

1 Christopher O. Rivas (SBN 238765)
2 REED SMITH LLP
3 355 South Grand Avenue, Suite 2900
4 Los Angeles, CA 90071-1514
Telephone: 213.457.8000
Facsimile: 213.457.8080

5 *Attorneys for Columbia Gas of Virginia, Inc.*

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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11 IN RE:
12
13 **COLOREP, INC.,**
14 a California corporation, *et al.*,
15 Debtors.

Case No. 2:13-bk-27689-WB

Chapter 11
(Jointly Administered)

**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)**

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

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1 Columbia Gas of Virginia, Inc. ("Columbia"), by its undersigned counsel, hereby objects to
2 the form and amount of the Debtors' proposed assurance of payment to Columbia for post-petition
3 utility services under section 366 of the Bankruptcy Code pursuant to the objection procedures set
4 forth in the *Order Granting Emergency Motion for Order: (I) Deeming Utilities Adequately Assured*
5 *of Future Performance; and (II) Establishing Procedures for Determining Requests for Additional*
6 *Assurance Pursuant to Bankruptcy Code Section 366* [Docket No. 54] (the "Utilities Order") and, in
7 support hereof, respectfully states as follows:

8 **I.**

9 **PRELIMINARY STATEMENT**

10 1. As an involuntary post-petition creditor, Columbia is entitled to adequate
11 assurance of payment for post-petition utility services provided to the Debtors that is satisfactory to
12 Columbia and that is sufficient to protect Columbia in the event of non-payment. The assurance of
13 payment proposed by the Debtors and preliminarily approved by the Utilities Order—an escrow
14 deposit of two week's average utility usage for the benefit of all of Debtors' thirteen utilities—is
15 inadequate and insufficient to protect Columbia in the event of non-payment. Indeed, because the
16 escrow deposit is available to all thirteen of the Debtors' utilities and may easily be exhausted by
17 other utilities in the event of non-payment, Columbia cannot be assured of *any* payment for the post-
18 petition services it is required to render. Moreover, the Debtors should not be permitted to rewrite
19 the requirements for terminating post-petition utility service by seeking an order that prohibits
20 utilities from altering, refusing, discontinuing service to, or discriminating against the Debtors under
21 *any* circumstances. If the relief requested by the Debtors is not modified, Columbia essentially will
22 be stripped of all protections intended to be provided by section 366 of the Bankruptcy Code.
23 Accordingly, the Debtors' proposed assurance of payment should be modified by the Court by
24 requiring the Debtors to deposit cash with Columbia in an amount equivalent to two months' highest
25 utility usage and by clarifying Columbia's right to terminate post-petition utility service in
26 accordance with applicable law and regulations for any reason other than commencement of a
27 bankruptcy case and non-payment of pre-petition debts.

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II.

JURISDICTION AND VENUE

2. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 366(a) and 366(c)(3).

III.

BACKGROUND

4. On July 10, 2013 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Central District of California, Los Angeles Division (the "Court").

5. Prior to the Petition Date, Columbia provided Debtor Transprint USA, Inc. ("Transprint") with gas services under a pre-petition account. Such services were provided to Transprint's facility located at 1000 Pleasant Valley Road, Harrisonburg, VA 22801. Columbia did not hold a pre-petition security deposit in connection with Transprint's pre-petition account.¹

6. Prior to February 2013, Columbia provided only gas transportation services to Transprint. On or about February 18, 2013, Transprint's gas supplier cancelled its contract with Transprint. In place of a stand-alone gas supplier, and in addition to the gas transportation services already provided, Columbia thereafter began supplying gas to Transprint sufficient to cover Transprint's monthly gas consumption and billing Transprint the applicable rate, which is referred to as the "Gas Daily Rate." The Gas Daily Rate varies every month. From and after February 2013,

¹ Section 366(c)(3)(B) of the Bankruptcy Code instructs bankruptcy courts not to consider "the absence of security before the date of the filing of the petition" when determining whether an assurance of payment is adequate. 11 U.S.C. § 366(c)(3)(B).

