

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

Zosano Pharma Corporation,<sup>1</sup>

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

**MOTION OF THE DEBTOR FOR ENTRY OF INTERIM AND FINAL ORDERS (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR DISCONTINUING SERVICE, (II) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PERFORMANCE, AND (III) ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT**

The above-captioned debtor and debtor-in-possession (the “**Debtor**”), submits this motion (the “**Motion**”), pursuant to sections 105(a) and 366 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), for entry of an interim order, substantially in the form attached hereto as **Exhibit A** (the “**Interim Order**”), and a final order, substantially in the form attached hereto as **Exhibit B** (the “**Final Order**”), (a) prohibiting the Utility Providers (as defined below) from discontinuing, altering, or refusing service to the Debtor on account of the commencement of this chapter 11 case, that a debt owed by the Debtor for prepetition Utility Services (as defined below) was not paid when due, or any perceived inadequacy of the Debtor’s proposed adequate assurance, (b) authorizing the proposed form of adequate assurance of payment to the Utility Providers, (c) establishing and approving procedures for resolving objections by Utility Providers to the proposed form of adequate assurance of payment, (d) setting a final hearing on the proposed adequate assurance procedures (the “**Final Hearing**”), and (e) granting related relief. In support of this Motion, the Debtor respectfully states as follows:

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<sup>1</sup> The business address and the last four (4) digits of the Debtor’s federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).



### **Jurisdiction and Venue**

1. The United States Bankruptcy Court for the District of Delaware (the “**Court**”) has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Pursuant to 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**”), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that the Court lacks authority under Article III of the United States Constitution to enter such final order or judgment absent consent of the parties.

### **Background**

3. On June 1, 2022 (the “**Petition Date**”), the Debtor commenced this case (the “**Case**”) by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Court.

4. The Debtor continues to operate its business and manage its property as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner or official committee of unsecured creditors has been appointed in the Debtor’s chapter 11 case.

5. Additional information regarding the Debtor’s business and operations, as well as the events precipitating the commencement of this case, is set forth in the *Declaration of Steven Lo in Support of the Debtor’s Chapter 11 Petition and Requests for First Day Relief* (the “**First Day Declaration**”), filed on or shortly following the Petition Date and incorporated herein by reference.

### Utility Services

6. To operate its business and manage its facilities, the Debtor requires various utility services, including, but not limited to, electricity, natural gas, water, internet, telephone, fire protection, waste removal and other similar services (each, a “**Utility Service**” and collectively, the “**Utility Services**”) from a number of utility providers (each, a “**Utility Provider**” and collectively, the “**Utility Providers**”). A nonexclusive list of the Utility Providers that provide Utility Services to the Debtor as of the Petition Date is attached to the proposed Interim and Final Orders as **Annex 1** (the “**Utility Providers List**”).<sup>2</sup>

7. In the ordinary course of business, the Debtor regularly incurs utility expenses for the Utility Services and has a long and established payment history with most or all of the Utility Providers. As of the Petition Date, the Debtor estimates that approximately \$5,500 is owed to Utility Providers. Approximately \$1,500 is on account of past due invoices, while approximately \$4,000 is due on the Petition Date or will become due shortly thereafter.

8. Prior to the Petition Date, the Debtor spent an average of approximately \$65,000 each month for Utility Services. Certain of the Utility Providers have security or deposits, in the aggregate, totaling approximately \$120,000.00.<sup>3</sup>

9. Uninterrupted Utility Services are essential to the Debtor’s business operations during the pendency of this chapter 11 case. Should any Utility Provider discontinue, alter, or refuse service, even for a brief period, the Debtor’s business operations could be severely

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<sup>2</sup> Although **Annex 1** is intended to be comprehensive, the Debtor may have inadvertently omitted one or more Utility Providers. By this Motion, the Debtor requests relief applicable to all Utility Providers, regardless of whether such Utility Provider is specifically identified on **Annex 1**. The inclusion of any entity on, or any omission of any entity from, **Annex 1** is not an admission by the Debtor that such entity is or is not a “utility” within the meaning of section 366 of the Bankruptcy Code, and the Debtor hereby reserves and preserves its rights with respect thereto.

<sup>3</sup> For example, PG&E—the Debtor’s electricity provider—is the beneficiary under a letter of credit issued by Silicon Valley Bank in the amount of \$119,580.00, which is secured by the Debtor’s cash in a pledged account at Silicon Valley Bank.

disrupted, and such disruption could negatively affect the Debtor's business relationships, revenue and profits and could jeopardize the Debtor's potential reorganization efforts. Operating the Debtor's facilities necessitates the uninterrupted use of the Utility Services, including, but not limited to, electricity, telephone, and internet service, to ensure that the Debtor's websites, offices and research and development facilities continue to operate. Indeed, any interruption of the Utility Services would effectively shut down the Debtor's business operations and would thereby negatively affect the Debtor's business relationships and effort to reorganize. It is, therefore, critical that the Utility Services continue uninterrupted.

10. The Debtor seeks the relief requested herein with respect to all Utility Providers providing Utility Services to the Debtor, including, but not limited to, those listed on the Utility Providers List. The Debtor reserves the right to supplement the Utility Providers List by filing a notice or notices (each, a "**Supplemental Notice**") with this Court.

#### **Relief Requested**

11. By this Motion, the Debtor seeks the entry of interim and final orders (a) prohibiting Utility Providers from discontinuing, altering or refusing service to the Debtor on account of the commencement of this chapter 11 case, that a debt owed by the Debtor for prepetition Utility Services was not paid when due, or on account of any perceived inadequacy of the Debtor's Proposed Adequate Assurance, (b) authorizing the Proposed Adequate Assurance, (c) establishing and approving the Adequate Assurance Procedures, (d) setting a Final Hearing on the Motion, and (e) granting related relief.

#### **Proposed Adequate Assurance of Payment**

12. Section 366 of the Bankruptcy Code protects a debtor against the immediate termination or alteration of utility services following the commencement of a chapter 11 case. *See* 11 U.S.C. § 366. However, if a utility does not receive "adequate assurance of payment" from the

debtor within thirty (30) days after the petition date, then the utility may alter, refuse, or discontinue the debtor's utility service. *Id.* § 366(c)(2). Section 366(c)(1)(A) of the Bankruptcy Code defines the phrase "assurance of payment" to mean, *inter alia*, a cash deposit. *Id.* § 366(c)(1)(A).

