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11 *Proposed Counsel for the Debtors*  
12 *and Debtors in Possession*

13 **UNITED STATES BANKRUPTCY COURT**  
14 **FOR THE DISTRICT OF NEVADA**

15 In re:

Case No.: BK-S-14-12524-abl  
Chapter 11

16 TELEXFREE, LLC,

**[PROPOSED]**

**Jointly Administered with:**

17  Affects this Debtor

14-12525 TelexFree, Inc.  
14-12526 TelexFree Financial, Inc

18  Affects all Debtors

19  Affects TELEXFREE, INC.

20  Affects TELEXFREE FINANCIAL, INC

Date: OST REQUESTED  
Time: OST REQUESTED

21 **EMERGENCY MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL**  
22 **ORDERS PURSUANT TO SECTION 105(a) AND 366 OF THE BANKRUPTCY CODE**  
23 **(I) PROHIBITING UTILITIES FROM ALTERING, REFUSING, OR DISCONTINUING**  
24 **SERVICE, (II) DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE**  
25 **PERFORMANCE, AND (III) ESTABLISHING PROCEDURES FOR DETERMINING**  
26 **ADEQUATE ASSURANCE OF PAYMENT**

27 The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”)<sup>1</sup>  
28 hereby move the Court (the “Motion”), pursuant to sections 105(a) and 366 of chapter 11 of title

<sup>1</sup> The Debtors in these Chapter 11 Cases, along with the last four (4) digits of each Debtor’s federal tax identification number, are: TelexFree, LLC (0853), TelexFree, Inc. (1309) and Telexfree Financial, Inc (7555). The Debtors’ business address is 225 Cedar Hill Street, Suite 200, Marlborough, Massachusetts 01752.



1 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”), for entry of an  
2 interim order, attached hereto as Exhibit 2 (the “**Interim Order**”) and a final order, attached  
3 hereto as Exhibit 3 (the “**Final Order**”, together with the Interim Order, the “**Procedures**  
4 **Order**”): (a) prohibiting their Utility Providers (as defined below) from altering, refusing, or  
5 discontinuing service; (b) deeming Utility Providers adequately assured of future performance;  
6 and (c) establishing procedures for determining adequate assurance of payment. In addition, the  
7 Debtors request that the Court set a final hearing (the “**Final Hearing**”) on the Debtors’  
8 proposed adequate assurance procedures. In support of this Motion, the Debtors respectfully  
9 state as follows:

10 **Status of the Case and Jurisdiction**

11 1. On April 13, 2014 (the “**Petition Date**”), the Debtors commenced these cases (the  
12 “**Chapter 11 Cases**”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy  
13 Code.

14 2. The Debtors have continued in possession of their properties and are operating  
15 and managing their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of  
16 the Bankruptcy Code.

17 3. No request has been made for the appointment of a trustee or examiner, and a  
18 creditors’ committee has not yet been appointed in the Chapter 11 Cases.

19 4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and  
20 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This matter is core within  
21 the meaning of 28 U.S.C. § 157(b)(2).

22 5. The statutory bases for the relief requested herein are sections 105(a) and 366 of  
23 the Bankruptcy Code.

24 6. Pursuant to LR 9014.2, Debtors consent to entry of final order(s) or judgment(s)  
25 by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the  
26 parties, cannot enter final orders or judgments consistent with Article III of the United States  
27 Constitution

28

### Background

1  
2 7. TelexFree, LLC, a Nevada limited liability company (“**TelexFree Nevada**”),  
3 TelexFree, Inc., a Massachusetts corporation (“**TelexFree Massachusetts**”) and TelexFree  
4 Financial, Inc, a Florida corporation (“**TelexFree Florida**” and together with TelexFree  
5 Massachusetts and TelexFree Nevada, “**TelexFree**,” the “**Debtors**” or the “**Company**”) are a  
6 telecommunications business that uses multi-level marketing to assist in the distribution of voice  
7 over internet protocol (“**VoIP**”) telephone services. TelexFree’s retail VoIP product,  
8 99TelexFree, allows for unlimited international calling to approximately seventy countries for a  
9 flat monthly rate of \$49.90. Customers of the Debtors’ VoIP product (“**Customers**”) used  
10 approximately 11 million minutes of the 99TelexFree VoIP service in February 2014. Since  
11 99TelexFree was introduced in 2012, Customer usage increased on a monthly basis until March  
12 2014.

13 8. TelexFree is operated as a multi-level marketing company, and currently has over  
14 700,000 associates or promoters (the “**Promoters**”) worldwide. Prior to the filing of these  
15 Chapter 11 Cases, TelexFree compensated Promoters for the sales of the VoIP product, the  
16 placing of advertisements and the recruitment of other Promoters down line. Because questions  
17 were raised about its compensation plan, the Company on March 9, 2014, discontinued its  
18 original compensation plan (the “**Original Comp Plan**”) and replaced the Original Comp Plan  
19 with a revised compensation plan (the “**Revised Comp Plan**” and together with the Original  
20 Comp Plan, the “**Pre-Petition Comp Plans**”). At the time of the roll-out of the Revised Comp  
21 Plan, the Company decided to honor certain discretionary payments to Promoters under the  
22 Original Comp Plan. These discretionary payments quickly became a substantial drain on the  
23 Company’s liquidity. The Company discontinued the Pre-Petition Comp Plans and ceased  
24 making discretionary payments under the Original Comp Plan prior to the Petition Date.

25 9. The Company believes the sales of the 99TelexFree product, the TelexFree “app,”  
26 and other new products will ultimately prove successful and profitable. The Company is  
27 struggling, however, with several factors that required it to seek chapter 11 protection by filing  
28 these Chapter 11 Cases. First, the Company experienced exponential growth in revenue between

1 2012 and 2013 (from de minimus amounts to over \$1 billion), which put tremendous pressure on  
2 the Company's financial, operational and management systems. Second, although the Company  
3 revised its Original Comp Plan in order to address certain questions that were raised regarding  
4 such plan, the Company believes that the Pre-Petition Comp Plans need to be further revised.  
5 Finally, the trailing liabilities arising from the Original Comp Plan are difficult to quantify and  
6 have resulted in substantial asserted liabilities against the Company, a number of which may not  
7 be valid.

