

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

In re: CYNERGY DATA, LLC, <i>et al.</i> , ¹ Debtors.	Chapter 11 Case No. 09-_____ () Jointly Administered
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**DEBTORS’ MOTION FOR AN ORDER ESTABLISHING PROCEDURES
FOR INTERIM COMPENSATION AND REIMBURSEMENT
OF EXPENSES OF PROFESSIONALS AND COMMITTEE MEMBERS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), hereby move this Court (the “Motion”) for entry of an order, pursuant to sections 105(a) and 331 of Chapter 11 of Title 11 of the United States Code (11 U.S.C. § 101 et. seq. as amended, the “Bankruptcy Code”) and Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 2016-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), establishing procedures for interim compensation and reimbursement of expenses for professionals. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b). This matter is a “core” proceeding pursuant to 28 U.S.C. §157 (b)(2)(A), (N) and (O).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The Debtors are the following entities (with the last four digits of their federal tax identification numbers in parentheses): Cynergy Data, LLC (8677); Cynergy Data Holdings, Inc. (8208); Cynergy Prosperity Plus, LLC (4265). The mailing address for the Debtors is 30-30 47th Avenue, 9th Floor, Long Island City, New York 11101.



3. The statutory predicates for the relief requested herein are sections 105(a) and 331 of the Bankruptcy Code, Bankruptcy Rule 2016 and Local Rule 2016-2.

BACKGROUND

4. On the date of this Motion (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. No trustee, examiner or creditors' committee has been appointed in these cases.

6. The Debtors continue to operate their business and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

7. The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of these bankruptcy cases, is set forth in detail in the declaration of Charles M. Moore in Support of chapter 11 petitions and various first-day motions (the "Moore Declaration"), filed concurrently herewith and fully incorporated herein by reference.

RELIEF REQUESTED

8. During the course of these cases, the Debtors will seek approval of the employment of certain professionals to assist with the restructuring of their business, including Nixon Peabody LLP and Pepper Hamilton LLP, as their bankruptcy counsel, Unicorn Partners, LLC, as industry expert, and CM&D Management Services LLC, as restructuring expert. An Official Committee of Unsecured Creditors and other committees (collectively, the "Committee") may also be appointed in these cases. If appointed, the Committee is likely to retain counsel and other professionals.

9. Pursuant to section 331 of the Bankruptcy Code, all professionals are entitled to submit applications for interim compensation and reimbursement of expenses every 120 days, or more often, if the Court permits.

10. By this Motion, pursuant to sections 105(a) and 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a), the Debtors request entry of an order establishing procedures for the compensation and reimbursement of attorneys and other professionals whose retentions are approved by this Court pursuant to section 328 or 1103 of the Bankruptcy Code (collectively, the “Professionals”) on a monthly basis, on terms that satisfy the requirements of Local Rule 2016-2. The Debtors submit that such an order will streamline the professional compensation process and enable the Court and all other parties to more effectively monitor the professional fees incurred in these chapter 11 cases. In addition, the Debtors seek approval of a procedure for reimbursement of reasonable out-of-pocket expenses (but not attorneys’ fees) incurred by members of any statutory committee appointed in these chapter 11 cases.

11. Specifically, the Debtors propose that the monthly payment of compensation and reimbursement of expenses of the Professionals be structured in accordance with the following procedures (collectively, the “Compensation Procedures”):

- a. No earlier than the 10th day of each calendar month, each Professional seeking interim compensation and expense reimbursement shall file with the Court and serve a copy of its monthly invoice (the “Monthly Statement”) for the prior month (the “Compensation Period”) on: (i) the Office of the United States Trustee, J. Caleb Boggs Federal Building, 2nd Floor, 844 King Street, Wilmington, Delaware 19801, Attn: Thomas P. Tinker, Esq.; (ii) the Debtors, 30-30 47th Avenue, 9th Floor, Long Island City, New York 11101; (iii) counsel to the Debtors, Nixon Peabody LLP, 437 Madison Avenue, New York, New York 10056, Attn: Dennis J. Drebsky, Esq.; and Pepper Hamilton LLP, Suite 5100, 1313 Market Street, Wilmington, Delaware 19801, Attn: David B. Stratton, Esq., Evelyn J. Meltzer, Esq., and John H. Schanne, II, Esq; and (iv) counsel to any Committee appointed in the Debtors’ cases (collectively, the “Notice Parties”). All Monthly Statements shall comply with the timekeeping and detail requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the United States Trustee Fee Guidelines - Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 (Appendix A to 28 C.F.R. § 58) (the “U.S. Trustee Fee Guidelines”) and other applicable law. The first Monthly Statement shall be filed by the Professionals no earlier than October 10, 2009 and may cover fees and expenses incurred from the Petition Date through September 30, 2009.

