

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

UBIOME, INC.,¹

Debtor.

Chapter 11

Case No. 19-____ (____)

**DEBTOR’S MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR
DISCONTINUING SERVICE; (B) APPROVING THE DEBTOR’S PROPOSED
ADEQUATE ASSURANCE OF PAYMENT FOR POSTPETITION SERVICES; AND
(C) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS FOR
ADDITIONAL ADEQUATE ASSURANCE OF PAYMENT**

uBiome, Inc., the debtor and debtor in possession in the above-captioned chapter 11 case (the “Debtor”) hereby moves the Court (this “Motion”) for entry of an interim order (the “Interim Order”) and a final order (the “Final Order”) substantially in the form annexed hereto as Exhibit A and Exhibit B, respectively, pursuant to sections 105(a) and 366 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), (a) prohibiting the Utility Providers (as defined below) from (i) altering, refusing, or discontinuing utility services to, or discriminating against, the Debtor on account of any outstanding amounts for services rendered prepetition or (ii) drawing upon any existing security deposit, surety bond, or other form of security to secure future payment for utility services; (b) determining that adequate assurance of payment for postpetition utility services has been furnished to the Utility Providers; and (c) establishing procedures for resolving future requests by any Utility Provider for additional adequate assurance of payment. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Curtis G. Solsvig III in Support of the Debtor’s Chapter 11 Petition*

¹ The Debtor and the last four digits of its taxpayer identification number is: uBiome, Inc. (0019). The Debtor’s headquarters is located at 360 Langton Street, Suite 301, San Francisco, CA 94103.

and Requests for First Day Relief (the “First Day Declaration”), which was filed concurrently herewith.² In further support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and 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 order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105(a) and 366 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004.

BACKGROUND

2. On the date hereof (the “Petition Date”), the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code (this “Chapter 11 Case”). Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor is continuing to manage its financial affairs as debtor in possession. No trustee, examiner, or official committee of unsecured creditors has been appointed in this Chapter 11 Case.

² Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the First Day Declaration.

3. Additional information regarding the Debtor's history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of this Chapter 11 Case can be found in the First Day Declaration.

UTILITY SERVICES AND UTILITY PROVIDERS

4. In conjunction with the operation of its business, the Debtor receives traditional utility services from various utility providers (each, a "Utility Provider" and collectively, the "Utility Providers") set forth on Exhibit C hereto (the "Utility Providers List") at its corporate headquarters, lab facility, and warehouses in San Francisco, California. The Utility Providers provide among other things, electricity, water, gas, sewer, waste removal, telecommunications, and other similar services (collectively, the "Utility Services").

5. The Debtor paid an average of approximately \$9,620 per month on account of all Utility Services for the 12-month period preceding the Petition Date.

6. The termination or cessation (even if only temporary) of any of the Utility Services will result in disruption to the Debtor's business, as well as a potential loss of revenue and profits. Any interruption of the Utility Services would diminish or impair the Debtor's efforts to preserve and maximize the value of its estate and to successfully prosecute this Chapter 11 Case. It is, therefore, critical that the Utility Services continue uninterrupted.

RELIEF REQUESTED

7. Section 366 of the Bankruptcy Code prohibits a utility company, within the first 30 days after the filing of a chapter 11 case, from altering, refusing, or discontinuing services to, or discriminating against, a debtor solely on the basis of the commencement of bankruptcy proceedings or the debtor's failure to pay a prepetition debt.³ In a chapter 11 case, once the

³ There is an apparent discrepancy between subsections (b) and (c) of section 366 of the Bankruptcy Code because these two subsections set forth different time periods during which a utility is prohibited from altering, refusing or

initial 30 days have expired, a utility company may discontinue services if the debtor has not provided the utility company with “adequate assurance of payment for utility service that is satisfactory to the utility.” 11 U.S.C. § 366(c)(2).

8. By this Motion, the Debtor respectfully requests entry of the Interim Order and the Final Order, pursuant to sections 105(a) and 366 of the Bankruptcy Code, (a) prohibiting the Utility Providers from (i) altering, refusing, or discontinuing Utility Services to, or discriminating against, the Debtor on account of any outstanding amounts for services rendered prepetition or (ii) drawing upon any existing security deposit, surety bond, or other form of security to secure future payment for utility services, (b) determining that adequate assurance of payment for postpetition Utility Services has been furnished to the Utility Providers providing services to the Debtor, and (c) establishing exclusive procedures for resolving future requests by any Utility Provider for additional adequate assurance of payment.

