

**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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**MOTION OF DEBTORS FOR ENTRY OF ORDER
PURSUANT TO 11 U.S.C. §§ 363(b), 507(a)(8), 541, AND 105(a),
AUTHORIZING DEBTORS TO PAY PREPETITION TAXES AND ASSESSMENTS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), hereby move this Court (the “Motion”) for entry of an order, under sections 363(b), 507(a)(8), 541, and 105(a) of Chapter 11 of Title 11 of the United States Code (11 U.S.C. § 101 *et. seq.* as amended, the “Bankruptcy Code”), authorizing the Debtors to pay prepetition taxes and assessments. In support of the Motion, the Debtors respectfully state as follows:

Background

1. On the date hereof (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 the Bankruptcy Code in this Court. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. No trustee, examiner, or statutory creditors’ committee has been appointed in these chapter 11 cases.

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. A full description of the Debtors' business operations, corporate structures, capital structures, and reasons for commencing these cases is set forth in detail in the declaration of Charles M. Moore (the "Moore Declaration"), which was filed contemporaneously herewith and which is incorporated in this Motion by reference. Additional facts in support of the specific relief sought in this Motion are set forth below.

Jurisdiction

4. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Taxes and Assessments

5. In the ordinary course of business, the Debtors may incur certain sales, use, property, excise, gross receipts, franchise, income, and other taxes and governmental charges that are payable directly to the federal government and various state and local taxing authorities ("Taxing Authorities"). Attached as Exhibit A is a list of various taxes paid by the Debtors during 2008 and year to date 2009.

6. As of the Petition Date, the Debtors believe that they are current on all prepetition payments owed to any and all Taxing Authorities. They file this Motion in an abundance of caution to obtain authority, but not direction, to satisfy any prepetition payments to Taxing Authorities that are subsequently determined upon audit, or otherwise, to be owed for periods prior to the Petition Date.

Method of Payment

7. As stated above, in connection with the normal operation of their business, the Debtors may incur and pay Property Taxes, Sales Taxes, Use Taxes, Excise Taxes, Gross Receipts Taxes, Franchise Taxes, Business License Fees, Annual Report Taxes, and Other

Governmental Assessments (collectively, the “Taxes and Assessments”). Jurisdictions differ with regard to the frequency of when the Taxes and Assessments must be remitted, with payments ranging from monthly to quarterly to semi-annually to annually. The Taxes and Assessments are paid to the relevant Taxing Authority in accordance with the requirements of the respective Taxing Authority, including payments with funds drawn by checks (the “Checks”) or by means of electronic fund transfers (the “Electronic Transfers”).

Relief Requested

8. By this Motion, the Debtors seek authorization, but not direction, to pay, in their sole discretion, any of the Taxes and Assessments, including any penalties and interest thereon determined to be owed for periods prior to the Petition Date and all those Taxes and Assessments subsequently determined upon audit, or otherwise, to be owed for periods prior to the Petition Date.

9. In addition, prior to the Petition Date, certain Taxing Authorities were sent Checks or received Electronic Transfers in respect of Taxes and Assessments that may not have cleared the Debtors’ banks or other financial institutions (together, the “Banks”) as of the Petition Date. To the extent any Check or Electronic Transfer has not cleared the Banks as of the Petition Date, the Debtors further request the Court to authorize the Banks to receive, process, honor, and pay such Checks or Electronic Transfers if and to the extent the Debtors request same. Consistent with the foregoing, to the extent the Taxing Authorities have not otherwise received payment for all prepetition Taxes and Assessments owed, the Debtors seek authorization to issue replacement checks or provide for other means of payment to the Taxing Authorities, to the extent necessary to pay all outstanding prepetition Taxes and Assessments.

**Cause Exists to Authorize the Debtors'
Payment of Prepetition Taxes and Assessments**

10. Ample cause exists to authorize the payment of the prepetition Taxes and Assessments. There are various bases for granting the relief requested in this Motion, including the following: (i) interest and penalties may accrue on certain unpaid Property Taxes even after the Petition Date; (ii) non payment of Property Taxes, PILOT Payments and other government compensation payments could void various tax incentive agreements resulting in additional tax payments, (iii) the Debtors' Sales and Excise Taxes are trust fund taxes and not property of the estate; (iv) if unpaid, many taxes (e.g., Use Taxes) may carry officer or director liability, and governmental entities may sue the Debtors' directors and officers, thereby distracting them from the Debtors' reorganization efforts; (v) the Debtors meet the standard specified under 363(b) of the Bankruptcy Code; (vi) certain of the Taxes and Assessments may be entitled to priority status pursuant to section 507(a)(8) of the Bankruptcy Code; and (vii) section 105 of the Bankruptcy Code and the Court's general equitable powers permit the Court to grant the relief sought.