- b. Each Notice Party will have 20 days after service and filing of a Monthly Statement to object thereto (the “Objection Deadline”). Upon the expiration of the Objection Deadline, the Debtors shall be authorized to pay each Professional an amount (the “Actual Monthly Payment”) equal to the lesser of (i) eighty percent (80%) of the fees and one-hundred percent (100%) of the expenses requested in the Monthly Statement (the “Maximum Monthly Payment”); and (ii) eighty percent (80%) of the fees and one-hundred percent (100%) of the expenses not subject to an objection pursuant to subparagraph (c) below.
- c. If any Notice Party objects to a Professional’s Monthly Statement, it must file with the Court and serve on the affected Professional and each of the Notice Parties, a written objection (the “Objection”), which must be received by the affected Professional and the Notice Parties on or before the Objection Deadline. Thereafter, the objecting party and the affected Professional may attempt to resolve the Objection on a consensual basis. If the parties are unable to reach a resolution of the Objection within 20 days after service of the Objection, the affected Professional may either: (i) file a motion seeking resolution of the Objection with the Court, together with a request for payment of the difference, if any, between the Maximum Monthly Payment and the Actual Monthly Payment made to the affected Professional (the “Incremental Amount”); or (ii) forego payment of the Incremental Amount until the next interim or final fee application hearing, at which time the Court will consider and dispose of the Objection if requested by the parties.
- d. Commencing with the period beginning on the Petition Date and ending on November 30, 2009, and at three-month intervals thereafter, or at such other intervals convenient to the Court, each of the Professionals must file with the Court and serve upon the Notice Parties an interim application (the “Interim Fee Application”) for Court approval and allowance, pursuant to section 331 of the Bankruptcy Code, of the compensation and reimbursement of expenses sought in the Monthly Applications filed with respect to such three-month period (the “Interim Fee Period”). Each Professional must file its Interim Fee Application within 45 days after the end of the Interim Fee Period for which the application seeks allowance of fees and reimbursement of expenses and serve the Interim Fee Application on the Notice Parties. Each Professional must file its first Interim Fee Application on or before January 14, 2010, and the first Interim Fee Application should cover the Interim Fee Period from the commencement of these cases through and including November 30, 2009. Any Professional that fails to file an Interim Fee Application when due will be ineligible to receive further interim payments of fees or expenses under the compensation procedures until such time as the Interim Fee Application is submitted by the Professional or such requirement is waived by the Court after notice and hearing.
- e. The Debtors shall request that the Court schedule a hearing on the outstanding Interim Fee Applications at least once every four months, or at such other intervals as the Court deems appropriate.

- f. The pendency of an Objection to payment of compensation or reimbursement of expenses will not disqualify a Professional from the future payment of compensation or reimbursement of expenses under the procedures set forth in this Order.
- g. Neither: (a) the payment of or the failure to pay, in whole or in part, monthly interim compensation and reimbursement of expenses, nor (b) the filing of or failure to file an Objection will bind any party in interest or the Court with respect to the allowance of interim or final applications for compensation and reimbursement of expenses of Professionals.

12. The Debtors further request that the Court limit the notice of hearings to consider interim and final fee applications to: (a) the Notice Parties, and (b) all parties who have filed a notice of appearance with the Clerk of this Court and requested notice under Bankruptcy Rule 2002. Such notice should reach the parties most active in these cases and will save the expense of undue duplication and mailing.

13. The Debtors further request that each member of the Committee (once appointed) be permitted to submit statements of out-of-pocket expenses (excluding Committee-member counsel expenses) and supporting vouchers to counsel for the Committee, which will collect and submit such requests for reimbursement in accordance with the foregoing procedure for monthly and interim compensation and reimbursement of Professionals.

14. The Debtors will include all payments made to Professionals in accordance with the compensation procedures in its monthly operating report identifying the amount paid to each Professional.

BASIS FOR RELIEF

15. Section 331 of the Bankruptcy Code provides, in relevant part, as follows:

A trustee, an examiner, a debtor's attorney, or any professional person employed under sections 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a cases under this title, or more often if the court permits, for such compensation for services rendered before the date of

such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. . . .