A. Proposed Adequate Assurance

9. The Debtor intends to pay undisputed postpetition charges for Utility Services when due in the ordinary course of business. Nevertheless, consistent with section 366(c)(1)(A) of the Bankruptcy Code, which defines the phrase “assurance of payment” to include, among other things, a cash deposit, the Debtor proposes to deposit, within 20 days of the Petition Date,

discontinuing utility service. Specifically, section 366(b) of the Bankruptcy Code allows a utility to alter, refuse, or discontinue service “if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment,” while section 366(c)(2) of the Bankruptcy Code allows a utility in “a case filed under chapter 11 . . . [to] alter, refuse or discontinue service” to a chapter 11 debtor “if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service. . . .” (emphasis added).

Under the statutory construction canon *lex specialis derogat legi generali* (“specific language controls over general”), the language of section 366(c)(2) controls here because the Debtor is a chapter 11 Debtor. See 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 366.03 (16th ed. 2018) (“It is unclear how the 30-day period [in section 366(c)(2) of the Bankruptcy Code] meshes with the normal 20-day period in section 366(b). The better view is that, because section 366(c) is more specifically applicable to chapter 11 cases, the 30-day period, rather than the 20-day period in section 366(b), should apply.”). Nevertheless, by this Motion the Debtor proposes to provide the Adequate Assurance Deposit (as defined below) within 20 days of the Petition Date.

an amount equal to 50% of the estimated monthly cost of Utility Services, calculated based on the historical data for the 12 months preceding the Petition Date (the “Adequate Assurance Deposit”) into one segregated bank account designated for the Adequate Assurance Deposit (the “Adequate Assurance Deposit Account”) for the benefit of all Utility Providers. Thus, in order to maintain uninterrupted Utility Services, the Debtor proposes to deposit the Adequate Assurance Deposit into the Adequate Assurance Deposit Account within 20 days of the Petition Date. Thereafter, the Debtor proposes to adjust the amount in the Adequate Assurance Deposit Account to reflect several factors: (a) the termination of Utility Services by the Debtor regardless of any Additional Assurance Requests and (b) agreements reached with Utility Providers. These adjustments will permit the Debtor to maintain the Adequate Assurance Deposit Account with an amount that consistently provides the Utility Providers with a half-month deposit on account of such services.

10. While the form of adequate assurance of payment may be limited to the types of security enumerated in section 366(c)(1)(A) of the Bankruptcy Code, the determination of the amount of the adequate assurance is within the discretion of the Court. It is well established that the requirement that a utility receive adequate assurance of payment does not require a guarantee of payment. Instead, the protection granted to a utility under section 366 of the Bankruptcy Code is intended to avoid exposing the utility to an unreasonable risk of nonpayment.

11. The Debtor submits that the Adequate Assurance Deposit and maintenance of the Adequate Assurance Deposit Account as described above, in conjunction with the Debtor’s ability to pay for future utility services in the ordinary course of business (together, the “Proposed Adequate Assurance”), constitutes sufficient adequate assurance of future payment to the Utility Providers to satisfy the requirements of section 366 of the Bankruptcy Code.

However, if any Utility Provider believes additional assurance is required, they may request such assurance pursuant to the procedures described below.

B. Proposed Adequate Assurance Procedures

12. In light of the severe consequences to the Debtor of any interruption in services by the Utility Providers, but recognizing the right of each Utility Provider to evaluate the Proposed Adequate Assurance on a case-by-case basis, the Debtor requests that the Court approve, and allow the Debtor to implement, the following procedures (the “Adequate Assurance Procedures”) by which a Utility Provider not satisfied with the Proposed Adequate Assurance may request additional adequate assurance (an “Additional Assurance Request”):

- a. Within two (2) business days of the date the Interim Order is docketed, the Debtor will mail a copy of the Interim Order to the Utility Providers on the Utility Providers List;
- b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurance of payment in the form of a deposit, letter of credit, prepayment, or otherwise, it must serve an Additional Assurance Request upon (a) proposed counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Jordan E. Sazant (email: jsazant@ycst.com)), and (b) counsel to the DIP Financing Parties: (i) Morrison & Foerster LLP, 200 Clarendon St., Boston, MA 02116 (Attn: Alex Rheaume) (arheaume@mfo.com), and (ii) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Jason Goldstein) (jgoldstein@gibsondunn.com) (collectively, the “Notice Parties”);
- c. Each Additional Assurance Request must (a) be made in writing; (b) set forth all location(s) for which Utility Services are provided and the relevant account number(s); (c) include a summary of the Debtor’s payment history relevant to the affected account(s); (d) describe any deposits or other security currently held by the requesting Utility Provider; and (e) identify and explain the basis of the Utility Provider’s proposed adequate assurance requirement under section 366(c)(2) of the Bankruptcy Code;
- d. Upon the Notice Parties’ receipt of an Additional Assurance Request at the addresses set forth in subparagraph (b) above, the Debtor shall promptly negotiate with such Utility Provider to resolve such Utility Provider’s Additional Assurance Request;