13. The Debtor intends to pay postpetition obligations owed to the Utility Providers in a timely manner and anticipates having sufficient funds to do so. Nevertheless, to provide additional assurance of payment pursuant to section 366 of the Bankruptcy Code, other than those Utility Providers that are already holding a deposit or have some other form of adequate security, the Debtor proposes depositing into a segregated account at Silicon Valley Bank for the benefit of the Utility Providers (the "**Adequate Assurance Account**") cash in an amount equal to at least one-half (1/2) of the Debtor's average monthly cost of Utility Services for the trailing twelve (12) months (the "**Adequate Assurance Deposit**"). Based on this formula, the Debtor estimates that the total amount of the Adequate Assurance Deposit should equal \$2,900; *provided, however*, that the Debtor may reduce this amount in the event that its relationship with any Utility Provider ends by agreement or otherwise, upon notice to such Utility Provider (as described below).

14. The Adequate Assurance Deposit will be held by the Debtor in the Adequate Assurance Account for the benefit of the Utility Providers identified on the Utility Providers List, other than those Utility Providers that are already holding a deposit or have some other form of security, during the pendency of this chapter 11 case. No liens will encumber the Adequate Assurance Deposit or the Adequate Assurance Account.

15. The Adequate Assurance Deposit may be adjusted by the Debtor as to each Utility Provider during the pendency of this chapter 11 case should the Debtor: (a) terminate any of the Utility Services provided by a Utility Provider; (b) make other arrangements with certain Utility Providers for adequate assurance of payment; (c) determine that an entity listed on the Utility

Providers List is not a “utility” as that term is used in section 366 of the Bankruptcy Code; or (d) supplement the Utility Providers List to include additional Utility Providers (as described below). For any Utility Provider that is subsequently removed from the Utility Providers List, the Debtor requests authority to decrease the Adequate Assurance Deposit by an amount equal to the amount allocated for such Utility Provider.

16. The Debtor hereby further requests authority to cause the portion of the Adequate Assurance Deposit and any funds held in the Adequate Assurance Account attributable to each Utility Provider to be returned to the Debtor upon the earlier to occur of: (i) reconciliation and payment by the Debtor of the Utility Provider’s final invoice in accordance with applicable non-bankruptcy law following the Debtor’s termination of Utility Services from such Utility Provider; or (ii) the effective date of any chapter 11 plan in the Debtor’s case or such other time as this chapter 11 case may be closed, without further order of the Court.

17. The Debtor submits that the availability of the Adequate Assurance Deposit, together with the facts and circumstances of this chapter 11 case (collectively, the “**Proposed Adequate Assurance**”) constitutes sufficient adequate assurance of future payment to satisfy the requirements imposed by section 366 of the Bankruptcy Code.

18. Accordingly, the Debtor believes that no other or further assurance of payment is necessary. If, however, a Utility Provider disagrees, the Debtor submits that the Utility Provider must request such additional or alternative assurance of payment pursuant to the procedures described below.

**Proposed Adequate Assurance Procedures**

19. The Debtor seeks to establish the following procedures (the “**Adequate Assurance Procedures**”) with respect to the Proposed Adequate Assurance and to address a request of a

Utility Provider for adequate assurance in an amount greater than the proposed Adequate Assurance Deposit:

- A. The Debtor will serve or cause to be served a copy of this Motion and the Interim Order granting the relief requested herein, which include the Adequate Assurance Procedures, on each Utility Provider listed on the Utility Providers List within two (2) business days after the Court's entry of the Interim Order;
- B. The Debtor will deposit the Adequate Assurance Deposit into the Adequate Assurance Account within fourteen (14) days after the entry of the Interim Order;
- C. If a Utility Provider is not satisfied with the Adequate Assurance Deposit provided by the Debtor, the Utility Provider must serve a request for additional adequate assurance (the "**Additional Adequate Assurance Request**") so that it is actually received by the following parties (collectively, the "**Notice Parties**"):
  - the Debtor, Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555, Attn: Steven Lo;
  - proposed counsel to the Debtor, (a) Greenberg Traurig, LLP, The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware 19801, Attn: Dennis A. Meloro, Esq. (Melorod@gtlaw.com), (b) Greenberg Traurig, LLP, 3333 Piedmont Road NE, Suite 2500 Atlanta, Georgia 30305, Attn: John D. Elrod, Esq. (Elrodj@gtlaw.com), and (c) Greenberg Traurig, LLP 333 S.E. Second Ave, Suite 4400 Miami, Florida 33131, Attn: Ari Newman (Newmanar@gtlaw.com);
  - counsel to any statutory committee appointed in this chapter 11 case; and
  - the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801.
- D. An Additional Adequate Assurance Request must: (i) be in writing; (ii) set forth the amount and form of additional assurance of payment requested; (iii) set forth the type of Utility Services provided, (iv) set forth the location(s) at which the Utility Services are provided and any associated account number(s); (v) set forth whether the Utility Provider holds any deposit(s), prepayments or other security, and if so, in what amount(s); and (vi) set forth why the Utility Provider believes the Proposed Adequate Assurance is insufficient;
- E. Unless and until a Utility Provider serves an Additional Adequate Assurance Request on the Notice Parties, such Utility Provider shall be (i) deemed to have received adequate assurance of payment satisfactory to such Utility Provider in compliance with section 366 of the Bankruptcy Code, and (ii) prohibited from discontinuing, altering or refusing service to, or discriminating against, the Debtor on account of the commencement of this chapter 11 case, any unpaid prepetition

charges or requiring additional assurance of payment other than the Proposed Adequate Assurance;