11 U.S.C. § 331.

16. Section 105(a) of the Bankruptcy Code provides, in relevant part, as follows:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules. . . .

11 U.S.C. § 105(a).

17. Procedures comparable to those proposed in this Motion have been established in other chapter 11 cases. See, e.g., New Century TRS Holdings, Inc., Case No. 07-10416 (KJC) (Bankr. D. Del. 2007); In re Pliant Corporation, Case No. 06-10001 (MFW) (Bankr. D. Del. 2006); In re Meridian Automotive Systems – Composites Operations, Inc., Case No. 05-11168 (MFW) (Banks. D. Del. 2005). Such an order will permit the Court, the Office of the United States Trustee, and all other interested parties to effectively monitor the fees and expenses incurred in these cases.

18. Further, such procedures are needed not only to encourage the Professionals to provide services in connection with these chapter 11 cases, but also to avoid having Professionals fund these cases. In re Intl Horizons, Inc., 10 B.R. 895, 897-98 (Bankr. N.D. Ga. 1981) (establishing procedures for monthly interim compensation). Appropriate factors to consider include “the size of [the] reorganization cases, the complexity of the issues included, and the time required on the part of the attorneys for the Debtors in providing services necessary to achieve a successful reorganization of the Debtors.” Id.; see also In re Mariner Post-Acute Network, Inc., 257 B.R. 723, 727-28 (Bankr. D. Del. 2000) (approving monthly interim compensation procedures for professionals, noting that, given the large quantity of time likely

invested by professionals, their receiving payment only once every four months may impose an intolerable burden on them and may place them at a significant economic disadvantage to the professionals retained by the creditors). The Debtors submit that the procedures sought to be approved herein are appropriate considering these factors.

NOTICE

19. The Debtors have provided notice of this Motion by facsimile, electronic transmission, overnight delivery, or hand delivery to: (a) the United States Trustee for the District of Delaware; (b) the Debtors' twenty-five (25) largest unsecured creditors on a consolidated basis; (c) counsel to Comerica Bank; (d) counsel to Wells Fargo Foothill LLC; (e) counsel to Dymas Funding Company LLC; (f) counsel to Ableco Finance LLC; (g) counsel to A3 Funding LP; (h) counsel to Garrison Credit Investments; (i) counsel to Harris, N.A; and (j) all other parties required to receive notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is necessary.

NO PRIOR REQUEST

20. No prior motion for the relief requested herein has been made to this or any other court.

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WHEREFORE, the Debtors respectfully requests that the Court enter an order substantially in the form attached hereto approving interim compensation procedures on the terms and conditions set forth above, and granting such other and further relief as is just and proper.

Dated: September 1, 2009
Wilmington, Delaware

Respectfully submitted,

PEPPER HAMILTON LLP

/s/ Evelyn J. Meltzer

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*Proposed Counsel for the Debtors
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**ORDER ESTABLISHING PROCEDURES
FOR INTERIM COMPENSATION AND REIMBURSEMENT
OF EXPENSES OF PROFESSIONALS AND COMMITTEE MEMBERS**

Upon the motion (the “Motion”) of the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), for an order pursuant to sections 105(a) and 331 of the Bankruptcy Code², Bankruptcy Rule 2016 and Local Rule 2016-2, for an order establishing procedures for the interim compensation and reimbursement of fees and expenses for court-approved professionals; and upon the Moore Declaration and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtors, their creditors, and all parties-in-interest; and upon the Motion and all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is hereby

