

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

In re:  CYNERGY DATA, LLC, <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 09-_____ (     )  Jointly Administered
---	---

**DEBTORS' MOTION FOR ORDER UNDER BANKRUPTCY CODE  
SECTIONS 105, 363(b), 507(a), 541, 1107(a) AND 1108, AUTHORIZING,  
BUT NOT DIRECTING, DEBTORS, INTER ALIA, TO PAY PREPETITION  
WAGES, COMMISSIONS, COMPENSATION, AND EMPLOYEE BENEFITS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) hereby move this Court (the “Motion”) for entry of an order, under sections 105, 363(b), 507(a), 541, 1107(a) and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), (a) authorizing, but not directing, the Debtors to pay prepetition wages, commissions, compensation, salaries and employee benefits; (b) authorizing, but not directing, the Debtors to continue the maintenance of all employee benefit programs in the ordinary course; and (c) directing all banks to honor prepetition checks for payment of prepetition employee obligations. In support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

---

<sup>1</sup> 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.



2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 363(b), 507(a), 541, 1107(a) and 1108.

### **BACKGROUND**

3. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors continue to manage and operate their businesses as debtors in possession under Bankruptcy Code sections 1107 and 1108.

5. No trustee, examiner or creditors' committee has been appointed in these chapter 11 cases.

6. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these bankruptcy cases, is set forth in detail in the declaration of Charles M. Moore filed in support of the Debtors' chapter 11 petition and various first day applications and motions (the "Moore Declaration"), filed concurrently herewith and fully incorporated herein by reference.<sup>2</sup>

### **RELIEF REQUESTED**

7. By this Motion, the Debtors request that this Court enter an order, under Bankruptcy Code sections 105, 363(b), 507(a), 541, 1107(a) and 1108: (i) authorizing, but not directing, the Debtors to: (a) pay and/or perform, as applicable, prepetition obligations to current employees (the "Employees"), including accrued prepetition wages, salaries, and other cash and non-cash compensation claims (collectively, the "Employee Wage Claims"); (b) continue the Debtors' various non-working day policies, employee benefit plans and programs (and to pay all fees and costs in connection therewith, including those that arose prepetition) (collectively, the

---

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

“Employee Benefit Obligations”), the most significant of which are described in the Exhibits to this Motion; (c) reimburse Employees for prepetition expenses Employees have incurred on behalf of the Debtors in the ordinary course of business (the “Employee Expense Obligations”); (d) continue to pay and/or contest in good faith, all amounts related to workers’ compensation claims that arose prepetition (the “Workers’ Compensation Obligations”); and (e) pay all related prepetition withholdings and payroll-related taxes (the “Employer Taxes” and, with the Employee Wage Claims, the Employee Benefit Obligations the Employee Expense Obligations and the Workers’ Compensation Obligations, collectively, the “Prepetition Employee Obligations”) associated with the Employee Wage Claims and the Employee Benefit Obligations; (ii) authorizing and directing the Debtors’ banks to receive, process, honor and pay all of the Debtors’ prepetition checks and fund transfers on account of any of the Prepetition Employee Obligations; (iii) prohibiting the Debtors’ banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for the Prepetition Employee Obligations and (iv) authorizing, but not directing, the Debtors to issue new postpetition checks or effect new postpetition fund transfers on account of the Prepetition Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

## **BASIS FOR RELIEF**

### **I. WAGES AND SALARIES**

8. The Employees perform a variety of critical functions. The Employees’ skills, knowledge and understanding of the Debtors’ infrastructure, operations and customer relations are essential to the maintaining going concern value in the proposed sale of the Debtors’ business. A description of the Debtors’ Employees’ wages and salaries is attached as Exhibit A. By this Motion, the Debtors’ seeks to pay the outstanding amounts owed as of the Petition Date

for accrued and unpaid wages and salaries, including amounts that the Debtors are required by law to withhold from Employee payroll checks in respect of federal, state and local income taxes, garnishment contributions, social security and Medicare taxes.