11. Section 506(b) of the Bankruptcy Code provides:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. § 506(b). Thus, with respect to the Debtors' Property Taxes, interest as well as any penalties assessed on Property Taxes due under state law will continue to accrue even after the Petition Date. See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 238-49 (1989) (holding that section 506(b) entitles a creditor to receive postpetition interest on a nonconsensual oversecured claim allowed in a bankruptcy case). Further, to the extent that the proposed sale of substantially all of the Debtors' assets pursuant to Section 363 of the Bankruptcy Code is

approved, the Debtors, as a precondition to transfer the property, need to be current with respect to their Property Tax obligations. The existence of unpaid prepetition obligations could delay the consummation of the Debtors' proposed sale of substantially all of their assets pursuant to Section 363 of the Bankruptcy Code. Therefore, authorization is necessary and in the best interest of the Debtors' estates.

12. Some of the Taxes and Assessments are collected by the Debtors on behalf of the applicable Taxing Authority and are held in trust by the Debtors for the benefit of the Taxing Authorities. As such, these funds do not constitute property of the Debtors' estates pursuant to section 541 of the Bankruptcy Code. See, e.g., Begier v. IRS, 496 U.S. 53, 59-61 (1990) (withholding taxes are property held by debtors in trust for another and, as such, are not property of debtors' estates); Al Copeland Enters., Inc. v. Texas, 991 F.2d 233, 235 (5th Cir. 1993) (debtors' prepetition collection of sales taxes and interest thereon were held subject to trust and were not property of estate); Shank v. Wash. State Dep't of Revenue (In re Shank), 792 F.2d 829, 830 (9th Cir. 1986) (sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes); DeChiaro v. N Y. State Tax Comm'n, 760 F.2d 432, 433 (2d Cir. 1985) (sales taxes are "trust fund" taxes); In re Am. Int'l Airways, Inc., 70 B.R. 102, 103 (Banta. E.D. Pa. 1987) (excise and withholding taxes are "trust fund" taxes); see generally In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1060 (3d Cir. 1993) (indicating that even if a statute does not establish an express trust, a constructive trust may be found). Because some of the Taxes and Assessments are not property of the Debtors' estates, these funds are not available for the satisfaction of creditors' claims.

13. Moreover, many federal, state, and local statutes impose personal liability on the officers and directors for certain taxes owed by such entities. Thus, to the extent that the relevant

Taxes and Assessments remain unpaid by the Debtors, the Debtors' directors, officers, and executives may be subject to lawsuits or criminal prosecution during the pendency of these chapter 11 cases.² See, e.g., John F. Olson, et al., *Director & Officer Liability: Indemnification and Insurance* § 3.21, at 3-20.27 (2008) ("some states hold corporate officers personally liable for any sales tax and penalty owed and not paid by the corporation, regardless of cause"). Any such lawsuit or criminal prosecution (and the ensuing potential liability) would distract the Debtors and their officers, directors, and executives from devoting their full attention to the Debtors' business and the orderly administration of these chapter 11 cases. The Debtors believe that this would materially and adversely affect their ability to operate in the ordinary course of business and to administer these chapter 11 cases, with resulting detriment to all parties in interest.

14. Section 363(b) of the Bankruptcy Code, which provides that "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate," 11 U.S.C. § 363(b)(1), also provides a statutory basis for the relief sought herein. Under this section, a court may authorize a debtor to pay certain prepetition claims. See In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). To approve the use of a debtor's assets outside the ordinary course of business pursuant to section 363(b), a court must find that a sound business justification existed for the use of such assets. See, e.g., In re Enron Corp., 335 B.R. 22, 27-28 (S.D.N.Y. 2005). The business judgment rule is satisfied where "the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." In re Integrated Res., Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del.

² Because they are not debtors in these proceedings, the officers and directors of the Debtors are not protected by the automatic stay pursuant to 28 U.S.C. § 1334.

1985)), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993). It has been stated that “[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.” In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). Courts in this District have consistently declined to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and have upheld a board’s decisions as long as such decisions are attributable to any “rational business purpose.” In re Integrated Res. Inc., 147 B.R. at 656. The relief requested by the Debtors to pay the prepetition Taxes and Assessments becoming due in the ordinary course of business satisfies this business judgment standard.