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² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED in all respects.
2. Except as otherwise ordered by the Court, all Professionals may seek interim compensation and reimbursement of expenses in accordance with the following procedures:
 - a. No earlier than the 10th day of each calendar month, each Professional seeking interim compensation and expense reimbursement shall file with the Court and serve a copy of its monthly invoice (the "Monthly Statement") for the prior month (the "Compensation Period") on: (i) the Office of the United States Trustee, J. Caleb Boggs Federal Building, 2nd Floor, 844 King Street, Wilmington, Delaware 19801, Attn: Thomas P. Tinker, Esq.; (ii) the Debtors, 30-30 47th Avenue, 9th Floor, Long Island City, New York 11101; (iii) counsel to the Debtors, Nixon Peabody LLP, 437 Madison Avenue, New York, New York 10056, Attn: Dennis J. Drebsky, Esq.; and Pepper Hamilton LLP, Suite 5100, 1313 Market Street, Wilmington, Delaware 19801, Attn: David B. Stratton, Esq., Evelyn J. Meltzer, Esq., and John H. Schanne, II, Esq; and (iv) counsel to any Committee appointed in the Debtors' case (collectively, the "Notice Parties"). All Monthly Statements shall comply with the timekeeping and detail requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the United States Trustee Fee Guidelines - Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 (Appendix A to 28 C.F.R. § 58) (the "U.S. Trustee Fee Guidelines") and other applicable law. The first monthly fee applications filed by the Professionals shall be filed no earlier than October 10, 2009 and may cover fees and expenses incurred from the Petition Date through September 30, 2009.
 - b. Each Notice Party will have 20 days after service and filing of a Monthly Statement to object thereto (the "Objection Deadline"). Upon the expiration of the Objection Deadline, the Debtors shall be authorized to pay each Professional an amount (the "Actual Monthly Payment") equal to the lesser of (i) eighty percent (80%) of the fees and one-hundred percent (100%) of the expenses requested in the Monthly Statement (the "Maximum Monthly Payment"); and (ii) eighty percent (80%) of the fees and one-hundred percent (100%) of the expenses not subject to an objection pursuant to subparagraph (c) below.
 - c. If any Notice Party objects to a Professional's Monthly Statement, it must file with the Court and serve on the affected Professional

and each of the Notice Parties, a written objection (the “Objection”), which must be received by the affected Professional and the Notice Parties on or before the Objection Deadline. Thereafter, the objecting party and the affected Professional may attempt to resolve the Objection on a consensual basis. If the parties are unable to reach a resolution of the Objection within 20 days after service of the Objection, the affected Professional may either: (i) file a motion seeking resolution of the Objection with the Court, together with a request for payment of the difference, if any, between the Maximum Monthly Payment and the Actual Monthly Payment made to the affected Professional (the “Incremental Amount”); or (ii) forego payment of the Incremental Amount until the next interim or final fee application hearing, at which time the Court will consider and dispose of the Objection if requested by the parties.

- d. Commencing with the period beginning on the Petition Date and ending on November 30, 2009, and at three-month intervals thereafter, or at such other intervals convenient to the Court, each of the Professionals must file with the Court and serve upon the Notice Parties an interim application (the “Interim Fee Application”) for Court approval and allowance, pursuant to section 331 of the Bankruptcy Code, of the compensation and reimbursement of expenses sought in the Monthly Applications filed with respect to such three-month period (the “Interim Fee Period”). Each Professional must file its Interim Fee Application within 45 days after the end of the Interim Fee Period for which the application seeks allowance of fees and reimbursement of expenses and serve the Interim Fee Application on the Notice Parties. Each Professional must file its first Interim Fee Application on or before January 14, 2010, and the first Interim Fee Application should cover the Interim Fee Period from the commencement of these cases through and including November 30, 2009. Any Professional that fails to file an Interim Fee Application when due will be ineligible to receive further interim payments of fees or expenses under the compensation procedures until such time as the Interim Fee Application is submitted by the Professional or such requirement is waived by the Court after notice and hearing.
- e. The Debtors shall request that the Court schedule a hearing on the outstanding Interim Fee Applications at least once every four months, or at such other intervals as the Court deems appropriate.
- f. The pendency of an Objection to payment of compensation or reimbursement of expenses will not disqualify a Professional from

the future payment of compensation or reimbursement of expenses under the procedures set forth in this Order.

- g. Neither: (a) the payment of or the failure to pay, in whole or in part, monthly interim compensation and reimbursement of expenses, nor (b) the filing of or failure to file an Objection will bind any party in interest or the Court with respect to the allowance of interim or final applications for compensation and reimbursement of expenses of Professionals.

3. Each member of any Committee shall be permitted to submit statements of expenses (excluding third-party counsel expenses of individual members) and supporting vouchers to the respective Committee's counsel, which shall submit such requests for reimbursement in accordance with the Compensation Procedures. Approval of the Compensation Procedures will not authorize payment of such expenses to the extent that such authorization does not exist under the Bankruptcy Code, the Bankruptcy Rules, applicable Third Circuit law, the Local Rules, or the practices of this Court.

4. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

5. Notwithstanding any Bankruptcy Rule to the contrary, this Order shall be immediately effective and enforceable upon its entry.

Dated: _____, 2009

UNITED STATES BANKRUPTCY JUDGE