- e. If the Debtor determines that an Additional Assurance Request is not reasonable and is unable to reach an alternative resolution with the applicable Utility Provider, the Debtor shall, upon reasonable notice, calendar the matter (the “Adequate Assurance Dispute”) as promptly as practicable pursuant to section 366(c)(3) of the Bankruptcy Code;
- f. Pending resolution of any such Adequate Assurance Dispute, any such Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtor on account of unpaid charges for prepetition services, the filing of the Chapter 11 Case, or any objection to the adequacy of the Proposed Adequate Assurance;
- g. The Debtor may, in its discretion, resolve any Adequate Assurance Dispute by mutual agreement with the requesting Utility Provider without further notice to the Court or any other party in interest and may, in connection with any such agreement, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, a cash deposit, prepayment, letter of credit, and/or other forms of security, without further order of the Court to the extent the Debtor believes that such additional assurance is reasonable in the exercise of its business judgment and the Debtor may, by mutual agreement with the objecting Utility Provider and without further order of the Court, reduce the Adequate Assurance Deposit by an amount not exceeding the requesting Utility Provider’s estimated two-week utility expense; and
- h. Upon the termination of Utility Services, as applicable, the Debtor may, in its discretion, and without further order of the Court, reduce the Adequate Assurance Deposit by an amount not exceeding, for each of the Utility Services being discontinued, the lesser of (a) the estimated two-week utility expense for such Utility Services and (b) the amount of the Adequate Assurance Deposit then attributable to the applicable Utility Provider, *provided* that for any Utility Provider for which the Adequate Assurance Deposit is reduced, the Debtor shall have paid such Utility Provider in full for any outstanding postpetition Utility Services before reducing the Adequate Assurance Deposit, and the Utility Provider does not dispute that it has been paid in full for postpetition services.

13. In addition to establishing the Adequate Assurance Procedures, the Debtor requests a Final Hearing on this Motion to be held within twenty-five (25) days of the Petition Date to ensure that, if a Utility Provider argues it can unilaterally refuse service to the Debtor on the thirty-first (31st) day after the Petition Date, the Debtor will have the opportunity, to the extent necessary, to request that the Court make such modifications to the Adequate Assurance Procedures in time to avoid any potential termination of the Utility Services.

C. Subsequent Modification of the Utility Providers List

14. The Debtor requests that it be allowed, without further order of the Court, to supplement the Utility Providers List if any Utility Provider has been inadvertently omitted therefrom (each an “Additional Utility Provider”). If the Debtor determines that the Utility Providers List should be supplemented, the Debtor will, as soon as practicable, file with the Court a supplement to Exhibit C adding the name of any Additional Utility Provider to the Utility Providers. The Debtor will then serve by email or by facsimile transmission (or, where the Debtor does not have the email address or fax number of a Utility Provider, by First Class Mail) a copy of this Motion and the signed Interim Order or Final Order, as applicable, on any Additional Utility Provider.

15. Finally, the Debtor requests that the Interim Order and the Final Order provide that the Debtor may terminate the services of any Utility Provider by providing written notice (a “Termination Notice”) to the Utility Provider. Upon receipt of a Termination Notice by a Utility Provider, the Debtor proposes that it be permitted to immediately reduce the Adequate Assurance Deposit for such Utility Provider, as set forth above.

BASIS FOR RELIEF

A. Section 366 of the Bankruptcy Code Grants the Court the Discretion to Determine the Adequacy of the Debtor’s Proposed Adequate Assurance

16. Congress enacted section 366 of the Bankruptcy Code to protect a debtor from immediate termination of utility services after filing for bankruptcy, while at the same time providing the utility companies with adequate assurance of payment for postpetition utility services. *See* H.R. Rep. No. 95-595, at 350 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6306. Section 366 defines “assurance of payment” to mean several forms of security, including cash deposits, letters of credit, and prepayment of utility services. 11 U.S.C. § 366(c)(1)(A). Section

366(c)(1)(B) explicitly excludes, however, offering administrative expense priority as adequate assurance of payment.

17. While section 366(c) of the Bankruptcy Code sets forth what constitutes adequate assurance of payment, the bankruptcy court nonetheless retains discretion to determine what, if any, adequate assurance is necessary to satisfy section 366's requirement that assurance of payment must only be adequate. *See In re Adelpia Bus. Sols., Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) ("The bankruptcy courts are in agreement that section 366(b) vests in the bankruptcy court the exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service for non-payment of pre-petition utility bills.") (citing *In re Begley*, 41 B.R. 402, 405–06 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985)). Accordingly, a court is not required to give the utility companies an "absolute guarantee of payment," or require that the adequate assurance take the form of a deposit, bond, letter of credit, or similar security. *In re Caldor, Inc.—N.Y.*, 199 B.R. 1, 3 (S.D.N.Y. 1996), *aff'd sub nom. Va. Elec. & Power Co. v. Caldor, Inc.—N.Y.*, 117 F.3d 646 (2d Cir. 1997).

