened and the Debtors went through a
17 number of "dark" periods during which time production halted completely and employees went
18 unpaid. Fox Dec. at ¶ 17.

19 25. In June 2013, it became clear that the Debtors could not continue to operate
20 absent either a material de-leveraging of their balance sheet or significant, additional capital
21 infusions. When it became clear that new capital would not be available on reasonable terms, the
22 Debtors determined that filing for chapter 11 bankruptcy protection was the only feasible
23 alternative. Fox Dec. at ¶ 20.

25 26. The Debtors' contend that given the current, significant constraints and problems
26 facing them, if their assets are not sold on an expedited basis, the value of such assets will
27 continue to deteriorate and the going concern value of the Debtors will be lost. Fox Dec. at ¶ 21.
28

1 27. As of the Petition Date, the Debtors owe Meserole approximately \$17 million,
2 exclusive of interest, fees, costs and expenses. Meserole asserts a validly perfected, first-priority
3 secured lien on virtually all of the Debtors' assets. Fox Dec. at ¶ 23.

4 28. Several other parties assert secured liens on the Debtors' assets, including taxing
5 authorities, judgment lien creditors, and subordinated debt holders. The Debtors' contend that it
6 is presently unclear whether such parties have legitimate secured claims, have validly perfected
7 any alleged security interest or liens, and/or whether any funds would remain after the
8 satisfaction of Meserole's claims to pay such allegedly secured claims even if they are
9 determined to represent legitimate debts of the Debtors. Fox Dec. at ¶ 24.

11 **F. THE DEBTORS' POST-PETITION FINANCING**

12 29. On July 11, 2013, the Debtors filed the *Emergency Motion of Debtors and*
13 *Debtors In Possession For Interim and Final Orders (1) Authorizing Post-Petition Financing;*
14 *(2) Authorizing Use of Cash Collateral; (3) Granting Priming Liens and Superpriority Claims;*
15 *(4) Providing Adequate Protection; and (5) Granting Related Relief; Memorandum of Points and*
16 *Authorities In Support Thereof* (the "Financing Motion"). Through the Financing Motion, the
17 Debtors are seeking authority to obtain post-petition financing in the amount of (i) \$1.45 million
18 on an interim basis and (ii) \$2.5 million on a final basis. In the event that the partial refinancing
19 of the \$450,000 made available to the Debtors between June 20, 2013 and July 9, 2013 is not
20 approved under an interim financing order, then amount available would be (i) \$1 million on an
21 interim basis and (ii) \$2 million on a final basis. Financing Motion at p.9.

22 30. The DIP financing is to be used consistent with the terms of a budget approved by
23 the DIP Agent and DIP Lenders (the "Budget") to be attached to the Interim Financing Order.
24 Financing Motion at p. 6.

25 31. The DIP financing matures upon the earlier of: (a) 90 days from the Petition Date;
26
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1 (b) the effective date of a plan of reorganization; (c) the sales of the Debtors' assets; (d) the
2 delivery of a carve-out event notice; or (e) then entry of an order by the Court approving an
3 alternative DIP financing. The maturity date may be extended upon written agreement of the
4 parties without the need for Court approval. Financing Motion at p. 8.

5
6 32. On July 18, 2013, the Court entered the Interim Financing Order. Attached to the
7 Interim Financing Order is the Budget for the use of DIP funds through July 26, 2013. It appears
8 from the Budget that the Debtors did not budget any monies for the payment of post-petition
9 utility charges but only budgeted funds for the two-week Bank Account.