- F. In the event the Debtor receives an Additional Adequate Assurance Request in compliance with the Adequate Assurance Procedures, the Debtor shall have twenty-one (21) calendar days from the receipt of such Additional Adequate Assurance Request (the “**Resolution Period**”) to negotiate with the requesting Utility Provider to resolve its Additional Adequate Assurance Request; *provided that* during the Resolution Period, such Utility Providers may not terminate the Utility Services they provide to the Debtor on account of the bankruptcy filing or any unpaid charges for prepetition services;
- G. The Debtor, in its discretion, may resolve any Additional Adequate Assurance Request by mutual agreement with the requesting Utility Provider and without further order of the Court, and may, in connection with any such resolution, provide the requesting Utility Provider, including, but not limited to, cash deposits, prepayments, and/or other forms of security, if the Debtor believes such additional assurance is reasonable. The Debtor may reduce the amount of the Adequate Assurance Deposit by any amount allocated to a Utility Provider to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtor and the affected Utility Provider. Additionally, within ten (10) calendar days of the request of the Debtor, following the completion of any sale or other disposition of all or substantially all of the Debtor’s assets or stock and payment in full of all postpetition services, each Utility Provider that received any additional or alternative form of adequate assurance shall return said additional or alternative form of adequate assurance to the Debtor;
- H. If the Debtor determines that an Additional Adequate Assurance Request is not reasonable or cannot be resolved promptly, the Debtor will request a hearing before this Court at the next regularly scheduled omnibus hearing in this case to determine the adequacy of assurance of payment made to the requesting Utility Provider (the “**Determination Hearing**”), pursuant to section 366(c)(3)(A) of the Bankruptcy Code;
- I. Pending the resolution of the Additional Adequate Assurance Request at a Determination Hearing, the Utility Provider making such request shall be prohibited from discontinuing, altering, or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or any objections to the Proposed Adequate Assurance;
- J. Any Utility Provider that does not comply with the Adequate Assurance Procedures is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering, or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or requiring additional assurance of payment (other than the Proposed Adequate Assurance);

- K. A Utility Provider shall be deemed to have adequate assurance of payment unless the Utility Provider makes an Additional Assurance Request and (a) the Debtor agrees to an Additional Assurance Request or agrees to an alternative assurance of payment with the Utility Provider during the Resolution Period or (b) this Court enters an order requiring that additional adequate assurance of payment be provided;
- L. The Adequate Assurance Deposit shall be deemed adequate assurance of payment for any Utility Provider that fails to make an Additional Assurance Request; and
- M. At any time, the Debtor may terminate service from any of the Utility Providers, such termination being effective immediately upon the Debtor's notice to the Utility Provider. At such time, the Debtor shall no longer be required to make any more payments to such Utility Provider for any services provided after such termination, and any excess shall be returned forthwith.

20. The Debtor also requests authorization to periodically adjust the amount in the Adequate Assurance Account to reflect any termination of Utility Services by the Debtor (a) upon notice to the affected Utility Provider, and (b) if the Debtor has not received an objection from such Utility Provider within fourteen (14) calendar days of providing such notice. If the Utility Provider serves the Debtor with a written objection, the Debtor will request a hearing before the Court at the next omnibus hearing date or such other date that the Debtor and the Utility Provider may agree, subject to the Court's calendar.

21. The foregoing Adequate Assurance Procedures are consistent with procedures frequently approved by courts in this District.

**Subsequent Modification(s) of Utility Providers List**

22. The Debtor has made a good faith effort to identify each of its Utility Providers, the amounts of any deposits held by, or prepayments made to its Utility Providers, and to include them on the Utility Providers List. Nevertheless, it is possible that, despite the Debtor's effort, certain Utility Providers have not yet been identified by the Debtor or included on the Utility Providers List (each, an "Additional Utility Provider" and, collectively, the "Additional Utility Providers") or that the amounts of any deposits held by, or prepayments made to its Utility

Providers are incorrect.<sup>4</sup> Promptly upon the discovery of an Additional Utility Provider, if any, or an incorrect deposit amount, if any, the Debtor will adjust the Adequate Assurance Deposit by an amount equal to approximately one-half (1/2) of one (1) month of the Debtor's estimated aggregate utility expense for such Additional Utility Provider, unless such Additional Utility Provider agrees in writing to a lesser amount, is paid in advance for Utility Services, or already holds a deposit or prepayment for the Utility Services in excess of the proposed deposit.

23. In addition, the Debtor requests that any order entered hereon provide that the Additional Utility Providers are subject to the terms thereof, including the Adequate Assurance Procedures.

24. The Debtor maintains that the requested relief strikes a fair balance between protecting the rights of the Utility Providers and the rights of the Debtor under the Bankruptcy Code, and the need for the Debtor to continue to receive, for the benefit of its estate, the Utility Services, upon which the Debtor depends. The Debtor does not believe that the Utility Providers will be prejudiced by the Proposed Adequate Assurance, the requirement to provide the Debtor with uninterrupted access to Utility Services, or the procedures for resolving objections to the Proposed Adequate Assurance.

#### **Basis for Relief**

25. Congress enacted section 366 of the Bankruptcy Code to protect debtors from utility service cutoffs upon a bankruptcy filing while, at the same time, to provide utility companies with adequate assurance that debtors will pay for postpetition services. *See* H.R. REP. No. 95-

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<sup>4</sup> For Utility Providers that have already been identified, the Debtor has included, to its best effort, every account number for each Utility Provider. Upon notice or discovery of additional account numbers, the Debtor will promptly modify the Utility Providers List accordingly. Out of an abundance of caution, the Debtor is calculating the Adequate Assurance Deposit on a provider basis to account for each Utility Provider's entire pay history, even if a specific account number is not listed on the Utility Providers List.