1 Transprint's monthly billings increased substantially through the addition of gas supply services to
2 the pre-petition account.²

3 7. As of the Petition Date, Transprint was more than three months in arrears with
4 respect to its pre-petition account.³ Consequently, Columbia has a pre-petition claim against
5 Transprint in the aggregate amount of \$45,419.02, representing three months of unpaid invoices,
6 plus the amount due for gas service from and after the immediately preceding invoice up to the
7 Petition Date (which amount is yet to be determined).

8 8. When Columbia received notice of the Debtors' chapter 11 filings, Columbia
9 closed the pre-petition account, opened a new debtor-in-possession account, and continued to
10 provide service post-petition.

11 9. On July 11, 2013, the Debtors filed the *Emergency Motion for Order*:
12 *(I) Deeming Utilities Adequately Assured of Future Performance; and (II) Establishing Procedures*
13 *for Determining Requests for Additional Assurance Pursuant to Bankruptcy Code Section 366;*
14 *Memorandum of Points and Authorities in Support Thereof* [Docket No. 8] (the "Utilities Motion"),
15 pursuant to which the Debtors asked the Court to approve as adequate an assurance of payment to all
16 of the Debtors' thirteen utilities (the "Utilities") in the form of an escrow deposit in favor of the
17 Utilities of an amount equal to an average of two weeks' payments to each Utility, totaling only
18 \$22,595.00. To the extent that a utility provider finds the proposed assurance of payment
19 unsatisfactory, the Utilities Motion proposes procedures by which the utility provider is required to
20 file an objection seeking additional assurance of payment within fourteen days from the date of entry
21 of the Utilities Order. The Debtors did not contact Columbia to discuss adequate assurance or wait
22 to receive Columbia's request for an assurance of payment satisfactory to Columbia prior to filing
23 the Utilities Motion.

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25 ² The Debtors' method of calculating its proposed assurance of payment—an average of two weeks' payments to each
26 utility based upon historical payments made by the Debtors to each Utility over the last twelve months—does not
27 properly account for the significant increase in billings from Columbia beginning in February 2013. In other words,
the historical two-week average of payments over the last year does not accurately project average post-petition
billings from Columbia, which will include both gas transportation and supply charges.

28 ³ As set forth more fully below, the Debtor regularly made untimely payments and carried its accounts in arrears.

1 the courts—at least where the disposition required by the text is not absurd—is to enforce it
2 according to its terms.” Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (quoting Hartford
3 Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)). Because the Debtors’
4 proposed assurance of payment is not satisfactory to Columbia, the Debtors have failed to provide
5 adequate assurance of payment under section 366(c).

6 14. To the extent that a debtor seeks approval of an assurance of payment that is
7 not satisfactory to the utility, the debtor has the burden of proof as to whether its proposed assurance
8 of payment is adequate. See Long Island Lighting Co. v. Great Atl. & Pac. Tea Co., Inc. (In re Great
9 Atl. & Pac. Tea Co., Inc.), Case No. 11-CV-1338 (CS), 2011 WL 5546954, *4 (S.D.N.Y. Nov. 14,
10 2011) (“the debtor has the burden of proof on the issue of adequate assurance of payment”) (citing In
11 re Stagecoach Enters., Inc., 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979)). Because the proposed
12 assurance of payment is not satisfactory to Columbia, the Debtors have the burden of proving such
13 proposed assurance is adequate.

14 15. When determining whether to modify an assurance of payment demanded by
15 a utility, the “court must engage in a fact-driven analysis in order to balance the utility provider’s
16 need to be free from unreasonable risk of nonpayment and the debtor’s scarce financial resources
17 during bankruptcy.” In re Great Atl. & Pac. Tea Co., 2011 WL 5546954 at *5. Courts have held
18 that the deposit or other security “should bear a reasonable relationship to expected or anticipated
19 utility consumption by a debtor.” In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 883 (Bankr.
20 E.D.N.Y. 1986). In this analysis, it is appropriate to consider “the length of time necessary for the
21 utility to effect termination once one billing cycle is missed.” Begley v. Philadelphia Elec. Co., 760
22 F.2d 46, 49 (3d Cir. 1985).