10 **G. THE SALE MOTION**

11 33. On July 24, 2013, the Debtors filed the *Motion For Order: (A) Approving Sale*
12 *and Bid Procedures For the Sale of Substantially All the Assets of Debtors; (B) Scheduling An*
13 *Auction and Hearing To Consider the Sale and Approve the Form and Manner of Notice Related*
14 *Thereto; (C) Establishing Procedures Relating To the Assumption and Assignment of Certain*
15 *Contracts; and (D) Granting Other Related Relief* (the "Sale Motion"). Through the Sale
16 Motion, the Debtors are requesting (i) a bid deadline of August 19, 2013, and (ii) sale hearing to
17 take place on or before August 28, 2013. The Debtors do not have a stalking horse bidder for the
18 purchase of their assets.
19

20 **H. FACTS CONCERNING DOMINION**

21 34. Dominion provided the Debtors with prepetition utility goods and/or services and
22 has continued to provide the Debtors with utility goods and/or services since the Petition Date
23 pursuant to its Terms And Conditions, which are on file with the Virginia State Corporation
24 Commission (the "Terms And Conditions"). Dominion provides utility services to one location,
25 at 1000 Pleasant Valley Road, Harrisonburg, VA 22801.
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1 35. Under Dominion's billing cycle, the Debtors receive approximately one month of
2 utility goods and/or services before Dominion issues a bill for such charges. Once a bill is
3 issued, the Debtors have approximately 27 days to pay the applicable bill before a late fee may
4 be subsequently imposed on the account. If the Debtors fail to pay the bill after the issuance of
5 the past due notice, Dominion, pursuant to Section XVI of its Terms and Conditions, issues a
6 notice that informs the Debtors that they must cure the arrearage within ten (10) days or its
7 service will be disconnected. Accordingly, under Dominion's billing cycle, the Debtors could
8 receive more than two months of unpaid charges before Dominion could cease the supply of
9 goods and/or services for the post-petition payment default.

11 36. In order to avoid the need to bring witnesses and have lengthy testimony
12 regarding Dominion's regulated billing cycle, Dominion requests that this Court, pursuant to
13 Rule 201 of the Federal Rules of Evidence, take judicial notice of Dominion's billing cycles.
14 Pursuant to the foregoing request and based on the voluminous size of the applicable documents,
15 Dominion is providing the following web site link to the Terms and Conditions:

17 <http://www.dom.com/find-it-fast/rates/terms-and-conditions.jsp>

18 37. Subject to a reservation of Dominion's right to supplement its post-petition
19 deposit request if additional accounts belonging to the Debtor are subsequently identified,
20 Dominion's estimated prepetition debt and post-petition deposit request are as follows:

<u>Utility</u>	<u>No. of Accts.</u>	<u>Est. Prepet. Debt</u>	<u>Dep. Request</u>
Dominion	1	\$75,000	\$63,594 (2-month)

24 38. The \$63,594 2-month deposit requested by Dominion is authorized by Section
25 IX. of the Terms And Conditions.

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO DOMINION.

Sections 366(c)(2) and (3) of the Bankruptcy Code provide:

(2) Subject to paragraphs (3) and (4), 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;

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

As set forth by the United States Supreme Court, “[i]t is well-established that ‘when the statute’s language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.’” *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) (“Statutes . . . must be read in a ‘straightforward’ and ‘commonsense’ manner.”). A plain reading of Section 366(c)(2) makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. If a debtor believes the amount of the utility’s request needs to be modified, then the debtor can file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility’s request under Section 366(c)(2).

In this case, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested under Section 366(c)(2) to setting the form and amount of the adequate assurance of payment acceptable to the Debtors. Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c) and deny the Utility

1 Motion as to Dominion. *See In re Viking Offshore (USA), Inc.*, 2008 WL 782449 at *3 (Bankr.
2 S.D. Tex. Mar. 20, 2008) (“The relief requested by Debtors would reverse the burden, by making
3 an advance determination that the proposed assurance was adequate. . . . the court lacks the
4 power to reverse the statutory framework for provision of adequate assurance of payment.”); *see*
5 *also In re Pilgrim’s Pride Corporation*, Case No. 08-45664 (DML)(Docket No. 447), United
6 States Bankruptcy Court For the Northern District of Texas, *Memorandum Order* entered on
7 January 5, 2009 (Denying debtors’ motion seeking to establish adequate assurance of payment);
8 *see also In re Ramsey Holdings, Inc.*, Case No. 09-13998-M (TLM).
9

