

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

LYDIA CLADEK, INC.,

Case No. 3:10-bk-02805-PMG

Debtor.

(Consolidated by Prior Court Order with Case  
No. 10-bk-02800-PMG)

**EMERGENCY MOTION OF CHAPTER 11 TRUSTEE FOR AN ORDER  
(I) DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR  
FUTURE UTILITY SERVICES, AND (II) PROHIBITING UTILITIES  
FROM ALTERING OR DISCONTINUING UTILITY SERVICE**

Michael Phelan, the Chapter 11 Trustee of the consolidated Chapter 11 cases of Lydia Cladek, Inc. (the “Chapter 11 Trustee”), moves this Court for the entry of an order (i) determining the adequacy of the post-petition assurance of payment which the above-captioned debtor (the “Debtor”) has presented to its utility providers, and (ii) prohibiting its utility providers from terminating utility services, and in support thereof states:

**STATEMENT OF FACTS**

1. On April 2, 2010, several petitioning creditors filed an involuntary Chapter 11 petition against Lydia Cladek, Inc., case styled as In re Lydia Cladek, Inc., Case No. 10-bk-02800-PMG, in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division (the “Involuntary Case”).

2. Subsequently, on April 5, 2010, Lydia Cladek, Inc. (“LCI” or the “Debtor”) filed the instant voluntary Chapter 11 petition, case styled as In re Lydia Cladek, Inc., Case No. 10-bk-02805-PMG, in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division (the “Voluntary Case”).

3. On April 7, 2010, several creditors filed an Emergency Motion to Consolidate the Involuntary and Voluntary Chapter 11 cases of Lydia Cladek, Inc. [Docket No. 13]

4. On April 7, 2010, several creditors filed an Emergency Motion to Appoint a Chapter 11 Trustee. [Docket No. 11]

5. On April 12, 2010, the Court entered its Order Granting Motion To Consolidate, consolidating the Voluntary and Involuntary Chapter 11 cases of the Debtor, and providing that the Voluntary Case, Case No. 10-02805, shall be the lead case. [Docket No. 32]

6. On April 12, 2010, the Court entered its Order Granting Motion to Appoint Chapter 11 Trustee. [Docket No. 31]

7. On April 13, 2010, the United States Trustee filed its Appointment of Chapter 11 Trustee and Setting Bond, and its Application for Approval to Appoint Michael Phelan as Chapter 11 Trustee. [Docket Nos. 44 and 46]

8. On April 13, 2010, Michael Phelan filed a Notice of Acceptance as Chapter 11 Trustee (the "Chapter 11 Trustee"). [Docket No. 45]

9. On April 14, 2010, the Court entered its Order Approving Appointment of Chapter 11 Trustee and Setting of Bond. [Docket No. 47]

10. On April 15, 2010, the Chapter 11 Trustee filed an application seeking to employ the law firm of Akerman Senterfitt as counsel for the Chapter 11 Trustee in these cases pursuant to Section 327 of the Bankruptcy Code. [Docket No. 55]

11. On April 27, 2010, the Court entered its Interim Order Approving Appointment of Akerman Senterfitt as Counsel for the Chapter 11 Trustee. [Docket No. 72]

12. The Chapter 11 Trustee is currently operating the Debtor's business pursuant to sections 1106 and 1108 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

### VENUE AND JURISDICTION

13. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue is proper 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).

14. The statutory predicates for the relief requested herein are sections 105(a), 366, 1106 and 1108 of the Bankruptcy Code.

### RELIEF REQUESTED

15. In the normal course of its business, the Debtor obtains gas, water, sewer, electric, internet, data center solutions, communications management and other similar utility services (collectively "Utility Services") from the following providers (collectively, the "Utility Companies") in the average approximate amounts indicated:

<b>Provider</b>	<b>Average Monthly Consumption</b>
Florida Power & Light Company	\$2,000.00
PAETEC	\$6,000.00
St. Johns County Utilities	\$185.00

16. The Utility Companies are currently holding the following security deposits:

<b>Provider</b>	<b>Security Deposits</b>
Florida Power & Light Company	\$0.0 <sup>1</sup>

<sup>1</sup> Florida Power & Light Company initially held a pre-petition deposit in the amount of \$2,300.00; however, that deposit was recently returned to the Debtor.

PAETEC	\$0.0
St. Johns County Utilities	\$0.0

17. Section 366(a) of the Bankruptcy Code prevents utility companies from discontinuing, altering or refusing service to a debtor during the first twenty (20) days of a bankruptcy case. However, thirty (30) days from the petition date, a utility company has the option of terminating its services pursuant to 366(c)(2) of the Bankruptcy Code if the utility has not received adequate assurance of payment.

18. Utility Services are essential to the ability of the Chapter 11 Trustee to sustain the Debtor's operations while this chapter 11 case is pending. Any interruption of Utility Services, even for a brief period, would severely disrupt the Debtor's business operations and would be extremely harmful to the Debtor's customer relationships, revenues, profits, and ultimately its chances for a successful reorganization. It is critical that all Utility Services continue uninterrupted.