**II. OTHER COMPENSATION: VACATION, PERSONAL, SICK TIME, AND BUSINESS EXPENSES**

9. The Debtors offer their Employees other forms of compensation, including vacation time, overtime pay, paid holidays, other earned time off, and reimbursement of certain business expenses. A description of these other forms of compensation is attached as Exhibit B. These forms of compensation are usual, customary and necessary if the Debtors are to retain qualified employees to operate their business.

10. **Vacation, Holiday and Paid Time-Off.** Employees are eligible to accrue paid vacation, after certain periods of employments. By this Motion, the Debtors seek authority to honor in the ordinary course of business all liabilities to their Employees, including those liabilities that arose under the Debtors' vacation practices existing prior to the Petition Date. Use of Employee vacation time or paid time-off remains subject to ordinary course restrictions.

11. **Expense Reimbursement.** The Debtors routinely reimburse Employees for certain expenses incurred within the scope of their employment, including expenses for travel, lodging, professional seminars and conventions, ground transportation, meals, supplies and miscellaneous business expenses (collectively, the "Business Expenses").

12. Certain Employees have not yet been reimbursed for Business Expenses previously incurred. The Debtors estimate that there are approximately \$5,000 in pre-petition Business Expenses which have not been paid to Employees. The Debtors need to be authorized to reimburse all such expenses as and when reports are submitted by Employees. By this

Motion, the Debtors seek authority to pay all prepetition Business Expenses in the ordinary course of business.

### **III. EMPLOYEE BENEFIT PLANS**

13. The Debtors provide a number of Employees and their dependants with certain employee benefit plans, including the Medical Plan, the Dental Plan, short-term disability, and the Life and Accidental Death and Dismemberment Insurance (collectively, the “Employee Benefit Plans”), each as defined and described in the attached Exhibit C. By this Motion, the Debtors seek authority to remit all amounts owed under the Employee Benefit Plans in the ordinary course of business.

### **IV. SAVINGS AND RETIREMENT PLANS**

14. The Debtors offer certain Employees a savings and retirement plan through which they can accumulate savings for their future. A description of the savings and retirement plan is attached as Exhibit D. By this Motion, the Debtors seek authority to remit all amounts that are related to the 401(k) Plan, as defined in Exhibit D, that arose prior to the Petition Date in the ordinary course of the Debtors’ business.

### **V. WORKERS’ COMPENSATION**

15. The Debtors provide workers’ compensation benefits to all Employees. These benefits are described in the attached Exhibit E. Failure to maintain this insurance in the various states in which the Debtors do business could result in administrative or legal proceedings against the Debtors and their officers and directors. By this Motion, the Debtors seek authority to continue paying and/or contesting in good faith, as appropriate in the Debtors’ business judgment, all amounts related to workers’ compensation claims that arose prior to the Petition Date, as they become due in the ordinary course of the Debtors’ business.

## **VI. OTHER BENEFITS**

16. The Debtors offer certain benefit programs to various groups of Employees, including, but not limited to Flex Spending Accounts (“FSA’s”), voluntary life insurance, and Transit Checks. The Debtors believe that these programs maintain Employee morale and help retain the Debtors’ workforce. By this Motion, the Debtors seek authority to continue such programs in their sole discretion and make payments under such programs in the ordinary course.

## **VII. SOCIAL SECURITY, INCOME TAXES AND OTHER WITHHOLDING**

17. The Debtors routinely withhold from Employee paychecks amounts that the Debtors are required to transmit to third parties. Examples of such withholding include social security, FICA, federal and state income taxes, garnishments, FSA’s, voluntary life insurance, and health care payments. The Debtors believe that such withheld funds, to the extent that they remain in the Debtors’ possession, constitute moneys held in trust and therefore are not property of the Debtors’ bankruptcy estates. Thus, the Debtors believe that they have authority to direct such funds to the appropriate parties in the ordinary course of business.