10 **1. The Debtors’ Proposed Bank Account Is Not Relevant And Even If It**
11 **Is Considered, It Is Unsatisfactory Because It Does Not Provide**
12 **Dominion With Adequate Assurance of Payment.**

13 This Court should not even consider the Bank Account as a form of adequate assurance
14 of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can
15 only modify “the amount of an assurance of payment under paragraph (2)”; (2) The Bank
16 Account is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A);
17 and (3) Even if it could be considered a proper form, it is illusory in this case because the
18 decision whether or not it will be funded is left solely to the Debtors’ discretion. Although the
19 cases cited by the Debtors in the Utility Motion approved a bank account as adequate assurance,
20 they only did so by improperly ignoring the plain language of Section 366(c)(3) and Section
21 366(1)(A). Moreover, even if the Court were to consider the Bank Account, the Bank Account is
22 an improper and otherwise unreliable form of adequate assurance of future payment for the
23 following reasons:
24

- 25 i. The Debtors are not required to actually fund it;
26 ii. It is underfunded from the outset because Dominion issues monthly bills; and
27 iii. The Debtors are not required to replenish the Bank Account following pay-outs.
28

1 Accordingly, the Court should not approve the Bank Account as adequate assurance to Dominion
2 because the Bank Account is: (a) not the **form** of adequate assurance requested by Dominion; (b)
3 not a form recognized by Section 366(c)(1)(A); (c) illusory because the Debtors' do not have to
4 fund it; and (D) an otherwise unreliable form of adequate assurance.

5
6 **2. The Utility Motion Should Be Denied As To Dominion Because the**
7 **Debtors Have Not Set Forth Any Basis For Modifying Dominion's**
8 **Requested Deposit.**

9 In the Utility Motion, the Debtors fail to address why this Court should modify the
10 amount of Dominion's request for adequate assurance of payment. Under Section 366(c)(3), the
11 Debtors have the burden of proof as to whether the amounts of Dominion's adequate assurance
12 of payment request should be modified. *See In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734
13 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366
14 hearing, bears the burden of proof). However, the Debtors do not provide the Court with any
15 evidence or factually supported documentation to explain why the amount of Dominion's
16 adequate assurance request should be modified. Accordingly, the Court should deny the relief
17 requested by Debtors in the Utility Motion and require the Debtors to comply with the
18 requirements of Section 366(c) with respect to Dominion.

19
20 **3. The Debtors Are Improperly Attempting To Enjoin Dominion From**
21 **Terminating Post-Petition Utility Service Without Permission From**
22 **the Bankruptcy Court.**

23 The Debtors filed the Utility Motion and not an adversary proceeding to attempt to
24 obtain injunction relief in the form of enjoining Dominion from terminating post-position
25 utility service without Court approval. "A motion procedure cannot be used to circumvent the
26 requirement of an adversary proceeding." *GMAC Mortgage Corp. v. Salisbury (In re Loloee)*,
27 241 B.R. 655, 660 (9th Cir. BAP 1999), *citing Bear v. Coben (In re Golden Plan)*, 829 F.2d
28 705, 711-12 (9th Cir. 1986). In *In re Loloee*, the Ninth Circuit BAP held that due process was

1 denied when a lien priority dispute was resolved in a sale motion without an adversary
2 proceeding when Rule 7001(2) of the Federal Rules of Bankruptcy Procedure expressly
3 requires an adversary proceeding to resolve a lien priority dispute. *Id.*, 241 B.R. at 657. The
4 Ninth Circuit BAP in *In re Loloee* also held that the sale order was void because of the lack of
5 due process. In support of its ruling, the Ninth Circuit BAP stated:

6
7 GMAC had no reason to suspect that lien priorities would be
8 determined as part of the motion to sell property free and clear of
9 liens. It was entitled to expect that the court would apply the
10 pertinent rules of procedure.