18. Rather, in considering the facts and circumstances of each case, the Court must ensure only that the utility is not subject to an unreasonable risk of non-payment for postpetition services. *See In re Adelpia Bus. Sols., Inc.*, 280 B.R. at 80; *Mass. Elec. Co. v. Keydata Corp. (In re Keydata Corp.)*, 12 B.R. 156, 158 (B.A.P. 1st Cir. 1981). The Court, therefore, must strike a balance between satisfying the utility company's need for adequate assurance and ensuring that the debtor gives no more than what is adequate, as the debtor has a conflicting need to conserve financial resources. *See In re Magnesium Corp. of Am.*, 278 B.R. 698, 714 (Bankr. S.D.N.Y. 2002) (holding that to require the debtor to allocate valuable liquidity to provide further

“adequate assurance” to satisfy a utility’s obligations before their amount has been fixed would prejudice the entirety of the debtor’s unsecured creditor body for the benefit of a single one).

19. In determining whether a utility is subject to an unreasonable risk of non-payment, the Court may consider whether the utility would seek the same additional security from a non-bankruptcy customer. *See In re Caldor, Inc.—N.Y.*, 199 B.R. at 3 (finding that the utility companies were not seeking additional security for an adequate assurance of future payment, but solely because their monopoly position permitted them to capitalize on the debtors’ bankruptcy filing); *Whittaker v. Phila. Elec. Co. (In re Whittaker)*, 84 B.R. 934, 941–42 (Bankr. E.D. Pa. 1988), *aff’d*, 92 B.R. 110 (E.D. Pa. 1988), *aff’d*, 882 F.2d 791 (3d Cir. 1989). The Court may not consider, however, the absence of security before the petition date, the debtor’s history of timely payments, or the availability of an administrative expense priority. 11 U.S.C. § 366(c)(3)(B).

B. The Debtor’s Proposed Adequate Assurance is Routinely Upheld as Adequate by Courts in this District

20. Given that the Court has the discretion to determine the assurance necessary to satisfy the Utility Providers’ needs, the Debtor submits that the Proposed Adequate Assurance is more than adequate to ensure that the Debtor will meet its postpetition utility obligations. Indeed, the Debtor’s proposal comports with numerous orders entered by this and other bankruptcy courts.

21. Because the Debtor’s receipt of uninterrupted Utility Services is vital to the Debtor’s continued business operations and, consequently, to the success of this Chapter 11 Case, the relief requested herein is necessary and in the best interests of the Debtor, its estate, and creditors. Such relief ensures that the Debtor’s business operations will not be disrupted and

provides Utility Companies and the Debtor with an orderly and fair procedure for determining “adequate assurance.”

22. Based upon the foregoing, the Debtor submits that the relief requested herein should be granted.

C. Immediate Relief is Justified

23. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within 21 days after the filing of the petition regarding a motion to “use, sell, lease, or otherwise incur an obligation regarding property of the estate” only if such relief is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003(b). Immediate and irreparable harm exists where the absence of relief would impair a debtor’s ability to reorganize or threaten the debtor’s future as a going concern. *See In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of “immediate and irreparable harm” in relation to Bankruptcy Rule 4001).

24. Moreover, Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein to avoid harm to the Debtor’s customers and other third parties. Unlike Bankruptcy Rule 4001, Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of “immediate and irreparable harm” generally. *Cf.* Fed. R. Bankr. P. 4001(b)(2), (c)(2) (referring to “irreparable harm to the estate”). Indeed, the “irreparable harm” standard is analogous to the traditional standards governing the issuance of preliminary injunctions. *See* 9 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 4001.07[b][3] (16th ed. 2018) (discussing source of “irreparable harm” standard under Rule 4001(c)(2)). Courts will routinely consider third-party interests when granting such relief. *See, e.g., Capital Ventures Int’l v. Argentina*, 443 F.3d 214,

223 n.7 (2d Cir. 2006); *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001).

25. As described herein and in the First Day Declaration, the Debtor will suffer immediate and irreparable harm without Court authority to pay all undisputed invoices for Utility Services rendered by the Utility Providers to the Debtor after the Petition Date and to provide the Adequate Assurance Deposit for the benefit of the Utility Providers. If the relief is not granted, the Debtor's business operations that may suffer a significant disruption, thereby causing immediate and irreparable harm to the Debtor's estate and, consequently, other interested parties.