## **VIII. DIRECTION TO BANKS**

18. Finally, the Debtors seek an order authorizing and directing all banks to receive, process, honor and pay any and all checks drawn on the Debtors’ payroll and general disbursement accounts related to Prepetition Employee Obligations, whether presented before or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

## APPLICABLE AUTHORITY

### **I. THE PROPOSED PAYMENTS ARE ACCORDED PRIORITY UNDER BANKRUPTCY CODE SECTION 507**

19. Bankruptcy Code sections 507(a)(4) and 507(a)(5) require that certain claims for prepetition wages, salaries, vacation, and employee benefit contributions be accorded priority in payment in an amount not to exceed \$10,950 for each employee. The Debtors seek authority to pay the Employees only amounts no greater than the \$10,950 caps under Sections 507(a)(4) and 507(a)(5). Accordingly, granting the relief requested will not adversely affect the Debtors' other unsecured creditors.

### **II. THE PROPOSED PAYMENTS ARE APPROPRIATE UNDER BANKRUPTCY CODE SECTION 363**

20. Under Bankruptcy Code section 363, a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business. See 11 U.S.C. § 363. In order to obtain approval for the use of estate assets outside the ordinary course of business, the debtor must articulate a valid business justification for the requested use. See In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). Payment of prepetition wage and salary claims in order to preserve and protect a debtor's business by retaining its currently working employees and maintaining positive employee morale, even if such payment were deemed to be outside the ordinary course of business, is a sufficient business justification for such an authorization. See Id. at 175.

21. Indeed, "[w]age priority has been a feature of the bankruptcy law since 1898." In re Garden Ridge Corporation, Case No. 04-10324 (KJC) (Bankr. D. Del., March 2, 2006), 2006 Bankr. LEXIS 278 (quoting 4 COLLIER ON BANKRUPTCY § 507.05[1] (15th Ed. 2005)). Its purpose is to "alleviate hardship on workers. . . . who may have no other source of income" and "to encourage employees to stand by an employer in financial difficulty. . . ." This priority

extends to certain other “benefits that are considered akin to compensation, such as vacation, severance and sick leave pay. . . .” Id. Accordingly, this Court should grant the requested relief under Bankruptcy Code section 363.

22. It also is important to note that the Debtors do not seek to assume (at this time) any executory contracts or obligations, and this Motion should not be deemed to seek an assumption or adoption of any employee agreements or policies. Rather, the Debtors merely seek to take steps that they believe to be necessary to keep their existing workforce intact to maximize the value of the bankruptcy estates, pending further decisions relevant to the contemplated reorganization. Furthermore, the Debtors will retain the discretion to not make the payments contemplated by the motion for particular Employees, and nothing in the motion will, in and of itself, confer upon any Employees or other parties an entitlement to administrative priority or other preferences in distribution from the bankruptcy estates.

**III. THE PAYMENT OF THE PREPETITION EMPLOYEE OBLIGATIONS IS APPROPRIATE UNDER BANKRUPTCY CODE SECTIONS 507 AND 541**

23. The payment of the employee contribution component of the Employer Taxes and 401(k) Plan or payment of garnished wages will not prejudice the Debtors’ estates because such withholdings are held in trust for the benefit of the related payees and, thus, do not constitute property of the Debtors’ estate under Bankruptcy Code section 541. See Begier v. IRS, 496 U.S. 53 (1990). Moreover, payments which are critical to the retention and morale of the Debtors’ workforce actually add value to the estates because an unplanned reduction in Employee retention or productivity could have disastrous effects on recoveries to unsecured creditors.

**IV. THE PAYMENT OF THE PREPETITION EMPLOYEE OBLIGATIONS IS APPROPRIATE UNDER BANKRUPTCY CODE SECTIONS 1107(A) AND 1108**

24. The Debtors operating their business as debtors in possession under Bankruptcy Code sections 1107(a) and 1108, are fiduciaries “holding the bankruptcy estate[s] and operating



the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” Id.

25. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only ... by the preplan satisfaction of a prepetition claim.” Id. The CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” Id. at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

26. Payment of the Prepetition Employee Obligations meets each element of the CoServ court’s standard. As described above, the Employees likely maintain priority claims against the Debtors for the Prepetition Employee Obligations. In addition, any failure by the Debtors to pay the Prepetition Employee Obligations would negatively affect the morale of the Debtors’ Employees at a critical time for the Debtors and their business. In short, the potential harm and economic disadvantage that would stem from the failure to pay the Prepetition Employee Obligations is grossly disproportionate to the amount of any prepetition claim that may be paid.