11 *Id.*, 241 B.R. at 662.

12 The Debtors are seeking the entry of an order prohibiting the Debtors' utility service providers
13 from altering refusing, or discontinuing service to, or discriminating against, the Debtors.
14 Utility Motion at pp. 1, 12. When the Interim Utility Order (which was prepared by Debtors'
15 counsel) was entered by the Court, it appears that the grant of injunctive relief was more the
16 product of the Debtors' intentional failure to include the additional language contained in
17 Section 366(a), i.e., "on the basis of the commencement of these cases or on account of any
18 prepetition claim" in their proposed Interim Utility Order. The Debtors do not explain the need
19 for or justify the need for the Court to award them extraordinary injunctive relief in the Utility
20 Motion, and based upon the fact that they brought a Motion, not an adversary proceeding, the
21 Court should apply the pertinent rules of procedure and not enter an Order providing for the
22 extraordinary injunctive relief requested by the Debtors. Instead, the Court should only
23 approve the express language set forth in Section 366(a) of the Bankruptcy Code.

24
25 **4. The Interim Utility Order Was Entered Without Providing
26 Dominion With Notice and An Opportunity to Be Heard.**

27 The relief sought by the Debtors in the Utility Motion was based on Section 366(c) of the
28 Bankruptcy Code, which specifically requires that it be set after notice and a hearing. Rule 9014

1 of the Federal Rules of Bankruptcy Procedure provides that “reasonable notice and opportunity
2 for hearing shall be afforded the party against whom relief is sought.” Neither of the foregoing
3 were followed by the Debtors in this matter in complete violation of Dominion’s rights. It is
4 undisputed that the Debtors failed to provide proper notice to Dominion concerning the Utility
5 Motion and the expedited hearing on the Utility Motion. Because Dominion was not provided
6 with proper notice and an opportunity to be heard on the Utility Motion, Dominion was unable
7 participate in the expedited hearing on the Utility Motion that took place on the fifth day of the
8 case and just four days after the Utility Motion was filed. As such, Dominion has
9 unquestionably and wrongfully been denied any opportunity to contest the relief sought in the
10 Utility Motion. Therefore, the Court should deny the Utility Motion as to Dominion or
11 otherwise at least permit Dominion to be heard on the issues raised in the Utility Motion and in
12 this Motion at the next available hearing date.
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14

15 **B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE**
16 **ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY DOMINION**
17 **PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.**

18 Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power*
19 *Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), that held that an administrative expense,
20 without more, could constitute adequate assurance of payment in certain cases. Section
21 366(c)(1)(A) specifically defines the forms that assurance of payment may take as follows:

- 22 (i) a cash deposit;
23 (ii) a letter of credit;
24 (iii) a certificate of deposit;
25 (iv) a surety bond;
26 (v) a prepayment of utility consumption; or
27 (vi) another form of security that is mutually agreed upon between the utility and the
28 debtor or the trustee.

29 Section 366 of the Bankruptcy Code was enacted to balance a debtor’s need for utility services
30 from a provider that holds a monopoly on such services, with the need of the utility to ensure for