19. The Chapter 11 Trustee intends to timely pay all post-petition obligations owed to the Utility Companies, and has funds sufficient to enable it to meet the Debtor's essential obligations. Recognizing that mere promises of future payment may not be sufficient, the Chapter 11 Trustee is willing to provide post-petition cash deposits to the Utility Companies in the following amounts (equal to at least 50% of the Debtor's estimated cost of its monthly utility consumption to each Utility) as adequate assurance of future payment (the "Adequate Assurance Deposits"):

<b>Provider</b>	<b>Proposed Deposit</b>
Florida Power & Light Company	\$2,000.00

PAETEC	\$3,000.00
St. Johns County Utilities	\$185.00

20. By this Motion, the Chapter 11 Trustee seeks the entry of an order determining that the proposed Adequate Assurance Deposits described above constitute adequate assurance of future payment within the meaning of 11 U.S.C. § 366(b). The Chapter 11 Trustee further requests the entry of an order prohibiting the Utility Companies from terminating Utility Services to the Debtor based on any perceived inadequacy of the Adequate Assurance Deposits.

21. The fundamental policy underlying section 366 of the Bankruptcy Code is to protect debtors from utility service cutoffs upon the filing of a bankruptcy case, while at the same time providing utility companies with adequate assurance that the debtor will pay for post-petition services. *See* H.R. Rep. No. 95-595, at 350 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6306.

22. To that end, Bankruptcy Code § 366(a) provides:

Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

11 U.S.C. § 366(a).

Bankruptcy Code § 366(b) further states, however, that:

Such utility may 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, in the form of a deposit or other security, for service after such date.

11 U.S.C. § 366(b)<sup>2</sup>.

23. Determination of “adequate assurance” within the meaning of section 366 of the Bankruptcy Code is within this Court’s discretion. *See In re Marion Steel Co.*, 35 B.R. 188, 198 (Bankr. D. Ohio 1983); *see also In re Pacific Gas & Elec. Co.*, 271 B.R. 626-644 (N.D. Cal., 2002) (the “decision whether to order security lies within the discretion of the Bankruptcy Court”). Whether utilities are subject to an unreasonable risk of nonpayment for post-petition services must be determined from the facts and circumstances of each case. *See In re Marion Steel Co.*, 35 B.R. at 198. Moreover, “[S]ection 366(b) requires the Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with ‘adequate assurance’ of payment. The statute does not require an ‘absolute guarantee of payment.’” *In re Caldor, Inc.-NY, et al.*, 199 B.R. 1, 3 (S.D.N.Y. 1996) (citations omitted).

24. The proposed cash deposit of \$3,000.00 to PAETEC is adequate assurance of future payment. The Debtor’s average consumption from PAETEC in the 12 months preceding the petition date is approximately \$6,000.00. PAETEC is presently holding no deposit. The proposed Adequate Assurance Deposit to PAETEC will cover at least two week’s utility consumption, which has been found to be sufficient in other cases. *See, e.g., In re Mortgage Lenders Network USA, Inc.*, Case No. 07-10146 (Bankr. D. Del. Feb. 28, 2007) (two-week deposit for utilities constituted adequate assurances of future performance under Bankruptcy Code section 366); *In re Refco, Inc., et al.*, Case No. 05-60006 (Bankr. S.D.N.Y. Dec. 9, 2005) (same); *In re Pliant Corp., et al.*, Case No. 06-10001 (Bankr. D. Del. Feb. 8, 2006) (same).

25. For the same reasons, the proposed cash deposits of \$2,000.00 to Florida Power & Light Company and \$185.00 to St. Johns County Utilities, which will cover the Debtor's average

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<sup>2</sup> This Court also has authority to grant the relief requested herein pursuant to section 105(a) of the Bankruptcy Code which 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).

monthly consumption for each of these Utilities, should be deemed sufficient to protect them during the pendency of the case.

**CONCLUSION**

WHEREFORE, the Chapter 11 Trustee request the entry of an order (i) determining that the Utility Companies have been provided with adequate assurance of payment within the meaning of section 366 of the Bankruptcy Code, (ii) approving the Chapter 11 Trustee's proposed offer of adequate assurance of future payment, (iii) prohibiting the Utility Companies from altering, refusing or discontinuing services on account of pre-petition amounts outstanding or on account of any perceived inadequacy of the Chapter 11 Trustee's proposed adequate assurance, and (iv) granting such other and further relief as the Court deems just and proper.

Dated: April 30, 2010.

AKERMAN SENTERFITT

By: /s/ Jacob A. Brown

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Attorneys for the Chapter 11 Trustee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished either by electronic notification or U.S. mail, this 30th day of April, 2010 to:

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St. Augustine, FL 32080

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St. Augustine, FL 32080-7979

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Buffalo, NY 14240-1283

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Bldg. 200  
Ft. Lauderdale, FL 3333

PAETEC  
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600 WillowBrook Office Park  
Fairport, NY 14450-4223

Elena L. Escamilla, Esq.  
United States Trustee  
135 W. Central Blvd., Suite 620  
Orlando, FL 32806

St. Johns County Utility Department  
P.O. Box 3006  
St. Augustine, FL 32085

Florida Power & Light Company  
PO Box 025576  
Miami, FL 33102

and the parties listed on the attached Local Rule 1007-2 Parties in Interest List.

/s/ Jacob A. Brown  
Attorney

Label Matrix for local noticing  
 113A-3  
 Case 3:10-bk-02805-PMG  
 Middle District of Florida  
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End of Label Matrix	
Mailable recipients	13
Bypassed recipients	0
Total	13