26. Accordingly, the Debtor submits that Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

REQUEST FOR WAIVER OF STAY

27. The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[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(h). As described above, the relief that the Debtor seeks in this Motion is necessary for the Debtor to operate its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

RESERVATION OF RIGHTS

28. Nothing contained herein (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtor and its estate, (ii) shall impair, prejudice, or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority, or

amount of any claim against the Debtor and its estate, (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to any and all claims or causes of action against any Utility Provider, or (iv) shall be construed as a promise to pay a claim.

NOTICE

29. The Debtor will provide notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) holders of the 30 largest unsecured claims against the Debtor; (c) counsel to the DIP Financing Parties; (d) the Utility Providers; and (e) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware
September 4, 2019

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Andrew L. Magaziner

Michael R. Nestor (No. 3526)

Joseph M. Barry (No. 4221)

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Proposed Counsel to the Debtor and Debtor in Possession

EXHIBIT A

PROPOSED INTERIM ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

UBIOME, INC.,¹

Debtor.

Chapter 11

Case No. 19-____ (____)

Ref. Docket No. _____

INTERIM ORDER (A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE; (B) APPROVING THE DEBTOR'S PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR POSTPETITION SERVICES; AND (C) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE OF PAYMENT

Upon the *Debtor's Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Service; (B) Approving the Debtor's Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment* (the "Motion")² filed by the above-captioned debtor and debtor in possession (the "Debtor"); and upon consideration of the First Day Declaration; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found 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 this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and a

¹ The Debtor and the last four digits of its taxpayer identification number is: uBiome, Inc. (0019). The Debtor's headquarters is located at 360 Langton Street, Suite 301, San Francisco, CA 94103.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

hearing having been held to consider the relief requested in the Motion; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors, and all other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on an interim basis until such time as this Court conducts a final hearing on this matter (the "Final Hearing").

2. The Final Hearing shall take place on _____, 2019 at __:__ .m. (prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before 4:00 p.m. (prevailing Eastern Time) _____, 2019 and served on (a) the Office of the United States Trustee for the District of Delaware, (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Joseph M. Mulvihill (jmulvihill@ycst.com), and Jordan E. Sazant (jsazant@ycst.com)), (c) counsel to any statutory committee appointed in this Chapter 11 Case, and (d) counsel to the DIP Financing Parties, (i) Morrison & Foerster LLP, 200 Clarendon St., Boston, MA 02116 (Attn: Alex Rheume) (arheume@mfo.com), and (ii) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Jason Goldstein) (jgoldstein@gibsondunn.com). If no objections are timely filed, this Court may enter the Final Order without further notice or hearing.

3. The Debtor is authorized to pay on a timely basis, in accordance with its prepetition practices, all undisputed invoices for Utility Services rendered by the Utility Providers to the Debtor after the Petition Date.

4. The Debtor shall provide an Adequate Assurance Deposit for all Utility Providers by depositing 50% of the estimated monthly cost of Utility Services into a segregated Adequate Assurance Deposit Account, within 20 days of the Petition Date, to be maintained on terms consistent with the Motion.

5. The Proposed Adequate Assurance comprises the Adequate Assurance Deposit and the Debtor's ability to pay for future Utility Services in the ordinary course of business, and subject to the Adequate Assurance Procedures set forth below, constitutes sufficient adequate assurance of future payment to the Utility Providers to satisfy the requirements of section 366 of the Bankruptcy Code.

6. Pending entry of the Final Order, the Utility Providers are prohibited from (a) altering, refusing, or discontinuing Utility Services to, or discriminating against, the Debtor on the basis of the commencement of the Chapter 11 Case or on account of any unpaid prepetition charges or (b) requiring additional adequate assurance of payment other than the Proposed Adequate Assurance, as a condition of the Debtor continuing to receive Utility Services.

7. The following Adequate Assurance Procedures are approved:

- a. Within two (2) business days of the date this Interim Order is docketed, the Debtor shall mail a copy of this Interim Order to the Utility Providers on the Utility Providers List;
- b. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurance of payment in the form of a deposit, letter of credit, prepayment, or otherwise, it must serve an Additional Assurance Request upon (a) proposed counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Jordan E. Sazant (jsazant@ycst.com)), and (b) counsel to the DIP Financing Parties (i) Morrison & Foerster LLP, 200 Clarendon St., Boston, MA 02116 (Attn: Alex Rheaume) (arheaume@mof.com), and (ii) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Jason Goldstein) (jgoldstein@gibsondunn.com) (collectively, the "Notice Parties");

