IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	**Chapter 11**
VYAIRE MEDICAL, INC., *et al.*,	**Case No. 24-11217 (BLS)**
Debtor.	**(Jointly Administered)**
	Re: Docket Nos. 10, 93
	Obj. Deadline: 7/2/24 at 4:00 p.m. **Hearing Date: 7/9/24 at 10:00 a.m.**

OBJECTION OF SOUTHERN CALIFORNIA EDISON COMPANY TO MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) APPROVING THE DEBTORS' PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES; (II) APPROVING DEBTORS' PROCEDURES FOR RESOLVING ADDITIONAL ASSURANCE REQUESTS; (III) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR DISCONTINUING SERVICES; AND (IV) GRANTING RELATED RELIEF

Southern California Edison Company ("SCE"), by counsel, hereby objects to the *Motion of Debtors for Entry of Interim and Final Orders (I) Approving the Debtors' Proposed Adequate Assurance of Payment for Future Utility Services; (II) Approving Debtors' Procedures for Resolving Additional Assurance Requests; (III) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Services; and (IV) Granting Related Relief* [Docket No. 10] (the "Utility Motion"), and respectfully sets forth the following:

Introduction

The Debtors' Utility Motion improperly seeks to shift the Debtors' obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested by the Utilities under Section 366(c)(2) to setting the form and amount of the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to shift their statutory burden.

Specifically, the Debtors seek to have this Court approve their proposed form of adequate assurance of payment, which is a bank account containing a total of $56,100 that supposedly reflects approximately two weeks of the Debtor's estimated aggregate utility charges, calculated using the historical average for its utility expenditures over the twelve-month period ended March 31, 2024 (the "Bank Account"). The Court should reject the Debtors' proposed Bank Account because: (1) Outside of bankruptcy courts that ignore the plain language of Section 366, this "form" of security is not a recognized form of security by any state public utility commission; (2) SCE bills the Debtors in arrears on a monthly basis and provides the Debtors with generous payment terms pursuant to applicable state-law tariffs, rules or regulations, and a two-week account is not sufficient in amount or in form to provide SCE with adequate assurance of payment; (3) Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated bank account; and (4) even if this Court were to improperly consider the Bank Account as a form of adequate assurance of payment for SCE, the Court should reject it as an insufficient form of adequate assurance of payment for the reasons set forth in Section A.1. of this Objection.

SCE is seeking a two-month cash deposit from the Debtors in the amount of $288,076.18, which is the deposit amount that SCE can obtain from its customers pursuant to applicable state law. Based on the foregoing, this Court should deny the Utility Motion as to SCE because the amount of SCE's post-petition deposit request is reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On June 9, 2024 (the "Petition Date"), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") that are now pending with this Court. The Debtors' bankruptcy cases are being jointly administered.

2. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

The Utility Motion

3. On June 10, 2024, the Debtors filed the Utility Motion.

4. One day later, on June 11, 2024, the Court entered the *Interim Order (I) Approving Debtors' Proposed Adequate Assurance of Payment for Future Utility Services; (II) Approving the Debtors' Proposed Procedures for Resolving Additional Assurance Requests; (III) Prohibiting Utility Providers from Altering, Refusing Or Discontinuing Services; and (IV) Granting Related Relief* [Docket No. 93] (the "Interim Utility Order"). The Interim Utility Order set (i) an objection deadline of July 2, 2024 at 4:00 p.m., and (ii) the final hearing on the Utility Motion to take place on July 9, 2024 at 10:00 a.m. Interim Utility Order at ¶ 2.

5. Through the Utility Motion, the Debtors seek to avoid the applicable legal standards under Sections 366(c)(2) and (3) by seeking Court approval for their own form of adequate assurance of payment, which is the Bank Account containing $56,100 that supposedly reflects approximately two weeks of the Debtors' estimated aggregate utility costs, calculated using the historical average for such utility expenditures over the twelve-month period ended March 31, 2024. Utility Motion at ¶¶ 10, 12. As the Debtors usage with SCE significantly increases in the June to October months, the average historical usage number used by the

Debtors is significantly lower than the average for the summer and early fall months that these cases are entering into.