8 10. As a result, the Company filed these Chapter 11 Cases to obtain the breathing  
9 room to address its operational and regulatory issues, revise the Pre-Petition Comp Plans, and  
10 quantify and address the claims against it. The Debtors believe that a restructuring of its debt,  
11 adoption of a post-petition revised compensation plan, unveiling of new products (including the  
12 TelexFree app), and return to growing its Customer base will allow the Company to realize its  
13 full potential and generate significant value for its constituents.

14 11. A detailed factual background of the Debtors' businesses and operations, as well  
15 as the events precipitating the commencement of these Chapter 11 Cases, is more fully set forth  
16 in the *Omnibus Declaration of William H. Runge III in Support of the Debtors' Chapter 11*  
17 *Petitions and Requests for First Day Relief* (the "**First Day Declaration**") filed  
18 contemporaneously herewith and incorporated herein by reference.

#### 19 Utility Providers

20 12. In connection with the operation of their businesses and management of their  
21 properties, the Debtors obtain telephone services and internet provider services (collectively, the  
22 "**Utility Services**") from certain utility companies (collectively, the "**Utility Providers**"),  
23 including those listed on Exhibit 1 hereto (the "**Utility Provider List**").<sup>2</sup>

24 13. In the ordinary course of business, the Debtors regularly incur utility expenses for  
25 Utility Services provided by the Utility Providers. The Debtors have a long and established

26 <sup>2</sup> The inclusion of any entity on, as well as any omission of any entity from, Exhibit 1 is not an  
27 admission by the Debtors that such entity is, or is not, a utility within the meaning of section 366 of the  
28 Bankruptcy Code, and the Debtors reserve all rights with respect thereto.

1 payment history with the Utility Providers. The Debtors' aggregate average monthly cost for  
2 utility services is approximately \$18,500.

3 14. Uninterrupted utility services are essential to the preservation of the Debtors'  
4 estates and assets, and therefore, to the success of these Chapter 11 Cases. Should a Utility  
5 Provider refuse or discontinue service, even for a brief period, the Debtors' ability to preserve  
6 and maximize the value of their estates could be severely and irreparably harmed. For example,  
7 a lack of telephonic or internet services would render the Debtors' services inoperable,  
8 effectively corrupting the good-will of the Debtors' businesses with end users of the Debtors'  
9 products. Such a result could jeopardize the Debtors' reorganization efforts and ultimately,  
10 value and creditor recoveries. It is therefore critical that utility services continue uninterrupted.

11 15. The relief requested herein is for all Utility Providers providing Utility Services to  
12 the Debtors, and is not limited to those listed on Exhibit 1. The Debtors reserve the right to  
13 supplement Exhibit 1 by filing a notice (a "Supplemental Notice") at a later date with the  
14 Court.

#### 15 Relief Requested

16 16. Section 366(a) of the Bankruptcy Code prohibits utility companies from  
17 discontinuing, altering, or refusing service to a debtor during the first twenty (20) days of a  
18 chapter 11 case. 11 U.S.C. § 366(a). However, pursuant to section 366(c)(2) of the Bankruptcy  
19 Code, in a chapter 11 context, a utility provider may refuse or discontinue service to a debtor  
20 after the first thirty (30) days if the debtor has not furnished the utility provider with "adequate  
21 assurance of payment" within the meaning of section 366(c)(1)(A) of the Bankruptcy Code. 11  
22 U.S.C. § 366(c)(2). Upon expiration of such period, a utility provider cannot terminate its  
23 services if a debtor has furnished "adequate assurance of payment." *Id.*

24 17. By this Motion, pursuant to sections 105(a) and 366 of the Bankruptcy Code, the  
25 Debtors seek entry of the Procedures Order:

- 26 (A) determining that their Utility Providers have been provided with  
27 adequate assurance of payment within the meaning of section 366  
28 of the Bankruptcy Code;

- 1 (B) approving the Debtors' proposed offer of adequate assurance and  
2 procedures governing Utility Providers' requests for additional or  
3 different adequate assurance;
- 4 (C) prohibiting the Utility Providers from altering, refusing, or  
5 discontinuing services on account of prepetition amounts  
6 outstanding or on account of any perceived inadequacy of the  
7 Debtors' proposed adequate assurance;
- 8 (D) establishing procedures for the Utility Providers to seek to opt out  
9 of the Debtors' proposed adequate assurance procedures; and
- 10 (E) determining that the Debtors are not required to provide any  
11 additional adequate assurance beyond what is proposed by this  
12 Motion.

13 18. Uninterrupted utility services are essential to the preservation of the Debtors'  
14 estates and assets, and therefore, to the success of the Debtors' Chapter 11 Cases. Should any  
15 Utility Provider refuse or discontinue service, even for a brief period, the Debtors' ability to  
16 preserve and maximize the value of their respective estates could be severely and irreparably  
17 harmed. It is therefore critical that utility services continue uninterrupted.

18 **A. Adequate Assurance**

19 19. Section 366(a) of the Bankruptcy Code prohibits utilities from altering, refusing,  
20 or discontinuing service to a debtor for the first twenty (20) days of a bankruptcy case.  
21 However, pursuant to section 366(c)(2) of the Bankruptcy Code, in a chapter 11 context, a utility  
22 provider may refuse or discontinue service to a debtor after the first thirty (30) days if the debtor  
23 has not furnished the utility provider with adequate assurance of future payment.

24 20. In light of the severe consequences to the Debtors of any interruption in services  
25 by the Utility Providers, but recognizing the right of the Utility Providers to evaluate the  
26 Proposed Adequate Assurance (as defined below) on a case-by-case basis, the Debtors propose  
27 that the Procedures Order approve and adopt the Adequate Assurance Procedures (as defined  
28 below).

29 21. The Debtors intend to pay all post-petition obligations and expect that revenues  
30 generated from the business operations, as well as existing cash, will be sufficient to pay all

1 undisputed post-petition obligations owed to the Utilities in a timely manner. However, to  
2 provide adequate assurance of payment for future services to the Utility Providers as set forth in  
3 section 366(c) of the Bankruptcy Code, the Debtors propose to deposit an initial sum equal to the  
4 Debtors' estimated average cost for two (2) weeks of Utility Services (the "**Adequate**  
5 **Assurance Deposit**"), into a segregated account (the "**Adequate Assurance Account**") within  
6 twenty (20) days of the Petition Date, pending further order of this Court. Because the Debtors'  
7 two-week spending on Utility Services is approximately \$9,300, the Adequate Assurance  
8 Deposit will be approximately \$9,300.

9       22. The Debtors further propose to maintain the Adequate Assurance Account with a  
10 minimum balance equal to the Debtors' estimated average two-week cost of Utility Services  
11 through the final hearing on the Motion. Thereafter, the Debtors propose to adjust the amount in  
12 the Adequate Assurance Account to reflect the following factors: (i) the termination of Utility  
13 Services by the Debtors regardless of any Additional Assurance Requests (as defined below),  
14 and (ii) agreements with the Utility Providers. These adjustments will permit the Debtors to  
15 maintain the Adequate Assurance Account with an amount that consistently provides the Utility  
16 Providers that do not otherwise hold deposits or security for their Utility Services with a two-  
17 week deposit on account of such services.

18       23. The Debtors submit that the Adequate Assurance Deposit, taken together with the  
19 facts and circumstances of the Debtors' Chapter 11 Cases (together, the "**Proposed Adequate**  
20 **Assurance**"), constitutes sufficient adequate assurance to the Utility Providers. Specifically, the  
21 Debtors have sufficient cash that they believe will meet their needs during the Chapter 11 Cases.  
22 As a result, the Debtors are objectively very likely to continue paying their obligations to the  
23 Utility Providers post-petition.

24       24. These protections ensure that all Utility Providers will have adequate assurance of  
25 payment throughout the Chapter 11 Cases, and the Debtors believe that no other or further  
26 assurance is necessary. However, if any Utility Provider believes adequate assurance is required  
27 beyond the protections described herein, it must request such assurance pursuant to the  
28 procedures described below (the "**Adequate Assurance Procedures**");

- 1 a. As adequate assurance of future payment to the Utility Providers, Debtors propose  
2 to deposit an initial sum equal to the Debtors' estimated average cost for two (2)  
3 weeks of Utility Services into the Adequate Assurance Account within twenty  
4 (20) days of the Petition Date, pending further order of this Court. The Debtors  
5 estimate the aggregate amount of all Adequate Assurance Deposits will not  
6 exceed \$9,300;
- 7 b. If a Utility Provider is not satisfied with the assurance of future payment provided  
8 by the Debtors, the Utility Provider must serve a written request (the "**Additional**  
9 **Assurance Request**") upon the Debtors setting forth, to the extent applicable, the  
10 locations(s) for which Utility Services are provided, the account number(s) for  
11 such locations(s), the outstanding balance for each account, a summary of the  
12 Debtors' payment history on each account, and an explanation of why the  
13 Adequate Assurance Deposit is inadequate assurance of payment;
- 14 c. The Additional Assurance Request must actually be filed with the Court and  
15 received by (i) the Debtors, Attn: Stuart MacMillan, 225 Cedar Hill Street,  
16 Marlborough, MA 01752, and (ii) the Debtors' counsel, Gordon Silver, 3960  
17 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89169 (Attn: Thomas H.  
18 Fell, Esq.), and Greenberg Traurig, LLP, MetLife Building, 200 Park Avenue,  
19 New York, NY 10166 (Attn: Zachary A. Polidoro, Esq.) (collectively, the "Notice  
20 Parties");
- 21 d. In the event that the Debtors receive any Additional Assurance Request in  
22 compliance with the procedures in the Motion, the Debtors shall have five (5)  
23 days after the Request Deadline date (collectively, the "Resolution Period") to  
24 negotiate with the Utility Provider to endeavor to resolve that Utility Provider's  
25 request for additional assurance of payment; and that during this period, Utility  
26 Providers may not terminate any of the services they provide to the Debtors on  
27 account of the bankruptcy filing or any unpaid charges for prepetition services;
- 28 e. The Debtors may, in their discretion, resolve any Additional Assurance Request  
by mutual agreement with the Utility Provider and without further order of the  
Court, and may, in connection with any such agreement, in their discretion,  
provide a Utility Provider with additional adequate assurance of future payment  
including, but not limited to, cash deposits, prepayments, and/or other forms of  
security, without further order of this Court, if the Debtors believe such additional  
assurance is reasonable;
- f. If the Debtors determine that an Additional Assurance Request is not reasonable  
and are not able to reach an alternative resolution with the Utility Provider during  
the Resolution Period, the Debtors, during or immediately after the Resolution  
Period, will request a hearing before this Court to determine the adequacy of  
assurances of payment with respect to a particular Utility Provider (the  
"**Determination Hearing**") pursuant to section 366(c)(3) of the Bankruptcy  
Code;

- 1 g. Pending resolution of any such Determination Hearing, such particular Utility  
2 Provider shall be restrained from discontinuing, altering, or refusing service to the  
3 Debtors on account of unpaid charges for prepetition services or the Debtors'  
4 bankruptcy filing;
- 5 h. A Utility Provider shall be deemed to have adequate assurance of payment unless  
6 and until (i) the Debtors, in their sole discretion, agree to an Additional Assurance  
7 Request or agree to an alternative assurance of payment with the Utility Provider  
8 during the Resolution Period, or (ii) this Court enters an order requiring that  
9 additional adequate assurance of payment be provided;
- 10 i. Any Utility Provider that fails to make an Additional Assurance Request shall be  
11 deemed to be satisfied that the Adequate Assurance Deposit provided to it  
12 supplies adequate assurance of payment; and
- 13 j. At any time, the Debtors may terminate service from any of the Utility Providers,  
14 such termination being effective immediately upon Debtors' notice to the Utility  
15 Provider. At such time, Debtors shall no longer be required to make any more  
16 payments to such Utility Provider for any services provided after such  
17 termination, and any excess shall be returned forthwith.

18 **B. Subsequent Modifications of Utility Provider List**

19 22. Although the Debtors have made an extensive and good-faith effort to identify all  
20 the Utility Providers, certain Utility Providers that currently provide Utility Services to the  
21 Debtors may not be listed on Exhibit 1. To the extent that the Debtors identify additional Utility  
22 Providers, the Debtors will file a Supplemental Notice and will serve the Interim Order or the  
23 Final Order, as applicable, and the Supplemental Notice on all Utility Providers listed in such  
24 Supplemental Notice via facsimile or, if such information is not available, via electronic mail.  
25 The Debtors request that the Interim Order and the Final Order be binding on all Utilities,  
26 including any Utility Provider set forth on any Supplemental Notice; provided, however, that any  
27 party included on a Supplemental Notice shall be provided twenty (20) days from the date of  
28 service of any Supplemental Notice to object to its inclusion in the Interim Order and the Final  
Order. If an objection is received within such twenty (20) day period, a hearing shall be heard on  
such objection at the next regularly scheduled hearing date, or on such date as mutually agreed to  
by the parties.



1 not abrogate the bankruptcy court's right to determine the amount of adequate assurance  
2 necessary or change the fundamental requirement that assurance of payment must simply be  
3 "adequate."

4 26. First, while section 366(c) does limit the factors a court can consider when  
5 determining whether a debtor has provided adequate assurance of payment, it does not limit the  
6 court's ability to determine the amount of payment necessary, if any, to provide such adequate  
7 assurance. Instead, section 366(c) gives courts the same discretion in determining the amount of  
8 payment necessary for adequate assurance as they previously had under section 366(b).  
9 *Compare* 11 U.S.C. § 366(b) (2005) ("On request of a party-in-interest and after notice and a  
10 hearing, the court may order reasonable modification of the amount of the deposit or other  
11 security necessary to provide adequate assurance") *with* 11 U.S.C. § 366(c)(3)(A) (2005) ("On  
12 request of a party-in-interest and after notice and a hearing, the court may order modification of  
13 the amount of an assurance payment under paragraph (2)"). Section 366(b) permits a court to  
14 find that no adequate assurance payment at all is necessary to provide a utility with adequate  
15 assurance of payment under certain circumstances. *See In re Steinebach*, 303 B.R. 634, 641  
16 (Bankr. D. Ariz. 2004) ("Bankruptcy courts are afforded reasonable discretion in determining  
17 what constitutes adequate assurance including discretion to determine that no deposit or other  
18 security is necessary."); *In re Caldor*, 117 F.3d 646, 650 (2d Cir. 1997) ("Even assuming that  
19 'other security' should be interpreted narrowly, a bankruptcy court's authority to 'modify' the  
20 level of the 'deposit or other security' provided for under § 366(b) includes the power to require  
21 'no deposit or other security' where none is necessary to provide a utility supplier with 'adequate  
22 assurance of payment'"). This may be particularly true in cases where the debtor has made  
23 prepetition deposits or prepayments for services that utilities will ultimately render post-petition.  
24 *See* 11 U.S.C. § 366(c)(I)(A)(v) (recognizing a prepayment for post-petition services as adequate  
25 assurance). Accordingly, courts continue to have discretion to determine the amount of adequate  
26 assurance payments and, where appropriate, to determine that no such payment is necessary.

27 27. Additionally, section 366(c), like section 366(b), simply requires that a utility's  
28 assurance of payment be "adequate." Courts have long recognized that adequate assurance of

1 performance does not constitute an absolute guarantee of a debtor's ability to pay. *See In re*  
2 *Steinebach*, 303 B.R at 641 (Bankr. D. Ariz. 2004) ("Adequate assurance of payment is not,  
3 however, absolute assurance . . . all § 366(b) requires is that a utility receive only such assurance  
4 of payment as is necessary to protect its interests given the facts of the debtor's financial  
5 circumstances"). Courts have also recognized that in determining the amount of adequate  
6 assurance, bankruptcy courts should focus "on the need of the utility for assurance, and to  
7 require that the debtor supply *no more than that*, since the debtor almost perforce has a  
8 conflicting need to conserve scarce financial resources." *In re Caldor*, 117 F.2d at 650  
9 (emphasis in original); *see also In re Penn. Cent. Transp. Co.*, 467 F.2d 100, 103-04 (3d Cir.  
10 1972) (affirming bankruptcy court's ruling that no utility deposits were necessary where such  
11 deposits would likely "jeopardize the continuing operating of the [debtor] merely to give further  
12 security to suppliers who are already reasonably protected"). Accordingly, demands by a utility  
13 for a guarantee of payment when they already have adequate assurance of payment in light of the  
14 Debtors' specific circumstances should be refused.

15 28. Based upon the foregoing, the Debtors believe that the proposed Adequate  
16 Assurance Deposits are sufficient adequate assurance of payment within the meaning of section  
17 366 of the Bankruptcy Code. The proposed Adequate Assurance Deposits are cash deposits, a  
18 listed form of assurance of payment in section 366(c)(1)(A)(i) of the Bankruptcy Code. The  
19 Debtors thus believe that they will be able to pay their operating costs, including utility costs, as  
20 they come due. Moreover, the Debtors have a powerful incentive to stay current on their utility  
21 obligations because of their significant reliance on utility services to maintain their business  
22 operations. These factors - which the Court should consider when considering the amount of any  
23 adequate assurance payments -- justify a finding that the Proposed Adequate Assurance is more  
24 than sufficient to assure the Utility Providers of future payment.

25 29. If the Utility Providers disagree with the Debtors' analysis, however, the  
26 procedures proposed in this Motion will enable the parties to negotiate and, if necessary, seek  
27 this Court's intervention without jeopardizing the Debtors' Chapter 11 Cases, while still  
28 protecting the rights of the Utility Providers under section 366 of the Bankruptcy Code.

1           30.     The Court has authority to approve the proposed procedures under section 105(a)  
2 of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides that the Court “may  
3 issue any order, process or judgment that is necessary or appropriate to carry out the provisions  
4 of this title.” The purpose of section 105(a) of the Bankruptcy Code is “to assure the bankruptcy  
5 courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of  
6 their jurisdiction.” 2 *Collier on Bankruptcy* ¶ 105.01, at 105-5 to 105-6 (15th ed. rev. 2001).  
7 Thus, section 105 essentially codifies the bankruptcy court’s inherent equitable powers. *See In re*  
8 *Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir. 1996) (*citing In re Courtesy Inns, Ltd.*  
9 (*Jones v. Bank of Santa Fe*), 40 F.3d 1084, 1089 (10th Cir. 1994) and *Chambers v. NASCO, Inc.*,  
10 501 U.S. 32, 33 (1991)) (stating that section 105 is intended to give the bankruptcy court the  
11 inherent power recognized by the Supreme Court in *Chambers*; *see also Management Tech.*  
12 *Corp. v. Pardo*, 56 B.R. 337, 339 (Bankr. D. N.J. 1985) (noting that the court’s equitable power  
13 is derived from section 105 of the Bankruptcy Code).

14           31.     The proposed procedures set forth a fair process that will enable all parties to  
15 negotiate their respective positions and, where necessary, seek Court intervention without  
16 jeopardizing the Debtors’ chapter 11 cases, but while preserving the Utility Provider’s rights  
17 under section 366 of the Bankruptcy Code. In fact, this Court and other courts have approved  
18 similar procedures in other chapter 11 cases filed after the 2005 Act became effective. *See In re*  
19 *Jerry’s Nugget, Inc.*, Case No. 12-19387-mkn, ECF No. 50 (Bankr. D. Nev. August 17, 2012); *In*  
20 *re Ahern Rentals, Inc.*, Case No. 11-53860-btb, ECF No. 34 (Bankr. D. Nev. February 6, 2012);  
21 *In re Spanish Trail Country Club, Inc.*, Case No. 11-23466-bam, ECF No. 28 (Bankr. D. Nev.  
22 Sept. 2, 2011); *In re 155 East Tropicana, LLC*, 11-22216-bam, ECF No. 62 (Bankr. D. Nev.  
23 August 8, 2011).

24           32.     Accordingly, the Debtors believe that the proposed procedures should be  
25 approved.

26 ...  
27 ...  
28 ...

**Bankruptcy Rule 6003 Satisfied and Request for Waiver of Stay**

1  
2 33. The Debtors further submit that because the relief requested in this Motion is  
3 necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein  
4 and in the First Day Declaration, Rule 6003 of the Federal Rules of Bankruptcy Procedure  
5 (the “**Bankruptcy Rules**”) has been satisfied and the relief requested herein should be granted.

6 34. Specifically, Bankruptcy Rule 6003 provides:

7 Except to the extent that relief is necessary to avoid immediate and  
8 irreparable harm, the court shall not, within 21 days after the filing  
9 of the petition, grant relief regarding the following: . . . (b) a  
10 motion to use, sell, lease, or otherwise incur an obligation  
11 regarding property of the estate, including a motion to pay all or  
12 part of a claim that arose before the filing of the petition, but not a  
13 motion under Rule 4001.

14 Fed. R. Bankr. P. 6003.

15 35. One court in the Ninth Circuit has, in an unpublished opinion, addressed the  
16 “immediate and irreparable harm” language in the context of Bankruptcy Rule 6003. That  
17 court noted “that Rule 6003 allows the court to authorize payments on prepetition debt if  
18 necessary to avoid immediate and irreparable harm, but does not require that such harm be to the  
19 bankruptcy estate. The court finds that a delay in payment would result in immediate and  
20 irreparable harm to both the dairy farmers and the debtor, and for this reason authorizes payment  
21 now.” *In re Humboldt Creamery, LLC*, 2009 Bankr. LEXIS 2477, 3 n. 3 (Bankr. N.D. Cal. Apr.  
22 23, 2009). However, the harm must be shown to be actual and imminent, not speculative or  
23 unsubstantiated. *See, e.g., Acierno v. New Castle County*, 40 F.2d 645, 653-55 (3d Cir. 1994).

24 36. The Debtors further seek a waiver of any stay of the effectiveness of the order  
25 approving this Motion. Pursuant to Bankruptcy Rule 6004(h) “[an] order authorizing the use,  
26 sale, or lease of property other than cash collateral is stayed until the expiration of ten (10)  
27 days after entry of the order, unless the court orders otherwise.” As set forth above, the  
28 payments proposed herein are essential to prevent irreparable damage to the Debtors’ operations  
and the value of their estates. Accordingly, the Debtors submit that ample cause exists to

1 justify a waiver of the ten (10) day stay imposed by Bankruptcy Rule 6004(h), to the  
2 extent it applies.

3 **Notice**

4 37. Notice of this Motion has been given to the following parties or, in lieu thereof, to  
5 their counsel, if known: (a) the Office of the United States Trustee for the District of Nevada; (b)  
6 creditors holding the thirty (30) largest unsecured claims as set forth in the consolidated list filed  
7 with the Debtors' petitions; (c) those parties requesting notice pursuant to Rule 2002; (d) the  
8 Office of the United States Attorney General for the District of Nevada; (e) the Massachusetts  
9 Securities Division; (f) the Internal Revenue Service; (g) the Securities and Exchange  
10 Commission; and (h) the Nevada Department of Employment, Training & Rehab, Employment  
11 Security Division; (i) the Nevada Department of Taxation, Bankruptcy Section; and (j) the  
12 Utility Providers<sup>4</sup> listed on **Exhibit 1** hereto. The Debtors submit that, in light of the nature of  
13 the relief requested, no other or further notice need be given.

14 **No Prior Request**

15 38. The Debtors have not previously sought the relief requested herein from this or  
16 any other court.

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27 <sup>4</sup> The Debtors intend to provide notice to the Utility Providers via facsimile. However, to the extent that  
28 the Debtors have been unable to obtain a Utility Provider's facsimile number, the Debtors propose to  
provide notice via electronic mail.

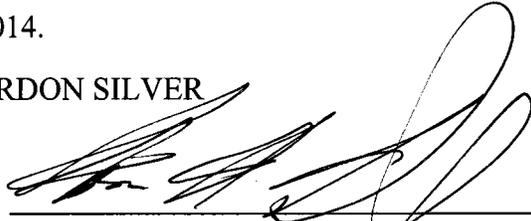
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**Conclusion**

WHEREFORE, the Debtors respectfully request that this Court enter an order granting the relief requested herein and that it grant the Debtors such other and further relief as is just and proper.

DATED this 12 day of April, 2014.

GORDON SILVER

By: 

GREGORY E. GARMAN, ESQ.  
THOMAS H. FELL, ESQ.  
TERESA M. PILATOWICZ, ESQ.  
3960 Howard Hughes Pkwy., 9th Floor  
Las Vegas, Nevada 89169

AND

NANCY A. MITCHELL (*pro hac vice pending*)  
MARIA J. DICONZA (*pro hac vice pending*)  
GREENBERG TRAUIG, LLP  
The MetLife Building  
200 Park Avenue  
New York, New York 10166

*Proposed Counsel for the Debtors  
and Debtors in Possession*

**Exhibit 1**

**Utility Providers**

<b><u>Provider Name</u></b>	<b><u>Description</u></b>	<b><u>Address</u></b>	<b><u>Telephone</u></b>	<b><u>Proposed Adequate Assurance Amount</u></b>
Verizon	Internet and Telephone Service Provider	500 Technology Dr. Suite 550 Weld Spring, MO 63304	636-793-1100	\$200.00
Access Northeast	Internet Bandwidth Provider	34 St Martin Dr. Marlborough, MA 01752	917-610-7783	\$3,500
Amazon Web Services, Inc.	Internet Service Provider	PO Box 84023 Seattle, WA 98124-8423	415-967-0258	\$3,500

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**Exhibit 2**

NANCY A. MITCHELL (*pro hac vice pending*)  
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tfell@gordonsilver.com  
tpilatowicz@gordonsilver.com

*Proposed Counsel for the Debtors  
and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEVADA**

In re:

TELEXFREE, LLC,

Affects this Debtor

Affects all Debtors

Affects TELEXFREE, INC.

Affects TELEXFREE FINANCIAL, INC

Case No.: BK-S-14-12524-abl  
Chapter 11

**[PROPOSED]**

**Jointly Administered with:**

14-12525 TelexFree, Inc.  
14-12526 TelexFree Financial, Inc

**INTERIM ORDER UNDER SECTION 366 OF THE BANKRUPTCY CODE  
(A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING,  
OR DISCONTINUING SERVICE, (B) DEEMING UTILITIES ADEQUATELY  
ASSURED OF FUTURE PERFORMANCE, AND (C) ESTABLISHING  
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

1 Upon the motion (the “**Motion**”)<sup>1</sup> filed by the above-captioned debtors and debtors-in-  
2 possession (collectively, the “**Debtors**”) seeking entry of interim and final orders:  
3 (a) determining that their Utility Providers have been provided with adequate assurance of  
4 payment within the meaning of section 366 of title 11 of the United States Code, 11 U.S.C. §§  
5 101-1532. (the “**Bankruptcy Code**”); (b) approving the Debtors’ proposed offer of adequate  
6 assurance and procedures governing Utility Providers’ requests for additional or different  
7 adequate assurance; (c) prohibiting the Utility Providers from altering, refusing, or discontinuing  
8 services on account of prepetition amounts outstanding or on account of any perceived  
9 inadequacy of the Debtors’ proposed adequate assurance; (d) establishing procedures for the  
10 Utility Providers to seek to opt out of the Debtors’ proposed adequate assurance procedures;  
11 (e) determining that the Debtors are not required to provide any additional adequate assurance  
12 beyond what is proposed by this Motion; and (f) setting a final hearing on the Debtors’ proposed  
13 adequate assurance procedures; the Court, having reviewed the Motion and having heard the  
14 statements of counsel in support of the relief requested in the Motion at the hearing before the  
15 Court (the “**Hearing**”), finds that the Court has jurisdiction over this matter pursuant to  
16 28 U.S.C. §§ 157 and 1334, this is a core matter pursuant to 28 U.S.C. § 157(b)(2), notice of the  
17 Motion and the Hearing were sufficient under the circumstances and that no further notice need  
18 be given, and the legal and factual bases set forth in the Motion and at the Hearing establish just  
19 cause for the relief granted herein,

20 THEREFORE, IT IS HEREBY ORDERED THAT:

- 21 1. The Motion is GRANTED on an interim basis.
- 22 2. Until such time that the Final Order is entered by the Court, all Utility Providers  
23 are prohibited from discontinuing, altering, or refusing service to the Debtor on account of any  
24 unpaid prepetition charges, or discriminating against the Debtors, or requiring payment of a  
25 deposit or receipt of any other security for continued service as a result of the Debtors’  
26
- 27 \_\_\_\_\_

28 <sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

1 bankruptcy filing or any outstanding prepetition invoices other than as set forth in the Motion,  
2 provided the Debtors are in compliance with the terms of this Order.

3 3. The Motion and this Interim Order shall be served, via first-class mail, on each  
4 Utility Providers listed on **Exhibit 1** to the Motion within two (2) business days of entry of this  
5 Interim Order.

6 4. The Debtors will deposit an initial sum equal to the Debtors' estimated average  
7 cost for two (2) weeks of Utility Services into the Adequate Assurance Account within twenty  
8 (20) days of the Petition Date, pending further order of this Court. The Debtors estimate the  
9 aggregate amount of all Adequate Assurance Deposits will not exceed \$9,300.

10 5. If a Utility Provider is not satisfied with the assurance of future payment being  
11 provided by the Debtors pursuant to the Motion, the Utility Provider must serve a written request  
12 upon the Debtors setting forth, to the extent applicable, the locations(s) for which Utility  
13 Services are provided, the account number(s) for such locations(s), the outstanding balance for  
14 each account, a summary of the Debtors' payment history on each account, and an explanation of  
15 why the Adequate Assurance Deposit is inadequate assurance of payment.

16 6. In the event the Debtors default post-petition in respect of any of their obligations  
17 under this Order to any Utility Provider, such Utility Provider may seek additional adequate  
18 assurances in this Court upon motion and appropriate notice to the Debtors and interested parties.

19 7. The Additional Assurance Request must be filed by \_\_\_\_\_ (the  
20 "**Request Deadline**") with the Court and received by (i) the Debtors, Attn: Stuart MacMillan  
21 225 Cedar Hill Street, Marlborough, MA 01752, and (ii) the Debtors' counsel, Gordon Silver,  
22 3960 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89169, and Greenberg Traurig,  
23 LLP, MetLife Building, 200 Park Avenue, New York, NY 10166 (Attn: Zachary A. Polidoro,  
24 Esq.) (collectively, the "**Notice Parties**").

25 8. The deadline by which objections to the Motion and the Final Order must be filed  
26 is \_\_\_\_\_, 2010, at \_:\_\_.m. (Prevailing Eastern Time). A final hearing, if required, on the  
27 Motion will be held on \_\_\_\_\_, 2010, at \_\_\_\_\_ (Prevailing Eastern Time). If no  
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1 objections are filed to the Motion, the Court may enter the Final Order without further notice or  
2 hearing.

3 9. Notwithstanding the relief granted herein any actions taken pursuant thereto,  
4 nothing herein shall be deemed: (i) an admission as to the validity of any claim against the  
5 Debtors; (ii) a waiver of the Debtors' right to dispute any claim on any grounds; (iii) a promise  
6 or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a  
7 type specified or defined hereunder; (v) a request or authorization to assume any agreement,  
8 contract or lease pursuant to section 365 of title 11 of the Bankruptcy Code; or (vi) a waiver of  
9 the Debtors' rights under the Bankruptcy Code or any other applicable law.

10 10. Consistent with Bankruptcy Rule 6003 and the relief requested in the Motion, the  
11 Debtors are authorized to pay within twenty (20) days following the Petition Date those  
12 payments which become due and owing during such period and those payments which became  
13 due prior to the Petition Date.

14 11. Notwithstanding Bankruptcy Rule 6004(h), 7062 and 9014 the terms and  
15 conditions of this Order shall be immediately effective upon its entry.

16 12. The Debtor shall fund the Adequate Assurance Deposits within twenty (20) days  
17 of the entry of this Interim Order.

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1           13.    The Court shall retain jurisdiction with respect to all matters arising from or  
2 related to the implementation of this Bridge Order.

3  
4 Submitted by:

5 GORDON SILVER

6  
7 By: \_\_\_\_\_  
8 GREGORY E. GARMAN, ESQ.  
9 THOMAS H. FELL, ESQ.  
10 TERESA M. PILATOWICZ, ESQ.  
11 3960 Howard Hughes Pkwy., 9th Floor  
12 Las Vegas, Nevada 89169

13 AND

14 NANCY A. MITCHELL (*pro hac vice pending*)  
15 MARIA J. DICONZA (*pro hac vice pending*)  
16 GREENBERG TRAURIG, LLP  
17 The MetLife Building  
18 200 Park Avenue  
19 New York, New York 10166

20 *Proposed Counsel for the Debtors*  
21 *and Debtors in Possession*  
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**Exhibit 3**

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tfell@gordonsilver.com  
tpilatowicz@gordonsilver.com

*Proposed Counsel for the Debtors  
and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEVADA**

In re:	Case No.: BK-S-14-12524-abl Chapter 11
TELEXFREE, LLC,	<b>[PROPOSED]</b> <b>Jointly Administered with:</b>
<input type="checkbox"/> Affects this Debtor	14-12525 TelexFree, Inc.
<input checked="" type="checkbox"/> Affects all Debtors	14-12526 TelexFree Financial, Inc
<input type="checkbox"/> Affects TELEXFREE, INC.	Date:
<input type="checkbox"/> Affects TELEXFREE FINANCIAL, INC	Time:

**FINAL ORDER (I) PROHIBITING UTILITIES FROM  
ALTERING, REFUSING, OR DISCONTINUING SERVICE, (II) DEEMING UTILITIES  
ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (III) ESTABLISHING  
PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

1 Upon the motion (the “**Motion**”) filed by the above-captioned debtors and debtors-in-  
2 possession (collectively, the “**Debtors**”) seeking entry of interim and final orders: (a)  
3 determining that their Utility Providers have been provided with adequate assurance of payment  
4 within the meaning of section 366 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532  
5 (the “**Bankruptcy Code**”); (b) approving the Debtors’ proposed offer of adequate assurance and  
6 procedures governing Utility Providers’ requests for additional or different adequate assurance;  
7 (c) prohibiting the Utility Providers from altering, refusing, or discontinuing services on account  
8 of pre-petition amounts outstanding or on account of any perceived inadequacy of the Debtors’  
9 proposed adequate assurance; (d) establishing procedures for the Utility Providers to seek to opt  
10 out of the Debtors’ proposed adequate assurance procedures; (e) determining that the Debtors are  
11 not required to provide any additional adequate assurance beyond what is proposed by this  
12 Motion; and (f) setting a final hearing on the Debtors’ proposed adequate assurance procedures;  
13 the Court having reviewed the Motion and having heard the statements of counsel in support of  
14 the relief requested in the Motion at the hearing before the Court (the “**Hearing**”), finds that the  
15 Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, this is a core  
16 matter pursuant to 28 U.S.C. § 157(b)(2), notice of the Motion and the Hearing were sufficient  
17 under the circumstances and that no further notice need be given, and the legal and factual bases  
18 set forth in the Motion and at the Hearing establish just cause for the relief granted herein,

19 THEREFORE, IT IS HEREBY ORDERED THAT:

- 20 1. The Motion is GRANTED on a final basis.
- 21 2. Absent compliance with the procedures set forth in the Motion, the Utility  
22 Providers are (a) forbidden to discontinue, alter, or refuse service on account of any unpaid pre-  
23 petition charges, and (b) deemed to have received adequate assurance of payment in compliance  
24 with section 366 of the Bankruptcy Code.
- 25 3. Any Utility Provider who has accepted an Adequate Assurance Deposit and did  
26 not make an Additional Assurance Request is hereby deemed to have stipulated that the  
27 Adequate Assurance Deposit constitutes adequate assurance of future payment to such Utility  
28 Provider, and such Utility Provider is further deemed to have waived any right to seek additional

1 adequate assurance during the course of these chapter 11 proceedings, provided, however, that in  
2 the event the Debtors default post-petition in respect of any of their obligations under this Order  
3 to any Utility Provider, such Utility Provider may seek additional adequate assurances in this  
4 Court upon motion and appropriate notice to the Debtors and interested parties.