595, at 350 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6306. Section 366(a) of the Bankruptcy Code prohibits utility companies from discontinuing, altering, or refusing service to a debtor. *See* 11 U.S.C. § 366(a). In a chapter 11 context, a utility provider may refuse or discontinue service to a debtor after the first thirty (30) days if the debtor has not furnished the utility provider with adequate “assurance of payment” within the meaning of section 366(c)(1)(A) of the Bankruptcy Code. *See id.* §§ 366(c)(1)(A) and 366(c)(2). Upon expiration of such period, a utility provider cannot terminate its services if a debtor has furnished adequate “assurance of payment.” *See id.* § 366(c).<sup>5</sup>

26. Under section 366(c) of the Bankruptcy Code, a court may determine whether a debtor has provided adequate assurance of payment. Additionally, section 366(c) of the Bankruptcy Code gives courts discretion in determining the amount of payment necessary, if any, for adequate assurance. *See* § 366(c)(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 payment under paragraph (2)”). Under certain circumstances, a court may find that no payment is necessary to provide a utility with adequate assurance of payment; this may be particularly true in cases where the debtor has made prepetition deposits or prepayments for services that utilities will ultimately render postpetition. *See* 11 U.S.C. § 366(c)(1)(A)(v) (recognizing a prepayment for postpetition

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<sup>5</sup> Section 366 of the Bankruptcy Code applies to entities that are traditionally viewed as utilities, such as those that provide electricity, telephone service, or water, and to any entity that supplies services that cannot be readily obtained or replaced elsewhere, or which constitutes a monopoly with respect to the services that it provides to the debtor. *See, e.g., One Stop Realtour Place, Inc. v. Allegiance Telecom of Pa., Inc. (In re One Stop Realtour Place, Inc.)*, 268 B.R. 430, 436-37 (Bankr. E.D. Pa. 2001) (provider of telephone service is a utility regardless of whether telephone service may be available from another provider); *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986) (landlord of the Brooklyn Navy Yard “occupies ‘a special position with respect to the debtor in its role as [the debtor’s] utility supplier”); *In re Nortel Networks Inc.*, Case No. 09-10138 (KG) (Bankr. D. Del. Jan. 15, 2009) [Docket No. 46] (approving internet-related services as utilities for purposes of Bankruptcy Code section 366). Despite the wide latitude afforded in determining those entities that constitute utilities under section 366, some of the companies listed on the Utility Providers List may also provide goods or services to the Debtor in a capacity other than that of a utility. With respect to any such goods or services, such companies are not entitled to adequate assurance under section 366. Moreover, the Debtor is not foreclosed from taking the position that any of the entities listed on the Utility Providers List are not utilities within the meaning of section 366.

services as adequate assurance). Accordingly, courts continue to have discretion to determine the amount of adequate assurance payments and, where appropriate, to determine that no such payment is necessary.

27. Additionally, section 366(c) of the Bankruptcy Code simply requires that a utility's assurance of payment be "adequate." Courts have long recognized that adequate assurance of performance does not constitute an absolute guarantee of a debtor's ability to pay. *See In re Adelpia Bus. Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) ("In determining adequate assurance, a bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment . . . ."); *In re Steinebach*, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) ("Adequate assurance of payment is not, however, absolute assurance."); *In re Penn Jersey Corp.*, 72 B.R. 981, 982 (Bankr. E.D. Pa. 1987) ("[Section] 366 contemplates that a utility receive only such assurance of payment as is sufficient to protect its interests given the facts of the debtor's financial circumstances . . . ."). Courts have also recognized that in determining the amount of adequate assurance, bankruptcy courts should "focus upon the need of the utility for assurance, and to 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 Co. v. Caldor, Inc.*, 117 F.3d 646, 650 (2d Cir. 1997) (emphasis in original) (internal quotation marks and citation omitted); *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 would likely "jeopardize the continuing operation of the [debtor] merely to give further security to suppliers who already are reasonably protected"). Accordingly, a demand by a Utility Provider for a guarantee of payment when it already has adequate assurance of payment in light of the Debtor's specific circumstances should be refused.

28. Based upon the foregoing, the Debtor believes that the proposed Adequate Assurance Deposit constitutes sufficient adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code. The proposed Adequate Assurance Deposit is a cash deposit, a listed form of assurance of payment in section 366(c)(1)(A) of the Bankruptcy Code. Moreover, the Debtor has a powerful incentive to stay current on its utility obligations because of the Debtor relies on the Utility Services to maintain its business operations. These factors—which the Court should take into account when considering the amount of any adequate assurance payments—justify a finding that the Proposed Adequate Assurance is more than sufficient to assure the Utility Providers of future payment.

29. If the Utility Providers disagree with the Debtor’s analysis, however, the procedures proposed in this Motion will enable the parties to negotiate and, if necessary, seek Court intervention without jeopardizing the Debtor’s chapter 11 case, while still protecting the rights of the Utility Providers under section 366 of the Bankruptcy Code.

30. The Court has authority to approve the proposed Adequate Assurance Procedures under section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code provides that the Court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The purpose of section 105(a) of the Bankruptcy Code is “to assure the bankruptcy courts [sic] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” COLLIER ON BANKRUPTCY ¶ 105.01 (Richard Levin & Henry J. Sommer eds., 16th ed.).

31. The proposed Adequate Assurance Procedures set forth a fair process that will enable all parties to negotiate their respective positions and, where necessary, seek Court intervention without jeopardizing the Debtor’s chapter 11 case, while preserving the Utility Providers’ rights under section 366 of the Bankruptcy Code. Courts in this District have approved

similar procedures in other chapter 11 cases. *See, e.g., In re RentPath Holdings, Inc.*, Case No. 20-10312 (BLS) (Bankr. D. Del. Feb. 13, 2020); *In re Lucky's Market Parent Co., LLC*, Case No. 20-10166 (JTD) (Bankr. D. Del. Jan. 28, 2020); *In re Videology, Inc.*, Case No. 18-11120 (BLS) (Bankr. D. Del. May 11, 2018); *In re Gibson Brands, Inc.*, Case No. 18-11025 (CSS) (Bankr. D. Del. May 2, 2018); *In re Bertucci's Holdings, Inc.*, (Case No. 18- 10894 (MFW) (Bankr. D. Del. April 17, 2018). Accordingly, the Debtor believes that the proposed Adequate Assurance Procedures should be approved.

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

32. The Debtor submits that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein and in the First Day Declaration, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted. Specifically, Bankruptcy Rule 6003 provides:

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

FED. R. BANKR. P. 6003.

33. The Third Circuit Court of Appeals has interpreted the “immediate and irreparable harm” language in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App’x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cty.*, 40 F.3d 645, 653-55 (3d Cir. 1994).

34. The Debtor further seeks a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6004. As set forth above, the relief requested herein is essential to prevent irreparable damage to the Debtor’s operations, going-concern value and its efforts to pursue a sale or restructuring of its assets and liabilities.

35. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rules 6003 and 6004(h).

#### **Notice**

36. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) creditors holding the twenty (20) largest unsecured claims against the Debtor; (c) the Office of the United States Attorney for the District of Delaware; (d) the Internal Revenue Service; (e) the Securities & Exchange Commission; (f) the Delaware Secretary of State; (g) the Delaware State Treasury; (h) the Utility Providers listed in **Annex 1** attached to the proposed Interim and Final Orders; (i) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (j) any other party entitled to notice pursuant to Local Rule 9013-1(m)(iii). As the Motion is seeking “first day” relief, within two (2) business days of the hearing on the Motion, the Debtor will serve copies of the Motion and any order entered with respect to the Motion in accordance with Local Rule 9013-1(m)(iv). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

**No Prior Request**

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

*[Signature on Next Page]*

**Conclusion**

WHEREFORE, the Debtor respectfully requests that this Court enter orders granting the relief requested herein and such other and further relief as is just and proper.

Dated: June 2, 2022

GREENBERG TRAURIG, LLP

/s/ Dennis A. Meloro

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*Proposed Counsel for the Debtor  
and Debtor-in-Possession*

**Exhibit A**

**Proposed Interim Order**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re:

Zosano Pharma Corporation,<sup>1</sup>

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

**Ref. Docket No.**

**INTERIM ORDER (A) PROHIBITING UTILITY PROVIDERS FROM DISCONTINUING, ALTERING OR REFUSING SERVICE, (B) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PERFORMANCE, (C) ESTABLISHING AND APPROVING PROCEDURES FOR DETERMINING ASSURANCE OF PAYMENT, AND (D) GRANTING RELATED RELIEF**

Upon consideration of the motion (the “**Motion**”)<sup>2</sup> filed by the above-captioned debtor and debtor-in-possession (the “**Debtor**”), pursuant to sections 105(a) and 366 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004(h), seeking entry of interim and final orders (a) prohibiting Utility Providers from discontinuing, altering or refusing to provide the Debtor with the Utility Services, (b) authorizing the Proposed Adequate Assurance, (c) establishing and approving the Adequate Assurance Procedures, (d) setting a Final Hearing, and (e) granting related relief; and upon the First Day Declaration; and upon the statements of counsel in support of the relief requested in the Motion at the hearing before the Court; and it appearing that this Court has jurisdiction to consider the Motion 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; and it appearing that venue of this chapter 11 case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Debtor having consented to the Court

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<sup>1</sup> The business address and the last four (4) digits of the Debtor’s federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

entering an order in the event this matter is deemed a non-core proceeding; and it appearing that proper and adequate notice of the Motion has been given under the circumstances and in accordance with the Bankruptcy Rules and Local Rules and that no other or further notice is necessary; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. Subject to the Adequate Assurance Procedures set forth below, and until such time that a final order is entered by the Court, all Utility Providers are prohibited from discontinuing, altering or refusing service to, discriminating against, or requiring payment of a deposit or receipt of any other security for continued service to, the Debtor on account of any unpaid prepetition charges, as a result of the Debtor's commencement of this chapter 11 case or any perceived inadequacy of the Proposed Adequate Assurance, other than as set forth in the Motion, provided the Debtor is in compliance with the terms of this Interim Order.
3. The Proposed Adequate Assurance constitutes adequate assurance of future payments as required under section 366 of the Bankruptcy Code.
4. The following Adequate Assurance Procedures are hereby approved on an interim basis:
  - A. The Debtor will serve or cause to be served a copy of the Motion and this Interim Order granting the relief requested herein, which include the Adequate Assurance Procedures, on each Utility Provider listed on the Utility Providers List within two (2) business days after the Court's entry of the Interim Order;
  - B. The Debtor will deposit the Adequate Assurance Deposit into the Adequate Assurance Account within fourteen (14) days after the entry of the Interim Order.
  - C. If a Utility Provider is not satisfied with the Adequate Assurance Deposit provided by the Debtor, the Utility Provider must serve a request for additional adequate assurance (the "**Additional Adequate Assurance Request**") so that it is actually received by the following parties (collectively, the "**Notice Parties**"):

- the Debtor, 34790 Ardentech Court, Fremont, California 94555, Attn: Steven Lo;
  - proposed counsel to the Debtor, (a) Greenberg Traurig, LLP, The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware 19801, Attn: Dennis A. Meloro, Esq. (Melorod@gtlaw.com), (b) Greenberg Traurig, LLP, 3333 Piedmont Road NE, Suite 2500 Atlanta, Georgia 30305, Attn: John D. Elrod, Esq. (Elrodj@gtlaw.com), and (c) Greenberg Traurig, LLP 333 S.E. Second Ave, Suite 4400 Miami, Florida 33131, Attn: Ari Newman (Newmanar@gtlaw.com);
  - counsel to any statutory committee appointed in this chapter 11 case; and
  - the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801.
- D. An Additional Adequate Assurance Request must: (i) be in writing; (ii) set forth the amount and form of additional assurance of payment requested; (iii) set forth the type of Utility Services provided, (iv) set forth the location(s) at which the Utility Services are provided and any associated account number(s); (v) set forth whether the Utility Provider holds any deposit(s), prepayments or other security, and if so, in what amount(s); and (vi) set forth why the Utility Provider believes the Proposed Adequate Assurance is insufficient;
- E. Unless and until a Utility Provider serves an Additional Adequate Assurance Request on the Notice Parties, such Utility Provider shall be (i) deemed to have received adequate assurance of payment satisfactory to such Utility Provider in compliance with section 366 of the Bankruptcy Code, and (ii) prohibited from discontinuing, altering or refusing service to, or discriminating against, the Debtor on account of the commencement of this chapter 11 case, any unpaid prepetition charges or requiring additional assurance of payment other than the Proposed Adequate Assurance;
- F. In the event the Debtor receives an Additional Adequate Assurance Request in compliance with the Adequate Assurance Procedures, the Debtor shall have twenty-one (21) calendar days from the receipt of such Additional Adequate Assurance Request (the “**Resolution Period**”) to negotiate with the requesting Utility Provider to resolve its Additional Adequate Assurance Request; *provided that* during the Resolution Period, such Utility Providers may not terminate the Utility Services they provide to the Debtor on account of the bankruptcy filing or any unpaid charges for prepetition services;
- G. The Debtor, in its discretion, may resolve any Additional Adequate Assurance Request by mutual agreement with the requesting Utility Provider and without further order of the Court, and may, in connection with any such resolution, provide the requesting Utility Provider, including, but not limited to, cash deposits, prepayments, and/or other forms of security, if the Debtor believes such additional