23 16. The form and amount of assurance that is satisfactory to Columbia and that
24 reasonably protects Columbia from the risk of non-payment for post-petition service is a cash
25 deposit with Columbia in the amount of \$41,866.75, which reflects two months’ highest utility usage
26 over the last twelve months.⁴

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28 ⁴ For reference, a deposit of two months’ average utility usage over the past twelve months would be \$29,388.72.

1 17. Like many utilities, Columbia's service meters are read on a monthly basis.
2 On the date that a meter is read, Columbia already has delivered approximately thirty days of gas
3 service for which no payment has been received (Day 30). Generally, Columbia issues an invoice on
4 approximately the sixth business day of the month after a meter is read (~ Day 36). Payment of the
5 invoice is due eighteen days after the invoice date, but is not considered delinquent until nineteen
6 days after the invoice date (~ Day 55). Once an invoice is delinquent, Columbia is required by the
7 Virginia State Corporation Commission (the "VSCC") to send a written notice of termination to the
8 customer. Columbia does not terminate service until the expiration of fourteen calendar days after
9 delivery of the termination notice (~ Day 69). Additional time invariably passes before service is
10 actually terminated. As a result of this process, Columbia customarily provides businesses such as
11 Transprint with more than 69 days of utility service at a particular location before it has an
12 opportunity to terminate service. This substantial risk has resulted in the VSCC's approval of a
13 deposit equal to two months' highest utility usage.

14 18. Because utilities commonly have exposure to 60 to 90 days of non-payment
15 for post-petition service, courts have held that a deposit in the amount of two months of the debtor's
16 utility usage is appropriate adequate assurance. See In re Bedford Town Condominium, 427 B.R.
17 380, 385-86 (Bankr. D. Md. 2010) (concluding that "a two month utility deposit as required by the
18 Utilities will provide adequate assurance of payment for utility service charges"); In re Beach House
19 Property, LLC, Case No. 08-11761-BKC-RAM, 2008 WL 961498 at *1, n. 1 (Bankr. S.D. Fla. Apr.
20 8, 2008) (requiring deposit of two months' usage); In re Spencer, 218 B.R. 290, 293 (Bankr.
21 W.D.N.Y. 1998) (requiring deposit of two highest months' usage); Lloyd v. Champaign Tel. Co., 52
22 B.R. 653, 656 (Bankr. S.D. Ohio 1985) (requiring deposit of 2.3 times average usage); In re Sun-Tel
23 Commc'ns, Inc., 39 B.R. 10, 11-12 (Bankr. S.D. Fla. 1984) (requiring deposit of approximately two
24 months' usage); In re Santa Clara Circuits W., Inc., 27 B.R. 680, 686 (Bankr. D. Utah 1982)
25 (requiring deposit of one billing period plus time period between end of billing period and due date
26 for payment); In re Stagecoach Enters., Inc., 1 B.R. 732, 736 (Bankr. M.D. Fla. 1979) (requiring
27 deposit of two billing periods).

1 19. The Court in In re Spencer held that, while the Court was not bound by the
2 State Public Service Commission Regulations, the two month deposit provided for in those
3 regulations was a factor to be considered by the court. 218 B.R. 290, 293-94 (Bankr. W.D.N.Y.
4 1998).⁵ In the instant case, the VSCC's approval of a deposit equal to two months' highest usage
5 provides a useful guideline for the Court to determine whether the Debtors' assurance of payment is
6 adequate.

7 20. Transprint's history of late payments to Columbia also should factor in favor
8 of an increased assurance of payment. See In re Bedford Town Condominium, 427 B.R. at 385, n. 4.
9 (“Section 366(c)(3)(B)(ii) prohibits the Court from considering a debtor's history of making *timely*
10 prepetition utility payment in determining adequate assurance. It does not prohibit the Court from
11 considering *untimely* prepetition payments.”) (emphasis in original). Prior to the Petition Date,
12 Transprint was over three months in arrears with respect to its pre-petition account and regularly
13 made late payments. Indeed, in the fifteen months prior to the Petition Date, the Debtor made 11
14 late payments on its pre-petition account, which payments were made on average 82 days late.

15 21. Considering Columbia's exposure to a minimum of 73 days of non-payment
16 before termination of service is permitted, applicable state regulations, and Transprint's history of
17 late payments, the Debtors' proposed assurance of payment of an escrow deposit of \$22,595.00,
18 which is available to be claimed by any of the Debtors' thirteen Utilities, is entirely inadequate to
19 protect Columbia in the event of non-payment. If the Debtors stop paying their Utilities, it is not
20 difficult to imagine a scenario where multiple claims are made against the escrow account thereby
21 exhausting the inadequate deposit in short order and leaving Columbia with unpaid post-petition
22 utility charges of \$41,866.75. Under the circumstances, the proposed escrow deposit provides
23 Columbia with very little, if any, assurance of future payment for the post-petition utility services
24 that Columbia is required to render to Transprint.

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27 ⁵ The Spencer Court also noted that utility bills can fluctuate dramatically depending on the season, and that “[r]equiring
28 the deposit to be based on the highest two months in the prior twelve month billing cycle should provide adequate
assurance for any two month period and eliminate the timing of a debtor's filing as a factor.” In re Spencer, 218 B.R.
at 294, n. 3.

1 22. Accordingly, the Court should modify the Debtors' proposed assurance of
2 payment to require a cash deposit with Columbia in the amount of \$41,866.75.

3 **B. THE DEBTORS CANNOT REWRITE SECTION 366 TO PROHIBIT COLUMBIA**
4 **FROM TERMINATING POST-PETITION UTILITY SERVICE FOR ANY REASON**
5 **OTHER THAN COMMENCEMENT OF A BANKRUPTCY CASE AND NON-**
6 **PAYMENT OF PRE-PETITION DEBTS.**

7 23. The Utilities Motion seeks to rewrite section 366 of the Bankruptcy Code by
8 purportedly extinguishing Columbia's rights to terminate service based upon reasons *other than* the
9 commencement of this bankruptcy case and Transprint's nonpayment of prepetition debt.
10 Specifically, the Utilities Motion requested an order providing, and the Utilities Order provides, that
11 "[t]he Debtors' utility service providers . . . are prohibited from altering, refusing, discontinuing
12 service to, or discriminating against the Debtors." Utilities Order at ¶ 2. By its plain terms, the
13 Utilities Order prohibits the Debtors' utility providers from terminating utility services under any
14 circumstances.

15 24. Section 366(a) protects the Debtors from a utility's refusal to provide services
16 solely because of (i) the filing of a bankruptcy petition or (ii) the failure to pay a prepetition debt
17 when due. See Hanratty v. Philadelphia Elec. Co. (In re Hanratty), 907 F.2d 1418, 1421 (3d Cir.
18 1990) ("This section gives debtors protection from a cut-off of service by a utility because of the
19 filing of a bankruptcy case."); see also Begley v. Philadelphia Elec. Co., 760 F.2d 46, 49 (3d Cir.
20 1985) ("restriction on termination in section 366(a) bars only those terminations which issue 'solely
21 on the basis' that a debt incurred prior to the bankruptcy order, was not paid when due.").

22 25. Section 366(c) provides an exception to the general rule set forth in subsection
23 (a). This subsection permits a utility to terminate (or refuse) post-petition service solely because of
24 the commencement of the bankruptcy case or the failure to pay pre-petition debts if the debtor also
25 fails to provide assurance of payment satisfactory to the utility. As an exception to subsection (a),
26 section 366(c) does not create an independent duty to provide services and does not prohibit a utility
27 from terminating services for any reason other than the commencement of the case or the fact that a
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1 prepetition debt was not paid. See Whittaker v. Philadelphia Elec. Co. (In re Whittaker), 882 F.2d
2 791, 794 (3d Cir. 1989) (“‘refuse’ was intended to encompass any denial of service for one of the
3 two prohibited reasons”).

4 26. Columbia has no duty to continue providing services to the Debtors so long as
5 the basis for termination is a reason other than the commencement of the bankruptcy case or the fact
6 that a prepetition debt was not paid. See Weisel v. Dominion Peoples Gas Co. (In re Weisel), 428
7 B.R. 185, 188 (W.D. Pa. 2010) (holding that a utility is permitted to unilaterally terminate gas
8 service based on postpetition unpaid bills, without requirement of seeking leave or court or relief
9 from stay). “[T]he use of the word ‘solely’ in § 366(a) implies that a utility may refuse to furnish
10 services on other grounds, but not because of the commencement of the bankruptcy case nor because
11 of prepetition debt.” Jones v. Boston Gas Co. (In re Jones), 369 B.R. 745, 749 (1st Cir. B.A.P. 2007)
12 (citing cases). Accordingly, the Debtor cannot rewrite section 366 of the Bankruptcy Code to
13 prohibit Columbia from terminating service in accordance with applicable law and regulations based
14 upon a reason not prohibited by section 366.

15 27. Columbia seeks confirmation that it is not prohibited by virtue of the Utilities
16 Order from terminating service in accordance with applicable law and regulations based upon a
17 reason other than commencement of the bankruptcy case and nonpayment of prepetition debts.

18 III.

19 BACKGROUND

20 WHEREFORE, Columbia respectfully requests that the Court enter an order,
21 substantially in the form attached hereto as **Exhibit A**, (i) modifying the form and amount of the
22 assurance of payment to Columbia by requiring a post-petition cash deposit with Columbia in the
23 amount of \$41,866.75, (ii) confirming Columbia’s right to terminate post-petition utility service in
24 accordance with applicable law and regulations for any reason other than commencement of a
25 bankruptcy case and non-payment of pre-petition debts, and (iii) granting such other and further
26 relief as may be just and proper.

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Dated: August 1, 2013

Respectfully submitted,

REED SMITH LLP

By: /s/ Christopher O. Rivas
Christopher O. Rivas
Email: crivas@reedsmith.com

Attorneys for Columbia Gas of Virginia, Inc.

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

Exhibit A

1 Christopher O. Rivas (SBN 238765)
REED SMITH LLP
2 355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
3 Telephone: 213.457.8000
Facsimile: 213.457.8080

4 *Attorneys for Columbia Gas of Virginia, Inc.*
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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **LOS ANGELES DIVISION**

11
12 IN RE:
13 COLOREP, INC.,
a California corporation, *et al.*,
14 Debtors.

Case No. 2:13-bk-27689-WB

Chapter 11
(Jointly Administered)

**ORDER MODIFYING DEBTORS'
PROPOSED ADEQUATE ASSURANCE
OF PAYMENT TO COLUMBIA GAS OF
VIRGINIA, INC. PURSUANT TO 11
U.S.C. § 366(c)(3)**

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

1 Upon consideration of the *Objection of Columbia Gas of Virginia, Inc. to Debtors'*
2 *Proposed Adequate Assurance of Payment for Utility Service Pursuant to 11 U.S.C. § 366(c)(3)* (the
3 "Objection") filed by Columbia Gas of Virginia, Inc. ("Columbia"), after notice and an opportunity
4 for a hearing, and after due deliberation and good and sufficient cause appearing therefor, IT IS
5 HEREBY ORDERED, ADJUDGED, AND DECREED THAT:¹

6 1. Pursuant to section 366(c)(3) of the Bankruptcy Code, the form and amount of
7 the Debtors' adequate assurance payment to Columbia is modified to require a post-petition cash
8 deposit in the amount of \$41,866.75 to be deposited with Columbia within ten (10) days of the date
9 of this Order.

10 2. In accordance with sections 366(a) and (c) of the Bankruptcy Code, the
11 Utilities Order should not be read or construed to prohibit Columbia from terminating post-petition
12 utility service to the Debtors in accordance with applicable law and regulations for any reason other
13 than commencement of the bankruptcy case or non-payment of pre-petition debts.

14 Dated: _____

The Honorable Julia W. Brand
United States Bankruptcy Judge

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28 ¹ Capitalized terms used but not defined in this Order have the meanings given in the Objection.

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: 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071.

A true and correct copy of the foregoing document entitled (*specify*): **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)** 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 (*date*) August 1, 2013, 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*) August 1, 2013, 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.

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 (*date*) August 1, 2013, 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.