15. In addition, payment of the prepetition Taxes and Assessments is critical to the Debtors’ efforts to preserve enterprise value. Sections 1107(a) and 1108 of the Bankruptcy Code vest debtors in possession with authority to continue operating their businesses and thus authorize the relief requested in this Motion. Courts have recognized that sometimes debtors in possession can only maximize the value of the estate by paying certain unsecured claims before confirmation of a bankruptcy plan. *See, e.g., In re Mirant Corp.*, 296 B.R. 427 (Bankr. N.D. Tex. 2003); In re CoServ, L.L.C., 273 B.R. 487, 498 (Bankr. N.D. Tex. 2002). Nonpayment of these obligations may cause the Taxing Authorities to take precipitous action, including, but not limited to, preventing the Debtors from conducting business in the applicable jurisdictions, seeking to lift the automatic stay, and perhaps attempting to file liens, all of which would disrupt the Debtors’ day-to-day operations. Failing to pay such amounts could also trigger unwarranted governmental action in the form of increased audits, which would be disruptive of the Debtors’ operations and detrimental to all parties in interest. As such, paying the Taxes and Assessments is well within the Debtors’ sound business judgment. Indeed, the Debtors submit that payment

of such amounts may actually reduce the amounts ultimately paid to the Taxing Authorities because penalties and interest will be avoided by prompt payment.

16. Further, most, if not all, of the Debtors' prepetition Taxes and Assessments are afforded priority status under section 507(a)(8) of the Bankruptcy Code. These include unsecured claims of governmental units for a tax on or measured by income or gross receipts for a taxable year ending on or before the Petition Date (11 U.S.C. § 507(a)(8)(A)), a property tax incurred before the Petition Date and last payable without penalty after one year before the Petition Date (Id. § 507(a)(8)(B)), a tax required to be collected or withheld and for which the debtor is liable in whatever capacity (Id. § 507(a)(8)(C)), and, under certain circumstances, an employment tax on wages, salaries, or commissions (Id. § 507(a)(8)(D)). Accordingly, as administrative and priority claims, most if not all of such prepetition Taxes and Assessments must be paid in full before any general unsecured obligations of the Debtors may be satisfied.

17. Finally, pursuant to section 105(a) of the Bankruptcy Code, the Court "may issue any order, process, or judgment that is necessary to carry out the provisions of this title." Id. § 105(a). The Debtors submit that the relief requested herein is necessary and appropriate to carry out the provisions of the Bankruptcy Code.

**Payment of Checks Issued and Other Transfers
Made in Respect of Prepetition Taxes and Assessments**

18. The Debtors further request that all applicable Banks, including, but not limited to, those set forth on Exhibit B annexed hereto, be authorized to receive, process, honor, and pay any and all Checks or Electronic Transfers drawn on the Debtors' accounts when the Debtors request in their sole discretion payment of prepetition Taxes and Assessments owed to the Taxing Authorities, whether those Checks or Electronic Transfers were presented prior to or after the Petition Date, and other transfers be made, provided that sufficient funds are available in the

applicable accounts to make such payments. The Debtors represent that each of these Checks, Electronic Transfers, or other transfers can be readily identified as relating directly to the authorized payment of prepetition Taxes and Assessments. Accordingly, the Debtors believe that Checks, Electronic Transfers, and other transfers, other than those relating to authorized payments, will not be honored inadvertently.

19. Nothing in this Motion should be construed as impairing the Debtors' right to contest the amount of any Taxes and Assessments that may be owed to any Taxing Authority, and the Debtors expressly reserve all of their rights with respect thereto.

The Debtors Have Satisfied Bankruptcy Rule 6003

20. Bankruptcy Rule 6003 provides that to the extent "relief is necessary to avoid immediate and irreparable harm," a Bankruptcy Court may approve a motion to "pay all or part of a claim that arose before the filing of the petition" prior to twenty days after the Petition Date. Fed. R. Bankr. P. 6003. The Debtors' business operations rely heavily on their compliance with applicable federal, state and local law. If the Debtors are unable to immediately comply with the requirements of the applicable Taxing Authorities, the Debtors' ability to conduct business in each certain jurisdiction will be placed in jeopardy. Furthermore, as stated above, without the relief requested herein, the Debtors' officers, directors, and other employees may be subject to lawsuits or criminal prosecution during the pendency of these chapter 11 cases. The threat of a lawsuit or criminal prosecution, and any ensuing liability, especially during the early stages of the Debtors' chapter 11 cases, would distract the Debtors and their personnel, to the detriment of all parties in interest. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

Waiver of Bankruptcy Rules 6004(a) and (h)

21. To implement the foregoing immediately, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the ten-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

Notice

22. 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; (j) all federal and state taxing authorities entitled to notice regarding the relief requested herein; and (k) 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 Relief Requested

23. No previous request for the relief sought herein has been made by the Debtors 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

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*Proposed Counsel for the Debtors
and Debtors in Possession*