5 4. The procedures for determining additional adequate assurances, as provided in the  
6 Motion, are hereby approved.

7 5. Any Utility Provider who failed to file its Adequate Assurance Request is hereby:  
8 (a) forbidden to discontinue, alter, or refuse service on account of any unpaid pre-petition  
9 charges, or require additional adequate assurance of payment other than the Proposed Adequate  
10 Assurance described in the Motion; and (b) deemed to have received adequate assurance of  
11 payment in compliance with section 366 of the Bankruptcy Code.

12 6. In the event that the Debtors receive any Additional Assurance Request in  
13 compliance with the procedures in the Motion, the Debtors shall have five (5) days after the  
14 Request Deadline date (collectively, the “**Resolution Period**”) to negotiate with the Utility  
15 Provider to endeavor to resolve that Utility Provider’s request for additional assurance of  
16 payment; and that during this period, Utility Providers may not terminate any of the services they  
17 provide to the Debtors on account of the bankruptcy filing or any unpaid charges for pre-petition  
18 services.

19 7. The Debtors may, in their discretion, resolve any Additional Assurance Request  
20 by mutual agreement with the Utility Provider and without further order of the Court, and may,  
21 in connection with any such agreement, in their discretion, provide a Utility Provider with  
22 additional adequate assurance of future payment including, but not limited to, cash deposits,  
23 prepayments, and/or other forms of security, without further order of this Court, if the Debtors  
24 believe such additional assurance is reasonable.

25 8. If the Debtors determine that an Additional Assurance Request is not reasonable  
26 and are not able to reach an alternative resolution with the Utility Provider during the Resolution  
27 Period, the Debtors, during or immediately after the Resolution Period, will request a hearing  
28 before this Court to determine the adequacy of assurances of payment with respect to a particular

1 Utility Provider (the “**Determination Hearing**”) pursuant to Section 366(c)(3) of the  
2 Bankruptcy Code.

3 9. Pending resolution of any such Determination Hearing, such particular Utility  
4 Provider shall be restrained from discontinuing, altering, or refusing service to the Debtors on  
5 account of unpaid charges for pre-petition services or the Debtors’ bankruptcy filing.

6 10. A Utility Provider shall be deemed to have adequate assurance of payment unless  
7 and until (a) the Debtors, in their sole discretion, agree to an Additional Assurance Request or  
8 agree to an alternative assurance of payment with the Utility Provider during the Resolution  
9 Period, or (b) this Court enters an order requiring that additional adequate assurance of payment  
10 be provided.

11 11. Any Utility Provider who failed to timely file an objection to the Motion is  
12 deemed to consent to the Adequate Assurance Procedures and shall be bound by the Adequate  
13 Assurance Procedures. The sole recourse of all Utility Providers that do not timely file objection  
14 to the Motion shall be to submit an Additional Assurance Request pursuant to the Adequate  
15 Assurance Procedures, and such Utility Providers shall be enjoined from ceasing performance  
16 pending any Determination Hearing that may be conducted pursuant to the Adequate Assurance  
17 Procedures.

18 12. Utility Providers that currently provide Utility Services to the Debtors’ are listed  
19 on Exhibit 1 to the Motion. However, all Utility Services may not be listed on Exhibit 1 to the  
20 Motion. To the extent that the Debtors identify additional Utility Providers, the Debtors shall  
21 promptly file amendments to the Utility Provider List, and shall serve copies of the Proposed  
22 Procedures Order on such newly-identified Utility Providers. Following the Debtors’ filing and  
23 service of such amendment to the Utility Provider List (which shall include a copy of the final  
24 order approving this Motion), the Utility Providers identified thereon shall have twenty (20) days  
25 therefrom to serve an Additional Assurance Request. Thereafter, the above-described  
26 procedures shall govern if and until any such resulting Adequate Assurance Requests are timely  
27 made. This Order is binding on all Utility Providers, regardless of when such Utility Provider  
28 was added to the Utility Provider List.

1 13. At any time, Debtors may terminate service from any of the Utility Providers,  
2 such termination being effective immediately upon Debtors' notice to the Utility Provider. At  
3 such time, Debtors shall no longer be required to make any more payments to such Utility  
4 Provider for any services provided after such termination.

5 14. Consistent with Bankruptcy Rule 6003 and the relief requested in the Motion, the  
6 Debtors are authorized to pay within twenty days following the Petition Date those payments  
7 which become due and owing during such period and those payments which became due prior to  
8 the Petition Date.

9 15. Notwithstanding Bankruptcy Rule 6004(h), 7062 and 9014 the terms and  
10 conditions of this Order shall be immediately effective upon its entry.

11 16. The Debtors are authorized and empowered to take all actions necessary to  
12 implement the relief granted in this Order.

13 17. The Court shall retain jurisdiction with respect to all matters arising from or  
14 related to the implementation of this Order.

15 Submitted by:

16 GORDON SILVER

17  
18 By: \_\_\_\_\_  
19 GREGORY E. GARMAN, ESQ.  
20 THOMAS H. FELL, ESQ.  
21 TERESA M. PILATOWICZ, ESQ.  
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24 AND

25 NANCY A. MITCHELL (*pro hac vice pending*)  
26 MARIA J. DICONZA (*pro hac vice pending*)  
27 GREENBERG TRAURIG, LLP  
28 The MetLife Building  
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*Proposed Counsel for the Debtors  
and Debtors in Possession*