6. The Debtors propose depositing cash into the Bank Account and refer to the monies contained in the Bank Account as the "Adequate Assurance Deposit." Utility Motion at ¶ 12. Monies contained in an escrow account controlled by a customer of a utility such as the proposed Bank Account are not recognized as a "cash deposit" provided by a customer to a utility by any public utility commission. Additionally, Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated utility bank account under the control of the Debtors. Simply put, the Debtors are not proposing to provide SCE with a cash deposit as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

7. The proposed Bank Account is not acceptable to SCE and should not be considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the Debtor are limited to modifying, if at all, the amount of the security sought by SCE under Section 366(c)(2).

8. The Debtors propose that the portion of the monies contained in the Bank Account attributable to each Utility Provider (including any additional amount deposited upon request of any applicable Utility Provider) shall revert to the Debtors less amounts owed on account of unpaid, post-petition Utility Services, by no later than five business days following the earlier of the date upon which (i) the Debtors reconcile and pay the Utility Provider's final invoice in accordance with applicable non-bankruptcy law following the Debtors' termination of Utility Services from such Utility Provider, or (ii) the effective date of any chapter 11 plan

confirmed in these chapter 11 cases. Interim Utility Order at ¶ 9(d); Final Utility Order at ¶ 8(d). As SCE bills the Debtors in arrears, and SCE may provide post-petition utility goods/services to the Debtors through the effective date of a plan or the closing of a sale of the Debtor's assets, any monies contained in the Bank Account on behalf of SCE should not be returned to the Debtors until the Debtors confirm that it has paid in full its post-petition utility expenses owed to SCE.

9. The Utility Motion does not address why the Bank Account would be underfunded with supposedly two-weeks of utility charges when the Debtors know that SCE is required by state-law tariffs, rules and/or regulations to bill the Debtors monthly in arrears. Moreover, presumably the Debtors want SCE to continue to bill them monthly and provide them with the same generous payment terms that it received prepetition. Accordingly, if the Bank Account is relevant, which SCE disputes, the Debtors need to explain: (A) why they are only proposing to deposit a supposed two-week amount into the Bank Account for SCE; and (B) how such an insufficient amount could even begin to constitute adequate assurance of payment for SCE's monthly bills.

10. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amount of SCE's adequate assurance request pursuant to Section 366(c)(2). Rather, without providing any specifics, the Utility Motion merely states that the Bank Account, "in conjunction with the Debtors' ability to pay for future Utility Services in accordance with their prepetition practices," constitutes sufficient adequate assurance of payment to the Debtors' Utility Providers "in full satisfaction of section 366 of the Bankruptcy Code." Utility Motion at ¶ 14.

11. In addition, the Utility Motion establishes Adequate Assurance Procedures for utilities to seek additional adequate assurance that are cumbersome, require SCE to provide

unnecessary and irrelevant information to multiple Notice Parties, and effectively extend the 20-day grace period under section 366(b) indefinitely even after an Adequate Assurance Request is made by a Utility Provider, as there is no time limit provided, promptness requirement, or any actual requirement at all for the Debtors to seek a Determination Hearing once they determine that the parties are unable to resolve an Additional Assurance Request after the 20-day negotiation period. Rather, the procedures simply provide that the Debtors "may" request a Determination Hearing. Interim Utility Order at ¶ 9(j); Proposed Final Utility Order at ¶ 8(j).

12. The Debtors claim that "[t]o the best of their knowledge, the Debtors are not in default or arrearages with respect to their obligations for prepetition Utility Services." Utility Motion at ¶ 10. However, Section 366(c)(3)(B)(ii) expressly provides that in making an adequate assurance of payment determination, a court may not consider a debtor's timely payment of prepetition utility charges.

Facts Regarding The Debtors

13. As of the Petition Date, the Debtors only have approximately $1.7 million in cash. *Declaration of John Bibb, Group Chief Executive Officer or Vyaire Medical, Inc., in Support of Debtors' Chapter 11 Petitions And First Day Motions* ("Bibb Dec."), at ¶ 69.

14. As of the Petition Date, the Debtors had approximately $533.6 million in total funded secured debt obligations. Bibb Dec. at ¶ 37.

The Debtors' DIP Financing Motion

15. On June 10, 2024, the Debtors filed the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Modifying the Automatic*

Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief [Docket No. 12] (the "DIP Motion") through which the Debtors seek (a) a superpriority senior secured debtor-in-possession credit facility in the principal amount of approximately $180 million, consisting of: (i) a new money term loan facility in an aggregate principal amount of $45 million from certain prepetition secured lenders, $25 million of which to be available on an interim basis, (b) a roll-up of their prepetition secured term loans in an aggregate amount of $135 million, $75 million of which shall be rolled up on an interim basis, and (c) the ability to use Cash Collateral, as all of the Debtors' cash and material assets are encumbered by existing liens under their prepetition debt (the "DIP Facility"). DIP Motion at ¶¶ 8, 33.

16. "Without access to the DIP Facility and use of the Cash Collateral…the Debtors would be unable to meet their obligations in the ordinary course of business and would be unable to continue the Marketing and Sale Process." DIP Motion at ¶ 3. "[T]he DIP [Facility] represents the only financing available to the Debtors, and given the Debtors' current cash position and the lack of alternatives, the DIP Facility is necessary to preserve value for the benefit of all stakeholders." DIP Motion at ¶ 30. Absent access to the DIP Facility and the Cash Collateral, the value of the Debtors' estates would be significantly impaired to the detriment of all stakeholders. DIP Motion at ¶ 34.

17. Through the DIP Motion, the Debtors seek a carve-out for payment to the Debtors' professionals of all expenses incurred up to one business day following the delivery of a Carve Out Trigger Notice, plus an additional $1.5 million incurred after the first business day following delivery of a Carve Out Trigger Notice (the "Carve-Out"). DIP Motion at p. 21; Interim DIP Order (defined below) at ¶ 10; Proposed Final DIP Order at ¶ 10.

18. The DIP Facility contains the following Case Milestones: (i) no later than 24 hours after Petition Date – Debtors' filing of First Day Pleadings, the DIP Motion, and the Bidding Procedures Motion; (ii) no later than June 12, 2024 – entry of Interim DIP Order; (iii) no later than July 1, 2024 –Debtors shall have designated a stalking horse bidder and received non-binding indications of interest; (iv) no later than July 8, 2024 – entry of Bidding Procedures Order; (v) no later than July 14, 2024 – entry of Final DIP Order; (vi) no later than July 22, 2024 – Bid Deadline; (vii) no later than July 25, 2024 – Auction to occur; (viii) no later than July 29, 2024 – entry of Sale Order(s); (ix) no later than August 19, 2024 – consummation of Sale Transaction(s). DIP Motion at pp. 21, 23-24; DIP Credit Agreement, Exh. A to Interim DIP Order (defined below), at § 6.19 and Annex I.

19. On June 12, 2024, the Court entered the *Interim Order (I) Authorizing the Debtors To Obtain Postpetition Financing, (II) Authorizing the Debtors' Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 103] (the "Interim DIP Order").

20. The Interim DIP Order approved the Carve-Out. Interim DIP Order at ¶ 10.

21. Attached as Exhibit B to the Interim DIP Order is a 13-week budget through the week ending September 6, 2024 (the "Budget"). The Budget does contain a disbursements line item for utility expenses or any line items for specific operating expenses. Accordingly, it is unclear whether sufficient funds have been budgeted for timely payment of the Debtors' post-petition utility charges over the period covered by the Budget.

22. The DIP Facility contains numerous Events of Default that are largely or fully out of Debtors' control, including, *inter alia*, (a) dismissal or conversion of the Debtors' case to a

chapter 7 case, (b) appointment of a chapter 11 trustee or examiner, (c) entry by the Bankruptcy Court of an order granting stay relief to any entity in to execute upon collateral or enforce a lien in excess of $500,000, (d) the entry by the Bankruptcy Court of any order terminating the Debtors' exclusive periods to file a chapter 11 plan and solicit acceptances thereon, and (e) the Debtors fail to meet any of the Case Milestones. DIP Motion at p. 20; Interim DIP Order at ¶ 14; DIP Credit Agreement, Exh. A to Interim DIP Order, at § 8.01

23. Upon an Event of Default, the DIP Facility provides for the automatic stay to be lifted as to the DIP Lenders to exercise their rights and remedies in accordance with the DIP Documents and the Interim DIP Order to satisfy the DIP Obligations, the DIP Superpriority Claims, and DIP Liens, subject only to the Carve Out, upon 5 business days' notice. Interim DIP Order at ¶ 15; Proposed Final DIP Order at ¶ 15.

The Debtors' Critical Vendor Motion

24. On June 10, 2024, the Debtors filed the *Motion of Debtors Seeking Entry of Interim and Final Orders (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, 503(b)(9) Claimants, and Lien Claimants, (II) Confirming Administrative Expense Priority of Outstanding Orders, and (III) Granting Related Relief* [Docket No. 7] (the "Critical Vendor Motion"). Through the Critical Vendor Motion, the Debtor seeks authority to pay, *inter alia*, "Critical Vendor Claims" of up to $3.3 million on an interim basis and $4.7 million on a final basis, in addition to "Foreign Vendor Claims" of up to $1.3 million on an interim basis and $1.8 million on a final basis. Critical Vendor Motion at ¶¶ 12, 15.

25. On June 11, 2024, the Court entered the *Interim Order (I) Authorizing Debtors To Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, 503(b)(9) Claimants, and*

Lien Claimants, (II) Confirming Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief [Docket No. 89] (the "Interim Critical Vendor Order"). The Interim Critical Vendor Order authorized the Debtors to pay all or part of the Critical Vendor Claims, the Foreign Vendor Claims, in addition to all or part of the Lien Claims and the 503(b)(9) Claims (each as defined in the Critical Vendor Motion), on an interim basis, provided that such aggregate payments shall not exceed $5.75 million on an interim basis. Interim Critical Vendor Order at ¶¶ 3-7.

26. Although the Debtors contends in Paragraph 9 of the Utility Motion that "[u]ninterrupted Utility Services are essential to the Debtors' ongoing business operations and, hence, the overall success of these chapter 11 cases," the Critical Vendor Motion does not reflect that the Debtors sought Court authority to pay prepetition utility charges.

The Debtors' Bidding Procedures Motion

27. On June 10, 2024, the Debtors filed the *Motion of Debtors for Entry of an Order (I) Approving Bidding Procedures in Connection with the Sale of Substantially All of the Debtors' Assets, (II) Authorizing the Debtors To Enter Into a Stalking Horse Agreement and Provide Bid Protections, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling an Auction and Sale Hearing, (V) Approving Procedures for the Assumption and Assignment of Contracts, (VI) Approving the Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief* [Docket No. 16] (the "Bidding Procedures Motion").

28. The Bidding Procedures Motion establishes Key Dates and Deadlines for a very quick auction and sale process, with a sale to be consummated no later than 71 days following the Petition Date (i.e., by August 19, 2024). Specifically, the Key Dates and Deadlines are as follows: (i) July 1, 2024 at 4pm (ET) – deadline for submitting a non-binding Indication of

Interest; (ii) July 1, 2024 – deadline for Debtors to designate one or more Stalking Horse Bidders; (iii) July 1, 2024 (subject to Court's availability) – deadline for Court to enter Bidding Procedures Order; (iv) no more than 4 days after filing of Stalking Horse Notice at 4pm (ET) – Stalking Horse Objection Deadline; (v) July 3, 2024 – deadline to serve sale notice; (vi) July 3, 2024 – deadline to file and serve Potentially Assumed and Assigned Contract Notice; (vii) 14 days following service of notice of proposed assumption and assignment – Assumption and Assignment Objection Deadline; (viii) July 5, 2024 – deadline to publish Publication Notice; (ix) July 22, 2024 at 4pm (ET) – Sale Transaction Objection Deadline; (x) July 22, 2024 – Bid Deadline; (xi) July 24, 2024 at 10am (ET) – Auction; (xii) July 24, 2024 – deadline to file Successful Bidder Notice; (xiii) July 25, 2024 at 4pm (ET) – Post-Auction Objection Deadline; (xiv) July 26, 2024 at 4pm (ET) – Sale Transaction Reply Deadline; (xv) July 29, 2024 at 10am (ET) – Sale Hearing; (xvi) August 19, 2024 – Sale Closing. Bidding Procedures Motion at ¶ 18.

29. "Time is of the essence in consummating the prospective sales. The Debtors' businesses cannot afford an extended stay in chapter 11 and require the funding from the DIP Facility to sustain operations during these chapter 11 cases. Simply put, without access to the DIP Facility and use of [Cash Collateral], the Debtors would be unable to meet their obligations in the ordinary course of business and would be unable to pursue a value-maximizing Marketing and Sale Process. The Debtors vigorously negotiated for the largest postpetition financing commitment and longest maturity possible to afford enough time to market their assets. [The Debtors' Group CEO] believe[s] the DIP Facility is currently structured on the best possible, available terms under the circumstances. Absent consummation of sale transactions on the timeline contemplated by the DIP Facility, [the Group CEO] believe[s] the Debtors' businesses

are at significant risk of liquidating, which would cost jobs, erode recoveries for creditors, and prevent valuable customers from receiving [the Debtors'] valuable services." Bibb Dec. at ¶ 14.

Facts Regarding SCE

30. SCE provided the Debtors with prepetition utility goods and/or services and has continued to provide the Debtors with utility goods and/or services since the Petition Date.

31. Under SCE's billing cycle, the Debtors receive approximately one month of utility goods and/or services before SCE issues a bill for such charges. Once a bill is issued, the Debtors have approximately 19 days to pay the applicable bill. If the Debtors fail to timely pay a bill, a past due notice is issued and a late fee may subsequently be imposed on the account. If the Debtors fail to pay the bill after the issuance of the past due notice, SCE issues a notice that informs the Debtors that they must cure the arrearage within a certain period of time or their service will be disconnected. Accordingly, under SCE's billing cycle, the Debtors could receive approximately two months of unpaid service before SCE could cease the supply of goods and/or services for a post-petition payment default.

32. In order to avoid the need to bring witnesses and have lengthy testimony regarding SCE's regulated billing cycle, SCE requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of SCE's billing cycle. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, the SCE website link to the applicable tariffs, state laws, regulations and/or ordinances can be obtained at:

https://www.sce.com/regulatory/tariff-books/rules

33. Subject to a reservation of SCE's right to supplement its post-petition deposit request if additional accounts belonging to the Debtors are subsequently identified, SCE's post-petition deposit request is as follows:

Utility	**Number of Accounts**	**Est. Prepet. Debt**	**Deposit Request**
SCE	3	$153,460.73	$288,076.18 (2-month)

34. The Debtors highest usage months with SCE are the months from June to October. Specifically, the 2023 bills during those months on the accounts are as follows:

A. Account No. xxxxxxxx9889

i. 7/12/23 Invoice - $80,047.75
ii. 8/10/23 Invoice - $98,110,49
iii. 9/11/23 Invoice - $93,964.03
iv. 10/10/23 Invoice - $71,829.35

B. Account No. xxxxxxxx6173
i. 7/12/23 Invoice - $8,395.94
ii. 8/9/23 Invoice - $15,150.54
iii. 9/8/23 Invoice - $12,429.61
iv. 10/9/23 Invoice - $11,272.03

C. Account No. xxxxxxxx2544
i. 7/12/23 Invoice - $26,276.30
ii. 8/9/23 Invoice - $30,759.59
iii. 9/8/23 Invoice - $30,777.06
iv. 10/9/23 Invoice - $30,620.53

35. As the Debtors are proposing a sale process that is seeking to complete a sale by mid to late August 2024, the relevant usage amounts are those for the June, July and August months, not the historical yearly average.

36. SCE maintained a prepetition cash deposit in the amount of $49,535 on its accounts with the Debtors, which it intends to recoup against prepetition debt on the Debtors' accounts pursuant to section 366(c)(4) of the Bankruptcy Code.

DISCUSSION

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

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. *In re* Lucre, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). If a debtor believes that 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 plain requirements of Section 366(c) and deny the Utility Motion as to SCE.

1. The Debtors' Proposed Bank Account Is Not Relevant And Even If It Is Considered, It Is Unsatisfactory Because It Does Not Provide SCE With Adequate Assurance Of Payment.

This Court should not even consider the Bank Account as a form of adequate assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can only modify "the amount of an assurance of payment under paragraph (2)"; and (2) The Bank Account is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if the Court were to consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

1. Unlike the statutory approved forms of adequate assurance of payment, the Bank Account is not something held by SCE. Accordingly, SCE would have no control over how long the Bank Account will remain in place.

2. To access the Bank Account, SCE would have to incur the expense to draft and serve a disbursement request on all of the Notice Parties and possibly litigate the demand if the Debtors refuse to honor a disbursement request or any other party objects to the disbursement request.

3. It is underfunded from the outset because SCE issues monthly bills in arrears, and by the time a default notice is issued the Debtors will have received approximately 60 days of utility service.