27. With respect to the Employees, the Debtors have examined other options short of payment of the Prepetition Employee Obligations and have determined that to avoid significant disruption of the Debtors' business operations there exists no practical or legal alternative to payment of such obligations. Therefore, the Debtors can only meet their fiduciary duties as debtors in possession under Bankruptcy Code sections 1107(a) and 1108 by payment of the Prepetition Employee Obligations.

**V. THE PAYMENT OF THE PREPETITION EMPLOYEE OBLIGATIONS SHOULD BE AUTHORIZED UNDER BANKRUPTCY CODE SECTION 105 AND THE DOCTRINE OF NECESSITY**

28. The proposed payments of the Prepetition Employee Obligations should be authorized under Bankruptcy Code section 105. Bankruptcy Code section 105 authorizes this Court "to issue any order ... necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105. For the reasons set forth herein, and in light of the critical need for the Debtors to preserve the going concern value of their business in order to effect a successful reorganization through, among other things, preservation of the Debtors' workforce and its morale, payment of the wages and benefits as requested herein is proper in accordance with Bankruptcy Code section 105.

29. Payment of the Prepetition Employee Obligations is further supported by the doctrine of necessity. This doctrine "recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor." In re Ionosphere Clubs, Inc., 98 B.R. at 176 (Bankr. S.D.N.Y. 1989); see also In re Just for Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor "cannot survive" absent payment of certain prepetition claims, the doctrine of

necessity should be invoked to permit payment);<sup>3</sup> In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

30. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. See Just For Feet, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); In re Payless Cashways., Inc., 268 B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); see also In re Ionosphere Clubs, Inc., 98 B.R. at 175.

31. Similarly, Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. Although there has not yet been a published decision in the Third Circuit interpreting Bankruptcy Rule 6003, it has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court instructed that

---

<sup>3</sup> The Court’s power to utilize the doctrine of necessity in Chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority to “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 United States Supreme Court first articulated the doctrine of necessity over a century ago, in Miltenberger v. Logansport, C & S.W. R. Co., 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. See id. at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in Miltenberger. See In re Lehigh & New Eng. Ry., 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation ... in serious jeopardy.”).

irreparable harm “is a continuing harm which 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 Fed. Appx. 907, 910 (3d Cir. 2007) (citing references omitted). The Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm.

32. Accordingly, the Court should allow the payment of the Prepetition Employee Obligations as requested herein.

33. Courts have routinely granted to large business debtors the same or substantially similar relief to that requested in this Motion. See, e.g., In re Tweeter Home Entm’t. Group, Inc., et al. Case No. 07-10787 (PJW) (Bankr. D. Del. Jun. 12, 2007); In re Radnor Holdings Corp., Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); In re Werner Holding Co. (DE), Inc., Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); In re Russell-Stanley Holdings, Inc., Case No. 05-12339 (PJW) (Bankr. D. Del. Aug. 22, 2005).

34. As a precaution, the proposed Order provides that the relief granted therein shall not constitute or be deemed an assumption of any of the employment and service agreements to which the Debtors are a party or any of the Debtors’ employee benefit policies, plans, programs, practices and procedures under Bankruptcy Code section 365(a).

35. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein.

36. The Debtors request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that any order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” As described above, the relief that the Debtors seek in this Motion is

immediately necessary in order for the Debtors to be able to continue to operate their business and preserve value for their estates. The Debtors respectfully request that the Court waive the ten-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

**NOTICE**

37. 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**

38. No prior request for the relief requested herein has been made to this or any other Court.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that this Court enter an order, substantially in the form annexed hereto, granting the relief requested in this Motion and such other and further relief as may be just and proper.