- c. Each Additional Assurance Request must (a) be made in writing; (b) set forth all location(s) for which utility services are provided and the relevant account number(s); (c) include a summary of the Debtor's payment history relevant to the affected account(s); (d) describe any deposits or other security currently held by the requesting Utility Provider; and (e) identify and explain the basis of the Utility Provider's proposed adequate assurance requirement under section 366(c)(2) of the Bankruptcy Code;
- d. Upon the Notice Parties' receipt of an Additional Assurance Request at the addresses set forth in subparagraph (b) above, the Debtor shall promptly negotiate with such Utility Provider to resolve such Utility Provider's Additional Assurance Request;
- e. If the Debtor determines that an Additional Assurance Request is not reasonable and is unable to reach an alternative resolution with the applicable Utility Provider, the Debtor shall, upon reasonable notice, calendar the matter (the "Adequate Assurance Dispute") for the next omnibus hearing date after the receipt of the request;
- f. Pending resolution of any such Adequate Assurance Dispute, any such Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtor on account of unpaid charges for prepetition services, the filing of this Chapter 11 Case, or any objection to the adequacy of the Proposed Adequate Assurance;
- g. The Debtor may, in its discretion, resolve any Adequate Assurance Dispute by mutual agreement with the requesting Utility Provider without further notice to this Court or any other party in interest and may, in connection with any such agreement, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, a cash deposit, prepayment, letter of credit, and/or other forms of security, without further order of this Court to the extent the Debtor believes that such additional assurance is reasonable in the exercise of its business judgment and the Debtor may, by mutual agreement with the objecting Utility Provider and without further order of this Court, reduce the Adequate Assurance Deposit by an amount not exceeding the requesting Utility Provider's estimated two-week utility expense; and
- h. Upon the termination of Utility Services, as applicable, the Debtor may, in its discretion, and without further order of this Court, reduce the Adequate Assurance Deposit by an amount not exceeding, for each of the Utility Services being discontinued, the lesser of (a) the estimated two-week utility expense for such Utility Services and (b) the amount of the Adequate Assurance Deposit then attributable to the applicable Utility Provider, *provided* that for any Utility Provider for which the Adequate Assurance Deposit is reduced, the Debtor shall have paid such Utility Provider in full for any outstanding postpetition Utility Services before reducing the Adequate Assurance Deposit, and the Utility Provider does not dispute that it has been paid in full for postpetition services.

8. The Debtor may supplement the Utility Providers List without further order of this Court with Additional Utility Providers if such Additional Utility Providers were inadvertently omitted from the Utility Providers List, and the Debtor will file as soon as practicable with this Court a supplement to Exhibit C annexed to the Motion that adds the name of any Additional Utility Provider to the Utility Providers List. The Debtor will then serve by email or by facsimile transmission (or, where the Debtor does not have the email address or fax number of an Additional Utility Provider, by First Class Mail) a copy of the Motion and this Interim Order on any Additional Utility Provider. Following service of the Motion, any Additional Utility Provider will be bound by this Interim Order and the Debtor shall provide an Adequate Assurance Deposit into the segregated Adequate Assurance Deposit Account equal to the estimated cost for two weeks of Utility Service from such Additional Utility Provider as soon as practical after the addition of the Additional Utility Provider to the Utility Providers List.

9. No money may be withdrawn from the Adequate Assurance Deposit Account except (a) in compliance with the Adequate Assurance Procedures, (b) by mutual agreement of the Debtor and the applicable Utility Provider, or (c) by further order of this Court. If the Debtor fails to pay for any legitimate postpetition Utility Services when due, a Utility Provider may access only that portion of the Adequate Assurance Deposit attributable to it in the Adequate Assurance Deposit Account.

10. The Debtor shall administer the Adequate Assurance Deposit Account in accordance with the terms of this Interim Order, pending entry of a Final Order.

11. Without further order of this Court, the Debtor may enter into agreements granting an Additional Assurance Request to a Utility Provider if the Debtor, in its discretion, determines that the Additional Assurance Request is reasonable.

12. The portion of the Adequate Assurance Deposit attributable to each Utility Provider shall be returned to the Debtor upon the conclusion of this Chapter 11 Case, if not applied earlier.

13. Nothing contained herein constitutes a finding that any entity is or is not a Utility Provider hereunder or under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Utility Providers List.

14. Within two business days of filing a supplement to the Utility Providers List, as applicable, the Debtor shall serve a copy of this Interim Order and the Motion on any applicable Additional Utility Provider.

15. Nothing in the Motion or this Interim Order, or the Debtor's payment of any claims pursuant to this Interim Order, shall be deemed or construed as: (a) an admission as to the validity of, or a promise to pay with respect to, any claim or lien against the Debtor or its estate, (b) a waiver of the Debtor's right to dispute any claim or lien, (c) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, (d) an admission of the priority status of any claim, whether under section 503(b)(9) of the Bankruptcy Code or otherwise, or (e) a modification of the Debtor's rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Utility Provider.