1 itself and its rate payers that it receives payment for providing these essential services. *See In re*
2 *Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security “should bear a
3 reasonable relationship to expected or anticipated utility consumption by a debtor.” *In re*
4 *Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a
5 determination, it is appropriate for the Court to consider “the length of time necessary for the
6 utility to effect termination once one billing cycle is missed.” *In re Begley*, 760 F.2d 46, 49 (3d
7 Cir. 1985). Based on the Debtors’ anticipated utility consumption, the minimum period of time
8 the Debtors could receive service from Dominion before termination of service for non-payment
9 of bills is approximately two (2) months or more. Moreover, even if the Debtors timely pay their
10 post-petition utility bills, Dominion still has potential exposure of 45 to 60 days based on its
11 Tariff-mandated billing cycles. Furthermore, the amount of Dominion’s deposit request is the
12 amount that the Virginia State Corporation Commission, which is a neutral third-party entity,
13 permits Dominion to request from its customers. Although Dominion recognizes that this Court
14 is not bound by the Terms And Conditions, the Terms And Conditions are extremely relevant
15 information of a determination made by an independent entity on the appropriate amount of
16 adequate assurance that should be paid to Dominion. Accordingly, the amount of the deposit
17 requested by Dominion is reasonable and should not be modified. *See In re Stagecoach*, 1 B.R.
18 732, 735-36 (Bankr. M.D. Fla. 1979) (holding that a two month deposit is appropriate where the
19 debtor could receive sixty (60) days of service before termination of services because of the
20 utilities’ billing cycle.); *see also In the Matter of Robmac, Inc.*, 8 B.R. 1, 3-4 (Bankr. N.D. Ga.
21 1979).

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24
25 In contrast, the Debtors fail to address in the Utility Motion why this Court should
26 modify, if at all, the amount of Dominion’s adequate assurance of payment request, which is the
27 Debtors’ statutory burden. Instead, the Debtors merely ask this Court to approve its proposed
28

1 form of adequate assurance of payment in the form of the two-week Bank Account. As set forth
2 in Section A.1. above, the proposed Bank Account does not provide adequate assurance of
3 payment to the Debtors' utility providers.

4 **WHEREFORE**, Dominion respectfully requests that this Court enter an order:

- 5 1. Denying the Utility Motion as to Dominion;
- 6 2. Awarding Dominion the post-petition adequate assurance of payment pursuant to
7 Section 366 in the amount and form satisfactory to Dominion;
- 8 3. Eliminating or modifying the injunctive relief in the Interim Utility Order and
9 entering a Final Utility Order that tracks the language of Section 366; and
10 4. Providing such other and further relief as the Court deems just and appropriate.

11 DATED: July 26, 2013

LAW OFFICES OF DAVID W. MEADOWS

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13
14
15 /s/ David W. Meadows

David W. Meadows

16 and

17 Russell R. Johnson III
18 John M. Craig
19 Law Firm of Russell R. Johnson III, PLC
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21 Manakin-Sabot, Virginia 23103
22 Telephone: (804) 749-8861
23 Facsimile: (804) 749-8862
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25
26
27
28 *Counsel for Virginia Electric and Power Company d/b/a
Dominion Virginia Power*

Exhibit A

1 DAVID W. MEADOWS, State Bar No. 137052
2 Law Offices of David W. Meadows
3 1801 Century Park East, Suite 1235
4 Los Angeles, California 90067
5 Telephone: (310) 557-8490
6 Facsimile: (310) 557-8493
7 E-mail: david@davidwmeadowslaw.com
8 Counsel for Virginia Electric and Power Company d/b/a
9 Dominion Virginia Power

10 UNITED STATES BANKRUPTCY COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 LOS ANGELES DIVISION

13 In re:) CASE NO. 13-bk-27689-WB
14)
15 COLOREP, INC.,) CHAPTER 11
16 a California corporation, *et al.*,)
17) (Jointly Administered)
18 Debtors,)
19) **DECLARATION OF SHERRY R. WARD IN**
20) **SUPPORT OF OBJECTION OF VIRGINIA**
21) **ELECTRIC AND POWER COMPANY d/b/a**
22) **DOMINION VIRGINIA POWER TO THE**
23) **EMERGENCY MOTION FOR ORDER: (I)**
24) **DEEMING UTILITIES ADEQUATELY**
25) **ASSURED OF FUTURE PERFORMANCE;**
26) **AND (II) ESTABLISHING PROCEDURES**
27) **FOR DETERMINING REQUESTS FOR**
28) **ADDITIONAL ASSURANCE PURSUANT**
) **TO BANKRUPTCY CODE SECTION 366;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT THEREOF**
)
) DATE: TBD
) TIME: TBD
) PLACE: Courtroom 1375
) 255 East Temple St.
) Los Angeles, CA 90012