Dated: September 1, 2009  
Wilmington, Delaware

Respectfully submitted,  
PEPPER HAMILTON LLP

/s/ Evelyn J. Meltzer  
David B. Stratton (DE No. 960)  
Evelyn J. Meltzer (DE No. 4581)  
John H. Schanne, II (DE No. 5260)  
Hercules Plaza, Suite 5100  
1313 Market Street  
P.O. Box 1709  
Wilmington, DE 19899-1709  
Telephone: (302) 777-6500  
Facsimile: (302) 421-8390

-and-

NIXON PEABODY LLP  
Mark N. Berman  
Dennis J. Drebsky  
Lee Harrington (DE No. 4046)  
437 Madison Avenue  
New York, New York 10022  
Telephone: (212) 940-3000  
Facsimile: (212) 940-3111

*Proposed Counsel for the Debtors  
and Debtors in Possession*

**Exhibit A**  
**Wages and Salaries**

1. Cynergy Data employs approximately 132 Employees, who provide myriad services to the Cynergy Data.
2. A full-time Employee (“Full-time Employee”) works 40 hours or more in a workweek, on a regular and continuous basis. Approximately 130 of the Employees work full-time. Part-time Employees (“Part-time Employee”) work between 15 but less than 30 in a work week, on a regular and continuous basis. Approximately 2 Employees work on a part-time basis.
3. Approximately 52 of all Employees are hourly wage earners (collectively, the “Hourly Employees”) and approximately 80 are salaried personnel (collectively, the “Salaried Employees”). The average monthly payroll for Cynergy Data’s Employees in a typical month is approximately \$735,500, which includes payroll taxes. Cynergy Data uses PayChoice to administer its payroll and the actual disbursements of payroll funds to Employees.
4. Salaried Employees are paid bi-weekly. Salaried Employees collectively are paid approximately \$471,000 per month. As of August 24, 2009, Cynergy Data estimates that approximately \$117,722 exists in accrued but unpaid payroll for Salaried Employees.
5. Hourly Employees generally are paid bi-weekly. Hourly Employees are paid approximately \$150,500 each month. Cynergy Data estimates that, as of August 24, 2009, approximately \$37,592 exists in accrued but unpaid payroll for Hourly Employees.
6. There are presently no Employees who are owed in excess of \$10,950 for prepetition wages or salaries.

## **Exhibit B**

### **Other Compensation: Vacation, Personal, Sick Time, and Business Expenses**

#### **Vacation, Holiday and Paid Time-Off**

1. **Vacation:** Employees are eligible to accrue vacation. Employees accrue vacation hours each payroll period based on their date of hire and the rate at which it accrues is dependent on position and length of service. See Employee Handbook, pg. 10 for a full description of how vacation is accrued.

2. **Holidays:** In addition to accrued vacation, Cynergy Data offers 8 paid holidays per calendar year – New Year’s Day (January 1), Good Friday, Memorial Day, Independence Day (July 4), Labor Day, Thanksgiving Day, and Christmas Day (December 25), plus one floating holiday. A full description of Cynergy Data’s holiday policies is set forth in the Employee Handbook at pages 11.

#### **Expense Reimbursement**

3. Cynergy Data routinely reimburses Employees for certain Business Expenses. Most Employees who are reimbursed for their expenses are management positions and above who incur business expenses as part of their jobs.

4. Certain Employees have not yet been reimbursed for Reimbursable Expenses previously incurred. Certain Reimbursable Expenses have been incurred through the use of corporate credit cards for which Cynergy Debtors and Employees may be liable. Cynergy Data processes expense reports on a monthly basis. Cynergy Data reimburses approximately \$15,000 per quarter, or approximately \$5,000 per month, in Reimbursable Expenses



**Exhibit C**  
**Employee Benefit Plans**

1. Full-time, exempt employees are eligible to enroll for the employee benefit plans outlined below on the first day of the month following 90 days of his/her date of hire (e.g., if the hire date is August 15, 2009, eligibility commences on December 1, 2009). Full-time, non-exempt employees are eligible to enroll for the benefit plans outlined below on the first day of the month following 90 days of continuous employment (e.g. if the hire date is August 15, 2009, eligibility commences on December 1, 2009).<sup>1</sup>

**Medical Plans**

2. Cynergy Data provides a number of Employees and their dependents<sup>2</sup> with medical benefits under a medical plan (the “Medical Plan”) administered by Aetna. Approximately 301 persons (includes those in COBRA status). 138 Employees and roughly 163 Employee dependents are covered under the Medical Plans.