assurance is reasonable. The Debtor may reduce the amount of the Adequate Assurance Deposit by any amount allocated to a Utility Provider to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtor and the affected Utility Provider. Additionally, within ten (10) calendar days of the request of the Debtor, following the completion of any sale or other disposition of all or substantially all of the Debtor's assets or stock and payment in full of all postpetition services, each Utility Provider that received any additional or alternative form of adequate assurance shall return said additional or alternative form of adequate assurance to the Debtor;

- H. If the Debtor determines that an Additional Adequate Assurance Request is not reasonable or cannot be resolved promptly, the Debtor will request a hearing before this Court at the next regularly scheduled omnibus hearing in this case to determine the adequacy of assurance of payment made to the requesting Utility Provider (the "**Determination Hearing**"), pursuant to section 366(c)(3)(A) of the Bankruptcy Code;
- I. Pending the resolution of the Additional Adequate Assurance Request at a Determination Hearing, the Utility Provider making such request shall be prohibited from discontinuing, altering, or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or any objections to the Proposed Adequate Assurance;
- J. Any Utility Provider that does not comply with the Adequate Assurance Procedures is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering, or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or requiring additional assurance of payment (other than the Proposed Adequate Assurance);
- K. A Utility Provider shall be deemed to have adequate assurance of payment unless the Utility Provider makes an Additional Assurance Request and (a) the Debtor agrees to an Additional Assurance Request or agree to an alternative assurance of payment with the Utility Provider during the Resolution Period or (b) this Court enters an order requiring that additional adequate assurance of payment be provided;
- L. The Adequate Assurance Deposit shall be deemed adequate assurance of payment for any Utility Provider that fails to make an Additional Assurance Request; and
- M. At any time, the Debtor may terminate service from any of the Utility Providers, such termination being effective immediately upon the Debtor's notice to the Utility Provider. At such time, the Debtor shall no longer be required to make any more payments to such Utility Provider for any services provided after such termination, and any excess shall be returned forthwith.

5. No liens will encumber the Adequate Assurance Deposit or the Adequate Assurance Account.

6. As set forth in the Adequate Assurance Procedures, the Motion and this Interim Order shall be served, via first-class mail, on each Utility Provider the Debtor believes could be affected by the Motion and all other parties required to receive service under the Local Rules within two (2) business days of entry of this Interim Order.

7. In the event the Debtor defaults postpetition in respect of any of its obligations under this Interim Order to any Utility Provider, such Utility Provider may seek additional adequate assurance in this Court upon motion and appropriate notice to the Debtor, its counsel and the other Notice Parties.

8. To the extent the Debtor subsequently identifies additional Utility Providers, determines that an entity was improperly included as a Utility Provider, determines that the amount of a deposit held by, or prepayments made to a Utility Provider was incorrect, or discontinues services from an existing Utility Provider, the Debtor is authorized, in its sole discretion and without further order of the Court, to amend the Utility Providers List to add or delete any Utility Provider or to correct the amount of a deposit held by, or prepayments made to a Utility Provider; *provided, however*, that the Debtor shall provide notice of any such addition, deletion, or correction to the Notice Parties. If the Debtor adds any Utility Providers to the Utility Providers List, the Debtor will serve a copy of the Motion, along with the applicable portion of the amended Utility Providers List and this Interim Order, on such Utility Provider, and provide such Utility Provider ten (10) business days from the date of service of such notice to object to its inclusion on the Utility Providers List. Subject to a timely served objection by any such subsequently added Utility Provider, such subsequently added Utility Provider will be subject to the Adequate Assurance Procedures. For any entity that is removed from the Utility Providers List, the Debtor shall serve

that entity with notice of removal and such entity shall have five (5) business days from the date of service of such notice to object to that removal.

9. Notwithstanding the relief granted herein or any actions taken pursuant thereto, nothing herein shall be deemed: (a) an admission as to the validity of any claim against the Debtor; (b) a waiver of the Debtor's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined hereunder; (e) a request or authorization to assume any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

10. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order.

11. A final hearing to consider the relief requested in the Motion shall be held on \_\_\_\_\_, 2022 at \_\_\_:\_\_\_ .m. (prevailing Eastern Time) and any objections to entry of such order shall be in writing and filed with the Court no later than \_\_\_\_\_, 2022 at 4:00 p.m. (prevailing Eastern Time) and served on:

- (i) the Debtor, Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, CA 94555 (Attn: Steven Lo);
- (ii) proposed counsel for the Debtor, Greenberg Traurig, LLP (Attn: Dennis A. Meloro (melorod@gtlaw.com), John D. Elrod (elrodj@gtlaw.com) and Ari Newman (newmanar@gtlaw.com));
- (iii) the Office of the United States Trustee for the District of Delaware, 844 King Street, Room 2207, Wilmington, DE 19801 (Attn: [●]); and
- (iv) counsel to any statutory committee appointed in the Case.

If no objections to the entry of the Final Order are timely filed, the Court may enter the Final Order without further notice or a hearing.