24 I, Sherry R. Ward, having been duly sworn, hereby state as follows to the best of my
25 knowledge and belief.

26 1. I make this Affidavit based on first-hand knowledge and am competent to
27 testify as to the matters stated herein.
28

1 2. I am the Customer Credit Representative for Virginia Electric and Power
2 Company d/b/a Dominion Virginia Power (“Dominion”), and I have been in that position for
3 approximately 10 years. It is part of my job responsibility to deal with credit and bankruptcy
4 issues concerning customers’ accounts and to review credit and payment histories of
5 Dominion’s customers.

6 3. Dominion provided the Debtors with prepetition utility goods and/or services
7 and has continued to provide the Debtors with utility goods and/or services since the Petition
8 Date . Dominion provides electric utility service to one account that Debtor Transprint USA,
9 Inc. (the “Debtor”) has with Dominion in the Commonwealth of Virginia.

10 4. The estimated prepetition debt owed by the Debtor to Dominion is
11 approximately \$75,000.

12 5. Dominion is seeking a two-month cash deposit in the amount of \$63,594 from
13 the Debtor as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy
14 Code.

15 6. The two-month deposit amount demanded Dominion is the amount that
16 Dominion is authorized to request pursuant to its Terms And Conditions (“Terms And
17 Conditions”), which are on file with the State Corporation Commission of Virginia (the
18 “SCC”). The Terms And Conditions can be reviewed and obtained online at:

19 <http://www.dom.com/find-it-fast/rates/terms-and-conditions.jsp>

20 7. Under Dominion’s billing cycles, which are governed the SCC, the Debtor
21 receives approximately one month of utility service before Dominion issues a bill for such
22 service. A bill is due upon receipt. Section XII of the Terms And Conditions, *Payments*. If
23 the Debtors fail to timely pay the bill within 28 days after issuance, a late fee may be charged.
24 Id. Dominion can disconnect service for non-payment of a past-due bill after providing 10
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1 days' notice by mail. Section XVI of the Terms And Conditions, *Disconnection of Electric*
2 *Service.*

3
4 I declare under penalty of perjury pursuant to 28 U.S.C. Section 1746 that the foregoing
5 is true and correct to the best of my knowledge, information and belief.

6
7 Executed this 26th day of July 2013 in Richmond, Virginia.

8 
9 Sherry R. Ward

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 1801 Century Park East, Suite 1235, Los Angeles, CA 90067.

A true and correct copy of the foregoing document entitled (*specify*): **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; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION IN SUPPORT THEREOF** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On 6/28/13, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) 7/26/13, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Duke Energy P.O. Box 1090 Charlotte, NC 28201-1090	Columbia Gas Attn: Keith Martin 200 Civic Center Drive Columbus, OH 43215
--	--

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on 7/26/13, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Hon. Julia Brand

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

7/26/13

Date

David W. Meadows

Printed Name

/s/ David W. Meadows

Signature

1. Continued:

- Brian L Davidoff bdavidoff@greenbergglusker.com,
jreinglass@greenbergglusker.com;kwoodson@greenbergglusker.com;calendar@greenbergglusker.com;
sgaeta@greenbergglusker.com
- Patrick B Howell phowell@whdlaw.com, dprim@whdlaw.com;tmichalak@whdlaw.com
- Ron Maroko ron.maroko@usdoj.gov
- Margreta M Morgulas mmorgulas@stutman.com
- Michael S Neumeister mneumeister@stutman.com
- Frank T Pepler frank.pepler@dlapiper.com
- Danielle A Pham dpham@stutman.com, daniellepham@gmail.com
- United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov