

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

)))
)	In re:)	Chapter 11)
)	CHARMING CHARLIE HOLDINGS INC., <i>et al.</i> , ¹)	Case No. 19-11534 (___))
))	(Joint Administration Requested))
)	Debtors.))

**DEBTORS’ MOTION SEEKING ENTRY OF INTERIM AND FINAL ORDERS
(I) DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE
UTILITY SERVICES, (II) PROHIBITING UTILITY PROVIDERS FROM ALTERING,
REFUSING, OR DISCONTINUING UTILITY SERVICES, (III) ESTABLISHING
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT,
(IV) AUTHORIZING FEE PAYMENTS TO ENGIE FOR SERVICES PERFORMED,
(V) REQUIRING UTILITY PROVIDERS TO RETURN DEPOSITS FOR UTILITY
SERVICES NO LONGER IN USE, AND (VI) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) respectfully state as follows in support of this motion:²

Relief Requested

1. The Debtors seek entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B** (respectively, the “Interim Order” and “Final Order”):
(a) determining adequate assurance of payment for future utility services; (b) prohibiting utility

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Charming Charlie Canada LLC (0693); Charming Charlie Holdings Inc. (6139); Charming Charlie International LLC (5887); Charming Charlie LLC (0263); Charming Charlie Manhattan LLC (7408); Charming Charlie USA, Inc. (3973); and Poseidon Partners CMS, Inc. (3302). The location of the Debtors’ headquarters is: 6001 Savoy Drive, Ste. 600 Houston, Texas 77036.

² A detailed description of the Debtors and their business, and the facts and circumstances supporting the Debtors’ chapter 11 cases, are set forth in greater detail in the *Declaration of Alvaro Bellon, Chief Financial Officer of Charming Charlie Holdings Inc., in Support of Debtors’ Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), filed contemporaneously with the Debtors’ voluntary petitions for relief filed under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) on July 11, 2019 (the “Petition Date”). Capitalized terms used but not otherwise defined in this motion shall have the meanings ascribed to them in the First Day Declaration.

providers from altering, refusing, or discontinuing services; (c) establishing procedures for determining adequate assurance of payment; (d) authorizing fee payments to Engie (as defined below) for services performed; (e) requiring utility providers to return deposits for utility services no longer in use; and (f) granting related relief. In addition, the Debtors request that the Court schedule a final hearing within approximately 30 days of the commencement of these chapter 11 cases to consider approval of this motion on a final basis.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a) and 366 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1(m).

The Utility Services

5. In connection with the operation of their businesses and management of their properties, the Debtors historically obtain water, sewer service, electricity, waste disposal, natural gas, and other similar services (collectively, the “Utility Services”) from a number of utility

providers or their brokers (collectively, the “Utility Providers”). A list of the Utility Providers and their affiliates that provide Utility Services to the Debtors as of the Petition Date (the “Utility Services List”) is attached hereto as **Exhibit C**.³

6. To manage the Debtors’ payments owed to most of their Utility Providers, Charming Charlie LLC entered into that certain Master Service Agreement with ENGIE Insight Services, Inc. f/k/a Ecova, Inc. (“Engie”), dated March 26, 2016 (as amended, modified, and supplemented from time to time, the “Service Agreement”). Pursuant to the Service Agreement, the Debtors pay Engie on a weekly basis for the amounts invoiced for the Utility Services managed by Engie, plus a monthly fee of approximately \$8,500, in each case, in the ordinary course of business. As of the Petition Date, the Debtors owe approximately \$40,000 in outstanding obligations to Engie, all of which will become due in the 30 days after the Petition Date.

7. Pursuant to the leases for several of the Debtors’ stores, certain Utility Services are billed directly to the Debtors’ landlords and passed through to the Debtors as part of the Debtors’ lease payments in accordance with the applicable lease agreements. The relief requested herein is with respect to all Utility Providers supplying Utility Services to the Debtors, including those that indirectly supply services through the applicable landlords.⁴

8. Uninterrupted Utility Services are essential to the Debtors’ ongoing business operations and, hence, the overall success of these chapter 11 cases. As of the Petition Date, the

³ Although **Exhibit C** is intended to be comprehensive, the Debtors may have inadvertently omitted one or more Utility Providers. By this motion, the Debtors request relief applicable to all Utility Providers, regardless of whether such Utility Provider is specifically identified on **Exhibit C**.

⁴ As of the Petition Date, the Debtors are negotiating rent concessions with certain of their landlords that pay for and pass through the cost of Utility Services to the Debtors. Notwithstanding any current or future nonpayment, deferral, waiver, or other compromise of rent, the Debtors respectfully submit that such landlords be required to continue to pay for Utility Services in the ordinary course until the effective date of the rejection of the applicable lease agreement, if any, pursuant to section 365 of the Bankruptcy Code.

Debtors' business includes approximately 260 brick-and-mortar retail locations, as well as a distribution center and corporate offices. These locations require electricity, telecommunications, internet, water, waste management (including sewer and trash), and other utility services to operate. Should any Utility Provider refuse or discontinue service, even for a brief period, the Debtors' business operations would be severely disrupted, and such disruption would interfere with the Debtors' ability to maximize the value of the store closing sales. Such disruption would also adversely affect customer goodwill and employee relations, which, in turn, would negatively affect the Debtors' store-closing sales. Accordingly, it is essential that the Utility Services continue uninterrupted during these chapter 11 cases.

9. On average, the Debtors pay approximately \$500,000 each month for Utility Services, calculated as a historical average payment for the twelve-month period ending July 1, 2019, including services paid under the Services Agreement and excluding Utility Services billed directly to the Debtors' landlords. The Debtors estimate that their cost for Utility Services during the next 30 days (not including any deposits to be paid or fees payable to Engie) will be approximately \$500,000. The Debtors estimate the aggregate amount currently held as deposits or prepayments by the Utility Providers is approximately \$239,000.

I. The Proposed Adequate Assurance and Adequate Assurance Procedures.

10. The Debtors intend to pay postpetition obligations to the Utility Providers in a timely manner. Cash held by the Debtors, cash generated in the ordinary course of business, and cash available to the Debtors under any postpetition financing facility will provide sufficient liquidity to pay the Debtors' Utility Service obligations in accordance with their prepetition practice.

11. To provide additional assurance of payment, the Debtors propose to deposit into a segregated account \$205,625.00 (the "Adequate Assurance Deposit"), which represents an amount

equal to approximately two weeks of Utility Services the Utility Providers provide the Debtors, calculated based on the Debtors' average utility expenses over the last twelve months ending July 1, 2019, excluding Utility Services billed directly to the Debtors' landlords and the average monthly fee paid to Engie. The Debtors are conducting store-closing sales for their stores ("Closing Stores"), which are expected to close on or before August 31, 2019. Closing Stores account for nearly all of the average monthly Utility Service costs. On a rolling basis, as stores are closed and their corresponding utilities accounts are settled, in accordance with the Adequate Assurance Procedures described below, the Adequate Assurance Deposit will be reduced by the two-week cost of Utility Services provided to the applicable Closing Stores, calculated based on the aforementioned historical average, to align with the go-forward average monthly cost of Utility Services.

12. The Adequate Assurance Deposit will be held in a segregated account (the "Adequate Assurance Account") at Wells Fargo Bank, N.A. ("Wells Fargo") for the benefit of the Utility Providers and for the duration of these chapter 11 cases and may be applied to any postpetition payment defaults owed to the Utility Providers by the Debtors. The Adequate Assurance Deposit will be held by the Debtors; no liens will encumber the Adequate Assurance Deposit or the Adequate Assurance Account. The Debtors submit that the Adequate Assurance Deposit, in conjunction with the Debtors' ability to pay for future utility services in accordance with their prepetition practices (collectively, the "Proposed Adequate Assurance"), constitutes sufficient adequate assurance to the Utility Providers in full satisfaction of section 366 of the Bankruptcy Code.

13. Nevertheless, if any entity believes that they are a Utility Provider and seeks to make a request for adequate assurance of future payment (each, an "Adequate Assurance

Request”), the Debtors request they be required to do so pursuant to the following procedures (the “Adequate Assurance Procedures”):

- a. The Debtors will serve a copy of this motion and the order granting the relief requested herein to each Utility Provider within two business days after entry of the order by the Court.
- b. Subject to paragraphs (f)–(j) herein, the Debtors will deposit the Adequate Assurance Deposit, in the aggregate amount of \$205,625.00, in the Adequate Assurance Account within ten business days after entry of the Interim Order.
- c. Each Utility Provider shall be entitled to the funds in the Adequate Assurance Account in the amount set forth for such Utility Provider in the column labeled “Proposed Adequate Assurance” on the Utility Providers List.
- d. If an amount relating to Utility Services provided postpetition by a Utility Provider is unpaid, and remains unpaid beyond any applicable grace period, such Utility Provider may request a disbursement from the Adequate Assurance Account by giving notice to: (i) the Debtors, Charming Charlie Holdings Inc., 6001 Savoy Drive, Ste. 600, Houston, Texas 77036, Attn: Al Bellon, (ii) proposed counsel to the Debtors, Paul Hastings, LLP, 71 South Wacker Drive, 45th Floor, Chicago, Illinois 60606, Attn: Nathan S. Gimpel and Matthew J. Smart; (iii) proposed co-counsel to the Debtors, Klehr Harrison Harvey Branzburg LLP, 919 N. Market Street, Suite 1000, Wilmington, Delaware 19801 Attn: Domenic E. Pacitti, Michael W. Yurkewicz, and Sally E. Veghte, (iv) counsel to the DIP Agent and Prepetition ABL Agent, Choate, Hall & Stewart LLP, Two International Place, Boston, Massachusetts 02110, Attn: Jonathan D. Marshall, John F. Ventola, and Jennifer Conway Fenn; (v) counsel to any statutory committee appointed in these cases; and (vi) the Office of The United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Linda Richenderfer, Esq.; and (vii) to the extent not listed herein, those parties requesting notice pursuant to Bankruptcy Rule 2002 (collectively, the “Notice Parties”). The Debtors shall honor such request within five business days after the date the request is received by the Debtors, subject to the ability of the Debtors and any such requesting Utility Provider to resolve any dispute regarding such request without further order of the Court. To the extent a Utility Provider receives a disbursement from the Adequate Assurance Account, the Debtors shall replenish the Adequate Assurance Account in the amount disbursed.
- e. The portion of the Adequate Assurance Deposit attributable to each Utility Provider will be returned to the Debtors on the earlier of (i) reconciliation and payment by the Debtors of the Utility Provider’s final invoice in

accordance with applicable nonbankruptcy law following the Debtors' termination of Utility Services from such Utility Provider, (ii) the effective date of any Court order directing the dismissal of these chapter 11 cases, (iii) the effective date of any Court order directing the conversion of these chapter 11 cases to chapter 7, or (vi) the effective date of any chapter 11 plan confirmed in these chapter 11 cases.

- f. Any Utility Provider desiring additional assurances of payment in the form of deposits, prepayments, or otherwise must serve a request for additional assurance (an "Additional Assurance Request") on the Notice Parties.
- g. Any Utility Provider that objects to the Debtors' Proposed Adequate Assurance must serve an Additional Assurance Request on the Notice Parties.
- h. Any Additional Assurance Request must: (i) be in writing; (ii) identify the location for which the Utility Services are provided; (iii) summarize the Debtors' payment history relevant to the affected account(s); (iv) certify the amount that is equal to two weeks of the Utility Services the Utility Provider supplies to the Debtors, calculated as a historical average over the twelve-month period ending July 1, 2019; (v) certify that the Utility Provider does not already hold a deposit equal to or greater than two weeks of Utility Services; (vi) provide evidence that the Debtors have a direct obligation to the Utility Provider; and (vii) explain why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of future payment.
- i. Any Additional Assurance Request may be made at any time. If a Utility Provider fails to file and serve an Additional Assurance Request, the Utility Provider shall be (i) deemed to have received "satisfactory" adequate assurance of payment in compliance with section 366 of the Bankruptcy Code and (ii) forbidden from discontinuing, altering, or refusing Utility Services to, or discriminating against, the Debtors on account of any unpaid prepetition charges, or requiring additional assurance of payment other than the Proposed Adequate Assurance.
- j. Upon the Debtors' receipt of an Additional Assurance Request, the Debtors shall have 21 days from the receipt of the Additional Assurance Request (the "Resolution Period") to negotiate with the Utility Provider to resolve the Utility Provider's Additional Assurance Request.
- k. Without further order of the Court, the Debtors may enter into agreements granting additional adequate assurance to a Utility Provider serving an Additional Assurance Request if the Debtors determine that the Additional Assurance Request is reasonable.

- l. If the Debtors determine that the Additional Assurance Request is not reasonable and the Debtors are unable to reach an alternative resolution with the Utility Provider, the Debtors, during or immediately after the Resolution Period, will request a hearing (a “Determination Hearing”) before the Court to determine the adequacy of assurance of payment with respect to that Utility Provider pursuant to section 366(c)(3) of the Bankruptcy Code.
- m. Pending resolution of such dispute at a Determination Hearing, the relevant Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtors on account of: (i) unpaid charges for prepetition services; (ii) a pending Additional Assurance Request; or (iii) any objections filed in response to the Proposed Adequate Assurance.
- n. The Adequate Assurance Deposit deposited into the Adequate Assurance Account on behalf of any Utility Provider (including any additional amount deposited upon request of any applicable Utility Provider), or any portion thereof, shall be returned to the Debtors, less any amounts owed on account of unpaid, postpetition Utility Services, by no later than five business days following the earlier of the date upon which (i) a chapter 11 plan becomes effective after being confirmed in these chapter 11 cases, (ii) a Court order dismissing these chapter 11 cases becomes effective, (iii) a Court order converting these chapter 11 cases to chapter 7 becomes effective, or (iv) the Debtors provide notice to a Utility Provider that services provided to the Debtors by such Utility Provider will no longer be needed or will be reduced.

14. The Adequate Assurance Procedures set forth a streamlined process for Utility Providers to address potential concerns with respect to the Proposed Adequate Assurance, while at the same time allowing the Debtors to administer their chapter 11 estates uninterrupted. More specifically, the Adequate Assurance Procedures permit a Utility Provider to object to the Proposed Adequate Assurance by serving an Additional Assurance Request upon certain notice parties. The Debtors, in their discretion, may then resolve any Additional Assurance Request by mutual agreement with the Utility Provider and without further order of the Court. If the Additional Assurance Request cannot be resolved by mutual agreement, the Debtors may seek Court resolution of the Additional Assurance Request.

15. Absent compliance with the Adequate Assurance Procedures, the Debtors request that the Utility Providers, including subsequently added Utility Providers, be forbidden from

altering, refusing, or discontinuing service or requiring additional assurance of payment other than the Proposed Adequate Assurance, pending entry of a final order approving the relief requested herein.

16. The relief requested herein is for all Utility Providers providing Utility Services to the Debtors and is not limited to those parties or entities listed on the Utility Services List.

II. Subsequently Identified Utility Providers.

17. To the extent the Debtors identify new or additional Utility Providers or discontinue services from existing Utility Providers, the Debtors seek authority to add or remove parties from the Utility Services List. For any Utility Provider that is subsequently added to the Utility Services List, the Debtors will serve such Utility Provider with a copy of the Court's order regarding Utility Services, including the Adequate Assurance Procedures, and increase the Adequate Assurance Deposit by an amount equal to two weeks of the Debtors' average cost of services from the subsequently added Utility Provider, net of any prepetition deposits, letters of credit, or surety bonds already provided to the Utility Provider in the ordinary course of business. The Debtors request that the terms of such Utility Services order and the Adequate Assurance Procedures apply to any subsequently identified Utility Provider to the same extent as if the Utility Provider was listed on the original Utility Providers List attached hereto. For any Utility Provider that is subsequently removed from the Utility Providers List, the Debtors request the authority to decrease the Adequate Assurance Deposit by an amount equal to two weeks of the Debtors' average cost of services from such removed Utility Provider.

Basis for Relief

18. Section 366 of the Bankruptcy Code protects a debtor against the immediate termination or alteration of utility services after the Petition Date. Section 366(c) requires the debtor to provide "adequate assurance" of payment for postpetition services in a

form “satisfactory” to the utility provider within thirty days of the Petition Date, or the utility provider may alter, refuse, or discontinue service. Section 366(c)(1) enumerates what constitutes “assurance of payment.” Although assurance of payment must be “adequate,” it need not constitute an absolute guarantee of the debtors’ ability to pay. *See, e.g., S. Cal. Edison Co. v. Crystal Cathedral Ministries (In re Crystal Cathedral Ministries)*, 454 B.R. 124, 131 (C.D. Cal. 2011) (explaining that utility providers are “entitled to receive adequate assurance of payment, which is not to be confused with actual payment or an absolute guarantee of payment”); *In re Great Atl. & Pac. Tea Co.*, No. 11-CV-1338, 2011 WL 5546954, at *5 (Bankr. S.D.N.Y. Nov. 14, 2011) (“Courts will approve an amount that is adequate enough to insure against unreasonable risk of nonpayment, but are not required to give the equivalent of a guaranty of payment in full.”); *In re New Rochelle Tel. Corp.*, 397 B.R. 633, 639 (Bankr. E.D.N.Y. 2008) (“Adequate assurance, however, is not a guarantee of payment; rather, it is intended to guard against the utility assuming an unreasonable risk of non-payment.”); *In re Caldor, Inc.*, 199 B.R. 1, 3 (S.D.N.Y. 1996) (“Section 366(b) requires . . . adequate assurance of payment. The statute does not require an absolute guarantee of payment.” (internal quotation and citation omitted)), *aff’d sub nom. Va. Elec. & Power Co. v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997).

19. When considering whether a given assurance of payment is “adequate,” the Court should examine the totality of the circumstances to make an informed decision as to whether the Utility Provider will be subject to an unreasonable risk of nonpayment. *See In re Adelpia Bus. Sols.*, 280 B.R. 63, 87 (Bankr. S.D.N.Y. 2002) (“The key to the analysis -- to look at the totality of the circumstances to see the extent to which utilities are subjected to unreasonable risk of payment.”); *see also Mass. Elec. Co. v. Keydata Corp. (In re Keydata Corp.)*, 12 B.R. 156, 158 (B.A.P. 1st Cir. 1981) (citing *In re Cunha*, 1 B.R. 330 (Bankr. E.D. Va. 1979)). Courts have

recognized that, in determining the requisite level of adequate assurance, “a bankruptcy court must focus upon the need of the utility for assurance, and . . . require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.” *Va. Elec. & Power*, 117 F.3d at 650 (internal quotations omitted) (citing *In re Penn Jersey Corp.*, 72 B.R. 981, 985 (Bankr. E.D. Pa. 1987)); *see also In re Penn. Cent. Transp. Co.*, 467 F.2d 100, 103–04 (3d Cir. 1972) (affirming bankruptcy court’s ruling that no utility deposits were necessary where such deposits likely would “jeopardize the continuing operation of the [debtor] merely to give further security to suppliers who already are reasonably protected”). Accordingly, demands by a Utility Provider for a guarantee of payment should be refused when the Debtors’ specific circumstances already afford adequate assurance of payment.

20. Here, the Utility Providers will be adequately assured against any risk of nonpayment for future services. The Adequate Assurance Deposit and the Debtors’ ongoing ability to meet obligations as they come due in the ordinary course provides assurance of the Debtors’ payment of their future obligations. Moreover, termination of any Utility Services could result in the Debtors’ inability to efficiently operate the store closing sales to the detriment of all stakeholders. *Cf. In re Monroe Well Serv., Inc.*, 83 B.R. 317, 321–22 (Bankr. E.D. Pa. 1988) (noting that without utility service, the debtors “would have to cease operations” and that section 366 of the Bankruptcy Code “was intended to limit the leverage held by utility companies, not increase it”).

21. Courts are permitted to fashion reasonable procedures, such as the Adequate Assurance Procedures proposed herein, to implement the protections afforded under section 366 of the Bankruptcy Code. *See, e.g., In re Circuit City Stores Inc.*, No. 08-35653, 2009 WL 484553, at *5 (Bankr. E.D. Va. Jan. 14, 2009) (“The plain language of § 366 of the Bankruptcy Code allows

the court to adopt the Procedures set forth in the Utility Order.”). Such procedures are important because, without them, the Debtors “could be forced to address numerous requests by utility companies in an unorganized manner at a critical period in their efforts to reorganize.” *Id.* Here, notwithstanding a determination that the Debtors’ Proposed Adequate Assurance constitutes sufficient adequate assurance, any rights the Utility Providers believe they have under sections 366(b) and 366(c)(2) of the Bankruptcy Code are wholly preserved under the Adequate Assurance Procedures. *See id.* at *5–6. The Utility Providers still may choose, in accordance with the Adequate Assurance Procedures, to request modification of the Proposed Adequate Assurance. *See id.* at *6. The Adequate Assurance Procedures, however, avoid a disorganized process whereby each Utility Provider could make a last-minute demand for adequate assurance that would force the Debtors to pay under the threat of losing critical Utility Services. *See id.* at *5.

22. Because the Adequate Assurance Procedures are reasonable and in accord with the purposes of section 366 of the Bankruptcy Code, the Court should grant the relief requested herein. Similar procedures have been approved by courts in this district. *See, e.g., In re EdgeMarc Energy Holdings, LLC*, No. 19-11104 (BLS) (Bankr. D. Del. June 6, 2019) (approving adequate assurance procedures whereby the adequate assurance deposits would be “equal to approximately two weeks of Utility Services, calculated as a historical average over the past twelve (12) months”); *In re Cloud Peak Energy Inc.*, No. 19-11047 (KG) (Bankr. D. Del. May 14, 2019) (approving adequate assurance procedures whereby adequate assurance accounts would be equal to two weeks of utility services, calculated as a historical average over a 15-month period); *In re Southcross Energy Partners, L.P.*, No. 19-10702 (MFW) (Bankr. D. Del. Apr. 2, 2019) (approving adequate assurance

accounts would contain two weeks of utility services, calculated as a historical average over the past 12-month period).⁵

23. Further, the Court possesses the power, under section 105(a) of the Bankruptcy Code, to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” The Adequate Assurance Procedures and the Proposed Adequate Assurance are necessary and appropriate to carry out the provisions of the Bankruptcy Code, particularly section 366. Accordingly, the Court should exercise its powers under sections 105(a) and 366 of the Bankruptcy Code and approve both the Adequate Assurance Procedures and the Proposed Adequate Assurance.

Processing of Checks and Electronic Fund Transfers Should Be Authorized

24. The Debtors have sufficient funds to pay the amounts described in this motion in the ordinary course of business by virtue of expected cash flows from ongoing business operations, the proposed debtor-in-possession financing, and anticipated access to cash collateral. Under the Debtors’ existing cash management system, the Debtors have made arrangements to readily identify checks or wire transfer requests relating to authorized payments in respect of Utility Services, as applicable. Accordingly, the Debtors believe that checks or wire transfer requests that are not related to authorized payments will not be honored inadvertently. Therefore, the Debtors respectfully request that the Court authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested in this motion.

⁵ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

The Requirements of Bankruptcy Rule 6003 Are Satisfied

25. Bankruptcy Rule 6003 empowers a court to grant relief within the first 21 days after the Petition Date “to the extent that relief is necessary to avoid immediate and irreparable harm.” For the reasons discussed above, prohibiting Utility Providers from altering or discontinuing services, authorizing the Debtors to deposit the Proposed Adequate Assurance and utilize the Adequate Assurance Procedures, to remit fees to Engie for services performed, and granting the other relief requested herein are integral to the Debtors’ ability to transition their operations into these chapter 11 cases smoothly. Failure to receive such authorization and other relief during the first 21 days of these chapter 11 cases would severely disrupt the Debtors’ operations at this critical juncture. For the reasons discussed herein, the relief requested is necessary in order for the Debtors to operate their business in the ordinary course, preserve the going concern value of the Debtors’ operations and, maximize the value of their estates for the benefit of all stakeholders. Accordingly, the Debtors submit that they have satisfied the “immediate and irreparable harm” standard of Bankruptcy Rule 6003 to support granting the relief requested herein.

Reservation of Rights

26. Nothing contained in this motion or any actions taken by the Debtors pursuant to relief granted in the Interim Order and Final Order is intended or should be construed as: (a) an admission as to the validity, priority or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors’ or any other party in interest’s rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors’ or any other party in interest’s rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any

other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this motion are valid and the Debtors and all other parties in interest expressly reserve their rights to contest the extent, validity, or perfection, or to seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity, priority or amount of any particular claim or a waiver of the Debtors' or any other party in interest's rights to subsequently dispute such claim.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

27. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

28. The Debtors will provide notice of this motion to: (a) the Office of the U.S. Trustee for the District of Delaware; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to the DIP Agents and the Prepetition ABL Agents; (d) counsel to the Prepetition Term Loan Agent and the Prepetition Vendor Financing Agent; (e) the United States Attorney's Office for the District of Delaware; (f) the Internal Revenue Service; (g) the United States Securities and Exchange Commission; (h) the state attorneys general for all states in which the Debtors conduct business; (i) the Utility Providers; (j) Engie; and (k) any party that requests service pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

29. No prior request for the relief sought in this motion has been made to this or any other court.

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WHEREFORE, the Debtors respectfully request entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively, (a) granting the relief requested herein and (b) granting such other relief as is just and proper.

Dated: July 11, 2019

Wilmington, Delaware

/s/ Domenic E. Pacitti

Domenic E. Pacitti (DE Bar No. 3989)

Michael W. Yurkewicz (DE Bar No. 4165)

Sally E. Veghte (DE Bar No. 4762)

KLEHR HARRISON HARVEY BRANZBURG LLP

919 N. Market Street, Suite 1000

Wilmington, Delaware 19801

Telephone: (302) 426-1189

Facsimile: (302) 426-9193

- and -

Matthew M. Murphy (*pro hac vice* admission pending)

Nathan S. Gimpel (*pro hac vice* admission pending)

Matthew Smart (*pro hac vice* admission pending)

PAUL HASTINGS LLP

71 South Wacker Drive, Suite 4500

Chicago, Illinois 60606

Telephone: (312) 499-6000

Facsimile: (312) 499-6100

Todd M. Schwartz (*pro hac vice* admission pending)

PAUL HASTINGS LLP

1117 South California Avenue

Palo Alto, California 94304

Telephone: (650) 320-1800

Facsimile: (650) 320-1900

Proposed Co-Counsel to the Debtors and Debtors in Possession