16. Nothing in this Interim Order authorizes the Debtor to pay prepetition claims without further order of this Court.

17. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion, as granted herein, is necessary to avoid immediate and irreparable harm to the Debtor.

18. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

19. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

20. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge

EXHIBIT B

PROPOSED FINAL ORDER

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

UBIOME, INC.,¹

Debtor.

Chapter 11

Case No. 19-____ (____)

Ref. Docket Nos. _____ & _____

FINAL ORDER (A) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING, OR DISCONTINUING SERVICE; (B) APPROVING THE DEBTOR'S PROPOSED ADEQUATE ASSURANCE OF PAYMENT FOR POSTPETITION SERVICES; AND (C) ESTABLISHING PROCEDURES FOR RESOLVING REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE OF PAYMENT

Upon the *Debtor's Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Service; (B) Approving the Debtor's Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment* (the "Motion")² filed by the above-captioned debtor and debtor in possession (the "Debtor"); and upon consideration of the First Day Declaration; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found 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 this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and

¹ The Debtor and the last four digits of its taxpayer identification number is: uBiome, Inc. (0019). The Debtor's headquarters is located at 360 Langton Street, Suite 301, San Francisco, CA 94103.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

upon the record of all hearings on the Motion and all of the proceedings had before this Court; and this Court having previously entered that certain *Interim Order (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Service; (B) Approving the Debtor's Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment* [D.I. ____]; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, its estate, its creditors, and all other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on a final basis.
2. The Debtor is authorized to pay on a timely basis, in accordance with its prepetition practices, all undisputed invoices for Utility Services rendered by the Utility Providers to the Debtor after the Petition Date.
3. To the extent not otherwise already done, the Debtor shall provide an Adequate Assurance Deposit for all Utility Providers by depositing 50% of the estimated monthly cost of Utility Services into a segregated Adequate Assurance Deposit Account within 20 days of the Petition Date, to be maintained on terms consistent with the Motion.
4. The Proposed Adequate Assurance comprises the Adequate Assurance Deposit and the Debtor's ability to pay for future utility services in the ordinary course of business, and subject to the Adequate Assurance Procedures set forth below, constitutes sufficient adequate assurance of future payment to the Utility Providers to satisfy the requirements of section 366 of the Bankruptcy Code.

5. The Utility Providers are prohibited from (a) altering, refusing, or discontinuing Utility Services to, or discriminating against, the Debtor on the basis of the commencement of the Chapter 11 Case or on account of any unpaid prepetition charges or (b) requiring additional adequate assurance of payment other than the Proposed Adequate Assurance, as a condition of the Debtor continuing to receive Utility Services.

6. The following Adequate Assurance Procedures are approved:

- a. If a Utility Provider is not satisfied with the Proposed Adequate Assurance and seeks additional assurance of payment in the form of a deposit, letter of credit, prepayment, or otherwise, it must serve an Additional Assurance Request upon (a) proposed counsel to the Debtor, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Jordan E. Sazant (jsazant@ycst.com)), and (b) counsel to the DIP Financing Parties (i) Morrison & Foerster LLP, 200 Clarendon St., Boston, MA 02116 (Attn: Alex Rheume) (arheume@mof.com), and (ii) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193 (Attn: Jason Goldstein) (jgoldstein@gibsondunn.com), (collectively, the “Notice Parties”);
- b. Each Additional Assurance Request must (a) be made in writing; (b) set forth all location(s) for which utility services are provided and the relevant account number(s); (c) include a summary of the Debtor’s payment history relevant to the affected account(s); (d) describe any deposits or other security currently held by the requesting Utility Provider; and (e) identify and explain the basis of the Utility Provider’s proposed adequate assurance requirement under section 366(c)(2) of the Bankruptcy Code;
- c. Upon the Notice Parties’ receipt of an Additional Assurance Request at the address set forth in subparagraph (a) above, the Debtor shall promptly negotiate with such Utility Provider to resolve such Utility Provider’s Additional Assurance Request;
- d. If the Debtor determines that an Additional Assurance Request is not reasonable and is unable to reach an alternative resolution with the applicable Utility Provider, the Debtor shall, upon reasonable notice, calendar the matter (the “Adequate Assurance Dispute”) for the next omnibus hearing date after the receipt of the request;
- e. Pending resolution of any such Adequate Assurance Dispute, any such Utility Provider shall be prohibited from altering, refusing, or discontinuing service to the Debtor on account of unpaid charges for prepetition services, the filing of the Chapter 11 Case, or any objection to the adequacy of the Proposed Adequate Assurance;

- f. The Debtor may, in its discretion, resolve any Adequate Assurance Dispute by mutual agreement with the requesting Utility Provider without further notice to this Court or any other party in interest and may, in connection with any such agreement, provide a Utility Provider with additional adequate assurance of future payment, including, but not limited to, a cash deposit, prepayment, letter of credit, and/or other forms of security, without further order of this Court to the extent the Debtor believes that such additional assurance is reasonable in the exercise of its business judgment and the Debtor may, by mutual agreement with the objecting Utility Provider and without further order of this Court, reduce the Adequate Assurance Deposit by an amount not exceeding the requesting Utility Provider's estimated two-week utility expense; and
- g. Upon the termination of Utility Services, as applicable, the Debtor may, in its discretion, and without further order of this Court, reduce the Adequate Assurance Deposit by an amount not exceeding, for each of the Utility Services being discontinued, the lesser of (a) the estimated two-week utility expense for such Utility Services and (b) the amount of the Adequate Assurance Deposit then attributable to the applicable Utility Provider, *provided* that for any Utility Provider for which the Adequate Assurance Deposit is reduced, the Debtor shall have paid such Utility Provider in full for any outstanding postpetition Utility Services before reducing the Adequate Assurance Deposit, and the Utility Provider does not dispute that it has been paid in full for postpetition services.

7. The Debtor may supplement the Utility Providers List without further order of this Court with Additional Utility Providers if such Additional Utility Providers were inadvertently omitted from the Utility Providers List, and the Debtor will file as soon as practicable with this Court a supplement to Exhibit C annexed to the Motion that adds the name of any Additional Utility Provider to the Utility Providers List. The Debtor will then serve by email or by facsimile transmission (or, where the Debtor does not have the email address or fax number of an Additional Utility Provider, by First Class Mail) a copy of the Motion and this Final Order on any Additional Utility Provider. Following service of the Motion, any Additional Utility Provider will be bound by this Final Order and the Debtor shall provide an Adequate Assurance Deposit into the segregated Adequate Assurance Deposit Account equal to the estimated cost for two weeks of Utility Service from such Additional Utility Provider as soon as practical after the addition of the Additional Utility Provider to the Utility Providers List.

8. No money may be withdrawn from the Adequate Assurance Deposit Account except (a) in compliance with the Adequate Assurance Procedures, (b) by mutual agreements of the Debtor and the applicable Utility Provider, or (c) by further order of this Court. If the Debtor fails to pay for any legitimate postpetition Utility Services when due, a Utility Provider may access only that portion of the Adequate Assurance Deposit attributable to it in the Adequate Assurance Deposit Account.

9. The Debtor shall administer the Adequate Assurance Deposit Account in accordance with the terms of this Final Order.

10. Without further order of this Court, the Debtor may enter into agreements granting an Additional Assurance Request to a Utility Provider if the Debtor, in its discretion, determines that the Additional Assurance Request is reasonable.

11. The portion of Adequate Assurance Deposit attributable to each Utility Provider shall be returned to the Debtor upon the conclusion of the Chapter 11 Case, if not applied earlier.

12. Nothing contained herein constitutes a finding that any entity is or is not a Utility Provider hereunder or under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Utility Providers List.

13. Nothing in this Order authorizes the Debtor to pay prepetition claims without further order of this Court.

14. Nothing in the Motion or this Final Order, or the Debtor's payment of any claims pursuant to this Final Order, shall be deemed or construed as: (a) an admission as to the validity of, or a promise to pay with respect to, any claim or lien against the Debtor or its estate, (b) a waiver of the Debtor's right to dispute any claim or lien, (c) an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, (d) an admission

of the priority status of any claim, whether under section 503(b)(9) of the Bankruptcy Code or otherwise; or (e) a modification of the Debtor's rights to seek relief under any section of the Bankruptcy Code on account of any amounts owed or paid to any Utility Provider.

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

16. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

17. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Final Order.

Dated: _____, 2019
Wilmington, Delaware

United States Bankruptcy Judge

EXHIBIT C**UTILITY PROVIDERS LIST**

Utility Provider	Address	Account Number(s)
Recology Golden Gate	Recology Sunset Scavenger 250 Executive Park Blvd Suite 100 San Francisco, CA 94124	11167568
PG&E	885 Embarcadero Drive West Sacramento, CA 95605	2811873626-4
San Francisco Public Utilities	525-501 Golden Gate Avenue San Francisco, CA 94102	608752630
Comcast	One Comcast Center Philadelphia, PA 19103	815520053689786
Monkeybrains	635 Potrero Avenue San Francisco, CA 94110	11710
Sonic	2260 Apollo Way Santa Rosa, CA 95407	1000112847
NewVoiceMedia	501 2nd Street Suites 310 & 330 San Francisco, CA 94107	N/A