12. The requirements of Bankruptcy Rule 6003(b) are satisfied.

13. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

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

**Annex 1**

**List of Utility Providers**

| Utility Provider                 | Utility Service               | Account Number(s)   | Utility Provider Address                       | Service Address                             | Adequate Assurance Deposit <sup>1</sup> |
|----------------------------------|-------------------------------|---|--|---|---|
| PG&E                             | Electric                      | 12844046800   | P.O Box 997340,<br>Sacramento, CA 95899-7340   | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$0.00                                  |
| Alameda County<br>Water District | Water                         | Acct #1 - 40473113<br>Acct #2 - 40473103<br>Acct #3 - 40473093                        | P.O Box 45676,<br>San Francisco, CA 94145-0676 | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$328.00                                |
| Republic Services                | Waste                         | 3-0916-0314443  | 42600 Boyce Road,<br>Fremont, California 94538 | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$777.00                                |
| AT&T                             | Phone/Internet                | Acct #1- 831-000-7735 689<br>Acct #2- 510-742-1929-410-8<br>Acct #3- 831-000-7857-724 | P.O. Box 5019,<br>Carol Stream, IL 60197-5025  | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$624.00                                |
| Ring Central Inc.                | Cloud-based<br>communications | 1671986020  | 20 Davis Drive,<br>Belmont, CA 94002           | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$1,138.00                              |

<sup>1</sup> The amount of the Adequate Assurance Deposit in the Adequate Assurance Account attributable to each Utility Provider is equal to 50% of the average monthly expense with respect to such Utility Provider based on the Debtor's books and records.

**Exhibit B**

**Proposed Final Order**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

Zosano Pharma Corporation,<sup>1</sup>

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

**Ref. Docket Nos.**

**FINAL ORDER (A) PROHIBITING UTILITY PROVIDERS FROM DISCONTINUING, ALTERING OR REFUSING SERVICE, (B) DEEMING UTILITY PROVIDERS ADEQUATELY ASSURED OF FUTURE PERFORMANCE, (C) ESTABLISHING AND APPROVING PROCEDURES FOR DETERMINING ASSURANCE OF PAYMENT, AND (D) GRANTING RELATED RELIEF**

Upon the motion (the “**Motion**”)<sup>2</sup> filed by the above-captioned debtor and debtor-in-possession (collectively, the “**Debtor**”), pursuant to sections 105(a) and 366 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004(h), seeking entry of interim and final orders: (a) prohibiting Utility Providers from discontinuing, altering or refusing to provide the Debtor with the Utility Services, (b) authorizing the Proposed Adequate Assurance, (c) establishing and approving the Adequate Assurance Procedures, (d) setting a Final Hearing, and (e) granting related relief; and upon the First Day Declaration [Docket No. ●]; and the Court having previously entered an order approving the Motion on an interim basis [Docket No. ●]; and the Debtor having funded the Adequate Assurance Deposit into the Adequate Assurance Account; and upon the statements of counsel in support of the relief requested in the Motion at the hearing before the Court; and it appearing that this Court has jurisdiction to consider the Motion 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; and it appearing that venue of this chapter 11 case

<sup>1</sup> The business address and the last four (4) digits of the Debtor’s federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Debtor having consented to the Court entering an order in the event this matter is deemed a non-core proceeding; and it appearing that proper and adequate notice of the Motion has been given under the circumstances and in accordance with the Bankruptcy Rules and Local Rules and that no other or further notice is necessary; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. Subject to the Adequate Assurance Procedures set forth below, and except for a Utility Provider that has properly served the Notice Parties with an Additional Adequate Assurance Request for which Court intervention has been requested or is otherwise pending, all Utility Providers are prohibited from discontinuing, altering or refusing service to, discriminating against, or requiring payment of a deposit or receipt of any other security for continued service to, the Debtor on account of any unpaid prepetition charges, as a result of the Debtor's commencement of this chapter 11 case or any perceived inadequacy of the Proposed Adequate Assurance, provided the Debtor is in compliance with the terms of this Final Order.
3. The Proposed Adequate Assurance constitutes adequate assurance of future payments as required under section 366 of the Bankruptcy Code.
4. The following Adequate Assurance Procedures are hereby approved on a final basis:
  - A. The Debtor will serve or cause to be served a copy of the Motion and this Final Order granting the relief requested herein, which include the Adequate Assurance Procedures, on each Utility Provider listed on the Utility Providers List within two (2) business days after the Court's entry of the Interim Order;

- B. The Debtor shall have deposited the Adequate Assurance Deposit into the Adequate Assurance Account within fourteen (14) days after the entry of the Interim Order;
- C. If a Utility Provider is not satisfied with the Adequate Assurance Deposit provided by the Debtor, the Utility Provider must serve a request for additional adequate assurance (the “**Additional Adequate Assurance Request**”) so that it is actually received by the following parties (collectively, the “**Notice Parties**”):
- the Debtor, 34790 Ardentech Court, Fremont, California 94555, Attn: Steven Lo;
  - proposed counsel to the Debtor, (a) Greenberg Traurig, LLP, The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware 19801, Attn: Dennis A. Meloro, Esq. (Melorod@gtlaw.com), (b) Greenberg Traurig, LLP, 3333 Piedmont Road NE, Suite 2500 Atlanta, Georgia 30305, Attn: John D. Elrod, Esq. (Elrodj@gtlaw.com), and (c) Greenberg Traurig, LLP 333 S.E. Second Ave, Suite 4400 Miami, Florida 33131, Attn: Ari Newman (Newmanar@gtlaw.com);
  - counsel to any statutory committee appointed in this chapter 11 case; and
  - the Office of the United States Trustee for the District of Delaware, 844 King Street, Room 2207, Wilmington, DE 19801 (Attn: [●]).
- D. An Additional Adequate Assurance Request must: (i) be in writing; (ii) set forth the amount and form of additional assurance of payment requested; (iii) set forth the type of Utility Services provided, (iv) set forth the location(s) at which the Utility Services are provided and any associated account number(s); (v) set forth whether the Utility Provider holds any deposit(s), prepayments or other security, and if so, in what amount(s); and (vi) set forth why the Utility Provider believes the Proposed Adequate Assurance is insufficient;
- E. Unless and until a Utility Provider serves an Additional Adequate Assurance Request on the Notice Parties, such Utility Provider shall be (i) deemed to have received adequate assurance of payment satisfactory to such Utility Provider in compliance with section 366 of the Bankruptcy Code, and (ii) prohibited from discontinuing, altering or refusing service to, or discriminating against, the Debtor on account of the commencement of this chapter 11 case, any unpaid prepetition charges or requiring additional assurance of payment other than the Proposed Adequate Assurance;
- F. In the event the Debtor receives an Additional Adequate Assurance Request in compliance with the Adequate Assurance Procedures, the Debtor shall have twenty-one (21) calendar days from the receipt of such Additional Adequate Assurance Request (the “**Resolution Period**”) to negotiate with the requesting Utility Provider to resolve its Additional Adequate Assurance Request; *provided that* during the Resolution Period, such Utility Providers may not terminate the

Utility Services they provide to the Debtor on account of the bankruptcy filing or any unpaid charges for prepetition services;

- G. The Debtor, in its discretion, may resolve any Additional Adequate Assurance Request by mutual agreement with the requesting Utility Provider and without further order of the Court, and may, in connection with any such resolution, provide the requesting Utility Provider, including, but not limited to, cash deposits, prepayments, and/or other forms of security, if the Debtor believes such additional assurance is reasonable. The Debtor may reduce the amount of the Adequate Assurance Deposit by any amount allocated to a Utility Provider to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtor and the affected Utility Provider. Additionally, within ten (10) calendar days of the request of the Debtor, following the completion of any sale or other disposition of all or substantially all of the Debtor's assets or stock and payment in full of all postpetition services, each Utility Provider that received any additional or alternative form of adequate assurance shall return said additional or alternative form of adequate assurance to the Debtor;
- H. If the Debtor determines that an Additional Adequate Assurance Request is not reasonable or cannot be resolved, the Debtor, during or promptly after the Resolution Period (as may be extended by the parties), will request a hearing before this Court to determine the adequacy of assurance of payment made to the requesting Utility Provider (the "**Determination Hearing**"), pursuant to section 366(c)(3)(A) of the Bankruptcy Code;
- I. Pending the resolution of the Additional Adequate Assurance Request at a Determination Hearing, the Utility Provider making such request shall be prohibited from discontinuing, altering, or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or any objections to the Proposed Adequate Assurance;
- J. Any Utility Provider that received service of the Motion and this Final Order is deemed to find the Proposed Adequate Assurance satisfactory to it and is forbidden from discontinuing, altering or refusing service to the Debtor on account of unpaid charges for prepetition services, the commencement of this chapter 11 case, or requiring additional assurance of payment (other than the Proposed Adequate Assurance);
- K. A Utility Provider shall be deemed to have adequate assurance of payment unless the Utility Provider makes an Additional Assurance Request and (a) the Debtor agrees to an Additional Assurance Request or agrees to an alternative assurance of payment with the Utility Provider during the Resolution Period or (b) this Court enters an order requiring that additional adequate assurance of payment be provided;
- L. The Adequate Assurance Deposit shall be deemed adequate assurance of payment for any Utility Provider that fails to make an Additional Assurance Request; and

M. At any time, the Debtor may terminate service from any of the Utility Providers, such termination being effective immediately upon the Debtor's notice to the Utility Provider. At such time, the Debtor shall no longer be required to make any more payments to such Utility Provider for any services provided after such termination, and any excess shall be returned forthwith.

5. No liens will encumber the Adequate Assurance Deposit or the Adequate Assurance Account.

6. In the event the Debtor defaults postpetition in respect of any of its obligations under this Final Order to any Utility Provider, such Utility Provider may seek additional adequate assurance in this Court upon motion and appropriate notice to the Debtor, its counsel and the other Notice Parties.

7. To the extent the Debtor subsequently identifies additional Utility Providers, determines that an entity was improperly included as a Utility Provider, determines that the amount of a deposit held by, or prepayments made to a Utility Provider was incorrect, or discontinues services from an existing Utility Provider, the Debtor is authorized, in its sole discretion and without further order of the Court, to amend the Utility Providers List to add or delete any Utility Provider or to correct the amount of a deposit held by, or prepayments made to a Utility Provider; *provided, however*, that the Debtor shall provide notice of any such addition, deletion, or correction to the Notice Parties. If the Debtor adds any Utility Providers to the Utility Providers List, the Debtor will serve a copy of the Motion, along with the applicable portion of the amended Utility Providers List and this Final Order, on such Utility Provider, and provide such Utility Provider ten (10) business days from the date of service of such notice to object to its inclusion on the Utility Providers List. Subject to a timely served objection by any such subsequently added Utility Provider, such subsequently added Utility Provider will be subject to the Adequate Assurance Procedures. For any entity that is removed from the Utility Providers List, the Debtor shall serve

that entity with notice of removal and such entity shall have five (5) business days from the date of service of such notice to object to that removal.

8. Notwithstanding the relief granted herein or any actions taken pursuant thereto, nothing herein shall be deemed: (a) an admission as to the validity of any claim against the Debtor; (b) a waiver of the Debtor's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined hereunder; (e) a request or authorization to assume any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

9. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Final Order.

10. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon entry hereof.

11. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation and/or interpretation of this Final Order.

**Annex 1**

**List of Utility Providers**

| Utility Provider                 | Utility Service               | Account Number(s)   | Utility Provider Address                       | Service Address                             | Adequate Assurance Deposit <sup>1</sup> |
|----------------------------------|-------------------------------|---|--|---|---|
| PG&E                             | Electric                      | 12844046800   | P.O Box 997340,<br>Sacramento, CA 95899-7340   | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$0.00                                  |
| Alameda County<br>Water District | Water                         | Acct #1 - 40473113<br>Acct #2 - 40473103<br>Acct #3 - 40473093                        | P.O Box 45676,<br>San Francisco, CA 94145-0676 | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$328.00                                |
| Republic Services                | Waste                         | 3-0916-0314443  | 42600 Boyce Road,<br>Fremont, California 94538 | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$777.00                                |
| AT&T                             | Phone/Internet                | Acct #1- 831-000-7735 689<br>Acct #2- 510-742-1929-410-8<br>Acct #3- 831-000-7857-724 | P.O. Box 5019,<br>Carol Stream, IL 60197-5025  | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$624.00                                |
| Ring Central Inc.                | Cloud-based<br>communications | 1671986020  | 20 Davis Drive,<br>Belmont, CA 94002           | 34790 Ardentech Court,<br>Fremont, CA 94555 | \$1,138.00                              |

<sup>1</sup> The amount of the Adequate Assurance Deposit attributable to each Utility Provider is equal to 50% of the average monthly expense the Debtor incurs with respect to such Utility Provider.