Honorable Judge Julia W. Brand
United States Bankruptcy Court
Central District of California
Edward R. Roybal Federal Building and Courthouse
255 E. Temple Street, Suite 1382 / Courtroom 1375
Los Angeles, CA 90012

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.

August 1, 2013

Evelyn Rodriguez

/s/ Evelyn Rodriguez

Date

Printed Name

Signature

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

Brian L Davidoff b davidoff@greenbergglusker.com,
jreinglass@greenbergglusker.com;kwoodson@greenbergglusker.com;calendar@greenbergglusker.c
om;sgaeta@greenbergglusker.com
Patrick B Howell phowell@whdlaw.com, dprim@whdlaw.com;tmichalak@whdlaw.com
Ron Maroko ron.maroko@usdoj.gov
David W. Meadows david@davidwmeadowslaw.com
Stephan W Milo smilo@wawlaw.com, psilling@wawlaw.com
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
Jeffrey M. Reisner jreisner@irell.com
United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov

2. SERVED BY UNITED STATES MAIL

Gary E. Klausner
Margreta M. Morgulas
Kizzy L. Jarashow
Stutman, Treister & Glatt Professional Corporation
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

Colorep, Inc. and Transprint USA, Inc.
1000 Pleasant Valley Road
Harrisonburg, VA 22801-9790

Office of the US Trustee
Ron Maroko, Esq.
725 S Figueroa St, Ste 2600
Los Angeles, CA 90017

Debtor:

Colorep, Inc.
c/o Law Offices of Joseph P. Bartlett
1900 Avenue of the Stars
20th Floor
Los Angeles, CA 90067

Office of the US Trustee
Ron Maroko , Esq.
725 S Figueroa St Ste 2600
Los Angeles, CA 90017
213-894-4520

Secured Lenders:

Meserole, LLC
Attn: Ari Hirt
152 W 57th Street, 4th Floor
New York, New York 10019

Counsel to Meserole LLC
DLA Piper LLP (US)
Attn: Stuart Brown
919 North Market Street
Suite 1500
Wilmington, Delaware 19801

Other Parties in Interest:

Wells Fargo Bank N.A.
141 East Market Street
Harrisonburg, VA 22801

Wells Fargo Bank N.A.
141 East Market Street
Harrisonburg, VA 22801

Governmental Agencies

Employment Development Department
Bankruptcy Group MIC 92E
PO Box 826880
Sacramento, CA 94280-0001

State of California Franchise Tax Board
Bankruptcy Section, MS: A-340
PO Box 2952
Sacramento, CA 95812-2952

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

Utility Providers

Dominion Va Power
P.O. Box 26666
Richmond, VA 23261-6666
Attn: Barbara Smith

Duke Energy
P.O. Box 1090
Charlotte, NC 28201-1090

Columbia Gas
Attn: Keith Martin
200 Civic Center Dr.
Columbus, OH 43215

ACC Business
400 West Ave.
Rochester, NY 14611
Attn: Ron Vanderwege

Sprint
Attn: Mildred Walker
PO Box 8077
London, KY 40742

Time Warner Cable
P.O. Box 77169
Charlotte, NC 28271-7169

Verizon South
PO Box 33078
St. Petersburg, FL 33733

Verizon South
Attn: Bankruptcy Matters
500 Technology Drive, Suite 550
Weldon Spring, MO 63304

Verizon NY
PO Box 15124
Albany, NY 12212-5124

Verizon NY
Attn: Bankruptcy Matters
500 Technology Drive, Suite 550
Weldon Spring, MO 63304

Verizon NY Internet
PO Box 33078
St. Petersburg, FL 33733
Phone: 800-837-4066

Verizon NY Internet
Attn: Bankruptcy Matters
500 Technology Drive, Suite 550
Weldon Spring, MO 63304

Verizon Business
P.O. Box 660794
Dallas, TX 75266-0794

City of Harrisonburg, VA
2155 Beery Rd
Harrisonburg, VA 22801-9655

Rockingham Co. Treasurer
20 East Gay Street
Harrisonburg, VA 22802

Allied Waste
1831 Avon Street Ext.
Charlottesville, VA 22902