3. The Medical Plans are funded through contributions by participating Employees and by Cynergy Data. The cost of the Medical Plan is borne primarily by Cynergy Data, but Employees contribute to the Medical Plan through payroll deductions.<sup>3</sup> Employee contributions are deducted from bi-weekly paychecks to pay for that month’s coverage.

4. The Medical Plan costs Cynergy Data approximately \$95,000 each month. This amount includes payments of administrative fees and as of August 24, 2009, the Debtor’s administrative fees under the Medical Plans were fully paid.

**Dental Plan**

5. Cynergy Data offers its Employees dental benefits (the “Dental Plan”) through Aetna. A total of 142 Employees participate in the Dental Plan (Includes members in COBRA status). Employee contributions are deducted from weekly paychecks to pay for that month’s coverage. The total cost of the Dental Plan is approximately \$6,350 per month.

**Life, Short-Term Disability and Long-Term Disability Insurance**

7. Cynergy Data provides its Employees life and short-term disability (collectively, the “Life Insurance Plans”).

---

<sup>1</sup> For purposes of this exhibit the term “Employees” only includes those employees that are eligible for the benefit plans as described above.

<sup>2</sup> Medical, dental and optical benefits are only offered to dependents of Full-time Employees.

<sup>3</sup> In addition, the Debtor uses a third-party administrator in connection with COBRA coverage for former Employees. Pursuant to the American Recovery and Reinvestment Act of 2009, the Debtor is responsible for 65% of each Employee’s COBRA coverage costs for nine months following any such Employee’s involuntary termination of employment, provided that such Employee elects COBRA coverage upon termination.

8. Cynergy Data provides its Employees with a short-term disability plan to provide income replacement coverage in the event that they are unable to work for an extended period due to illness or injury. Under the short-term disability policy, benefits begin on the sixth day of illness. Benefits are payable for a maximum of 26 weeks of disability. Disability payments are approximately 25% of the Employee's average weekly pay with a maximum determined by the applicable local state.

10. Cynergy Data provides its Employees with term life and accidental death and dismemberment insurance ("Life and Accidental Death and Dismemberment Insurance") at a rate of Executives at \$250,000, Managers and Directors at \$150,000 and staff at \$50,000.

11. Cynergy Data remits approximately \$2,700 per month to Aetna and Unum for the short and long-term disability plans and the Life and Accidental Death and Dismemberment Insurance. The voluntary life insurance plan through Unum is a 100% paid for by the employee.

### **Flexible Spending Accounts**

12. Cynergy Data offers its Employees flexible spending accounts ("FSA's") for both health care and dependent care. Cynergy Data initially funds the health care FSA's and Employees electing to participate in the FSA's fund through payroll deductions, up to a maximum annual amount of \$2,500 for health care purposes. The full cost of the employee FSA's is remitted to Cynergy in 26 increments via payroll deductions over the plan year. Employee's currently contribute approximately \$2,500 monthly to their FSA's.

## **Exhibit D**

### **Savings and Retirement Plans**

1. Eligible Employees each year may contribute 15% of their pre-tax compensation for investment in a 401(k) plan (the “401(k) Plan”) managed by Trustee and Cohen Benefits. Employees are eligible to participate in the 401(k) Plan once they have performed 6 months of continuous service and reached 21 years of age. Employees who participate in the 401(k) Plan may be eligible to receive a matching contributions from Cynergy Data equal to 50% of the first 6% of pre-tax wages contributed to the 401(k) Plan by the Employee. The matching contributions become vested over the course of an Employee’s service with Cynergy Data as more fully set forth on page 8 of the Cynergy Data 401(k) Plan SPD. On average, Cynergy Data withholds approximately \$7,500 for each bi-week pay period in amounts for Employees participating in the 401(k) Plan. In addition, Cynergy Data pays approximately \$600 per month to Cohen Benefits in connection with its administration of the 401(k) Plan.

**Exhibit E**  
**Workers' Compensation**

1. Workers' compensation benefits provided by Cynergy Data are covered primarily under the Cynergy Data's workers' compensation insurance program administered by Travelers.
2. Cynergy Data remits \$2,250 in working capital per month to Travelers used to pay workers' compensation claims on behalf of Cynergy Data for Employees nationally.

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

In re:  CYNERGY DATA, LLC, <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 09-_____ (     ) )  Jointly Administered
---	---

**ORDER UNDER BANKRUPTCY CODE SECTIONS 105, 363(b),  
507(a), 541, 1107(a) AND 1108, AUTHORIZING DEBTORS, INTER ALIA, TO PAY  
PREPETITION WAGES, COMPENSATION, AND EMPLOYEE BENEFITS**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtors for an order, under Bankruptcy Code sections 105, 363(b), 507(a), 541, 1107(a) and 1108 authorizing, but not directing, the Debtors, inter alia, to pay prepetition wages, compensation and employee benefits as set forth therein; and upon the Moore Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtors, their estates, its creditors, and other parties in interest; and the Debtors having satisfied the standard for immediate relief under Fed R. Bankr. P 6003(b); and after due deliberation thereon and sufficient cause appearing therefor, it is hereby:

**ORDERED, ADJUDGED, AND DECREED that:**

1. The Motion is GRANTED as set forth in this Order.
2. The Debtors shall be and hereby are authorized, but not directed, to pay

(including to any third parties that provide or aid in the monitoring, processing or administration

---

<sup>1</sup> 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.

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

of the Prepetition Employee Obligations), in their sole discretion, the Employee Obligations, including but not limited to Employee Wage Claims, up to the limit set forth in 11 U.S.C. § 507(a)(4), Employee Benefit Obligations, up to the limit set forth in 11 U.S.C. § 507(a)(5), Employee Expense Obligations, Worker's Compensation Obligations, and Employer Taxes, as and when such obligations are due, upon entry of this order.

3. The Debtors shall be and hereby are authorized, but not directed, in their sole discretion, to honor and continue its Employee Benefit Obligations that were in effect as of the Petition Date; provided, however, that such relief shall not constitute or be deemed an assumption or an authorization to assume any of such Employee Benefit Obligations, including, policies, plans, programs, practices, and procedures, under Bankruptcy Code section 365(a).

4. The Debtors' banks shall be and hereby are authorized to receive, process, honor and pay all pre- and postpetition checks and fund transfers on account of the Employee Obligations that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

5. The Debtors shall be and hereby are authorized, but not directed, to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

6. The Debtors may pay any and all withholding, including social security, FICA, federal and state income taxes, garnishments, health care payments, retirement fund withholding and other types of withholding, whether these relate to the period prior to the date of the Debtors' chapter 11 filing or subsequent thereto. Any party receiving payment from the Debtors is

authorized and directed to rely upon the representations of the Debtors as to which payments are authorized by this order.

7. Nothing in the Motion or this Order or the relief granted (including any actions taken or payments made by the Debtors pursuant to the relief) shall (a) be construed as a request for authority to assume any executory contract under 11 U.S.C. § 365; (b) waive, affect or impair any of the Debtors' rights, claims or defenses, including, but not limited to, those arising from Bankruptcy Code section 365, other applicable law and any agreement; (c) grant third-party beneficiary status or bestow any additional rights on any third party; or (d) be otherwise enforceable by any third party.

8. Authorizations given to the Debtors in this Order empower but do not direct the Debtors to effectuate the payments specified herein, said Debtors retaining the business judgment to make or not make said payments, and in all instances subject to the condition that funds are available to effect any payment and in no event shall any person (the Debtors, officer, director, or otherwise) be personally liable for any amounts authorized for payment herein but not paid. This paragraph 9 does not apply to the payment of trust fund taxes.

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

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

Dated: \_\_\_\_\_, 2009

---

UNITED STATES BANKRUPTCY JUDGE