4. The Debtors may close the Bank Account and/or remove monies therefrom before all post-petition utility charges are confirmed paid in full.

5. The Bank Account may be subject to the DIP lender's liens.

6. The Debtors fail to state whether draws from the Bank Account would be limited to two-week amounts.

Accordingly, the Court should not approve the Bank Account as adequate assurance as to SCE because the Bank Account is: (a) not the **form** of adequate assurance requested by SCE; (b) not a form recognized by Section 366(c)(1)(A); and (c) an otherwise unreliable form of adequate assurance.

2. The Utility Motion Should Be Denied As To SCE Because The Debtors Have Not Set Forth Any Basis For Modifying SCE's Requested Deposit.

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

B. THE COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY SCE PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.

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

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

Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate-payers that it receives payment for providing these essential services. *See In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985).

SCE bills the Debtor on a monthly basis for the charges already incurred by the Debtors in the prior month. Once a bill is issued, the Debtors have approximately 19 days to pay the applicable bill. If the Debtors fail to timely pay the bill, a past due notice is issued and a late fee may subsequently be imposed on the account. If the Debtors fail to pay the bill after the issuance of the past due notice, SCE issues a notice that informs the Debtors that they must cure the arrearage within a certain period of time or their service will be disconnected. Based on the foregoing state-mandated billing cycles, the minimum period of time the Debtors could receive service from SCE before termination of service for non-payment of post-petition bills is approximately two (2) months. Moreover, even if the Debtors timely pay their post-petition utility bills, SCE still has potential exposure of approximately 60 days or more based on its billing cycle. Furthermore, the form and amount of SCE's adequate assurance request is the form and amount that the applicable public service commission, which is a neutral third-party entity, permits SCE to request from its customers. SCE is not taking the position that the cash deposit that it is entitled to obtain under applicable state law is binding on this Court, but instead is introducing that form and amount as evidence of the form and amount that the applicable regulatory entity permits SCE to request from its customers.

In addition, as set forth in paragraphs 34 and 35 above, the Debtors' usage in the months of June, July and August are significantly higher than the remainder of the year. Accordingly, in order to ascertain the amount of appropriate adequate assurance in this case with a proposed August sale closing, the Court should focus on the usage for June, July and August.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amount of SCE's adequate assurance of payment request, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Bank Account supposedly containing approximately two-weeks of the Debtors' utility charges. The Debtors did not provide an objective, much less an evidentiary, basis for its proposed adequate assurance in the form of the Bank Account. To the contrary, the evidence of record is that (a) access to the DIP Facility and Cash Collateral, access to both of which are conditioned upon adherence to strict sale milestones, the Debtors would be unable to meet their obligations in the ordinary course of business and would be unable to pursue a value-maximizing Marketing and Sale Process, and that (b) absent consummation of sale transactions on the timeline contemplated by the DIP Facility, the Debtors' businesses are at significant risk of liquidating, which would erode recoveries for creditors. Bibb Dec. at ¶ 14. Moreover, in contrast to the improper treatment proposed to the Debtors' utilities, the Debtors have made certain that supposed "critical vendors" and post-petition professionals are favored creditors over the Utilities by ensuring (i) the payment of "Critical Vendor Claims" of up to $3.3 million on an interim basis and $4.7 million on a final basis, in addition to "Foreign Vendor Claims" of up to $1.3 million on an interim basis and $1.8 million on a final basis, and (ii) the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition default under the DIP Facility or on the use of cash collateral, by obtaining a $1.5 million professionals' carve-out for the payment of their fees/expenses after a default and a guarantee of payment for fees incurred up to a default. Despite the fact that SCE continues to provide the Debtors with admittedly crucial post-petition utility goods/services on the same generous terms that were provided prepetition, with the possibility of non-payment, the Debtors are seeking to deprive SCE of any actual adequate assurance of payment to which it is entitled for continuing to provide the Debtors with post-petition utility goods/services. Against this factual background, it is reasonable for SCE to seek and be awarded the full security it has requested herein.

WHEREFORE, SCE respectfully requests that this Court enter an order:

1. Denying the Utility Motion as to SCE;
2. Awarding SCE the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to SCE, which is the form and amount requested herein; and
3. Providing such other and further relief as this Court deems just and appropriate.

Dated: June 21, 2024

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