EXHIBIT A

Taxes Paid

2008

Date	Payee	Amount	Explanation/Comments
3/14/2008	NYC Department of Finance	149,060.00	FORM NYC 6 extension
4/30/2008	Washington State Department of Revenue	117.00	
5/20/2008	Delaware Secretary of State	200.00	File 4434633
9/1/2008	State of NJ-Labor & WorkForce Division	12.84	
9/15/2008	Florida U.C. Fund-FL Dept of Revenue	3,601.04	UT Acc# 2855478
9/15/2008	Florida U.C. Fund-FL Dept of Revenue	57.76	UT Acc# 2855478
3/14/2008	NYS Corporation Tax	2,500.00	EIN # 26-1308208-2007 CT 5.4 extension
9/12/2008	NYS Corporation Tax	1,565.00	EIN # 26-1308208-2007 NYS tax return-Form CT-3-S
12/1/2008	NYS Corporation Tax	100.00	EIN # 20-1969177-2007 CT-3-S

2009

Date	Payee	Amount	Explanation/Comments
1/27/2009	NYS LLC/LLP fee	25.00	EIN 26-1308677, 2008 filing fee
3/19/2009	NYS Dept of State-Div of Corporations	50.00	Cynergy Certificate of Good Standing
3/31/2009	Delaware Division of Corporations	250.00	Los5Amigos Producciones LLC-File No 4548
3/31/2009	Delaware Division of Corporations	250.00	Cynergy Prosperity Plus LLC-File No 4365319,200
3/31/2009	Delaware Division of Corporations	35.00	Cynergy Data LLC File No 4434633, 2008 Annual Tax
4/1/2009	Delaware Division of Corporations	354.88	CD Holdings Inc.:Franchise (225)+Penalty (100);int (4.88);filing fee (25)
5/8/2009	State of Texas Franchise Tax	-	Filing only-no payment
6/5/2009	Indiana Department of Revenue	525.11	TID: 0134224493-001 Notice No 09026491220-tax penalties-re: Q408 tax liability
6/12/2009	NYS Dept of State-Div of Corporations	9.00	3529850 filing fee-Cynergy Data LLC
7/27/2009	Massachusetts Department of Revenue	173.90	EIN: 261 308 677, DUA Acc# 96-50329-0-tax period 12/31/08
5/14/2009	NYC Department of Finance	900.00	ICIP Application Filing Fee
3/16/2009	NYS Corporation Tax	3,875.00	EIN # 26-1308208 2008 CT-5.4 Extension
6/12/2009	State of NJ-Dept of Labor and Workforce Development	67.18	EIN 26-1308677, Cynergy Data LLC Q4 2008
6/12/2009	State of Connecticut-Dept of Labor	25.00	Employer Reg No 41-130-71
7/27/2009	PA Dept of Revenue	300.58	EIN 11-3415154, Notice No 906-621-909-060-9
7/27/2009	PA Unemployment Comp Fund	44.99	Acc 45-23671 4-tax periods 12/31/08 and 3/31/09

EXHIBIT B

Debtors' Bank Accounts

<u>BANK NAME</u>	<u>ACCOUNT NUMBER</u>
Capital One	5024020686
Capital One	5224006733
Comerica	1852184116/366000 23300
Comerica	1852252996
Comerica	1852196722
Comerica	1852252988
Comerica	ORJ896667
Comerica	Multiple Accounts
Harris	2362556
Harris	2781011
Wells Fargo	32722514
Wells Fargo	412150772
Sterling National Bank	4400123745

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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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**ORDER AUTHORIZING DEBTORS TO PAY PREPETITION
TAXES AND ASSESSMENTS**

Upon the motion (the “Motion”)² of the above-captioned Debtors for entry of an order authorizing the Debtors to pay prepetition taxes and assessments; and upon the Moore Declaration; the Bankruptcy Court having found that: (a) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b); (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) the relief requested in the Motion is in the best interest of the Debtors, their estates and their creditors; (d) proper and adequate notice of the Motion and the hearing on the Motion has been given and that no other or further notice is necessary or required; (e) it appearing that the requirements of Bankruptcy Rule 6003 have been satisfied; and (f) upon the record and after due deliberation, good and sufficient cause exists for the granting of the relief as set forth in this Order; it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion GRANTED in its entirety.

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.

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

2. The Debtors are authorized, but not directed, to pay, in their sole discretion and in the ordinary course of business, all prepetition Taxes and Assessments to the applicable Taxing Authority.

3. The Banks are authorized, when requested by the Debtors in their sole discretion, to receive, honor, process and pay any and all checks or electronic transfers drawn on the Debtors' accounts to pay the Taxes and Assessments, whether those checks were presented before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.

4. To the extent the Taxing Authorities have not otherwise received payment for all prepetition Taxes and Assessments owed, the Debtors shall be and hereby are authorized to issue replacement checks or provide for other means of payment to the Taxing Authorities, to the extent necessary to pay all outstanding prepetition Taxes and Assessments.

5. Nothing in the Motion or this Order shall be construed as impairing the Debtors' right to contest the validity, priority or amount of any Taxes and Assessments that may be due to any Taxing Authorities.

6. The Debtors, their officers, employees and agents are authorized to take or refrain from taking such acts as are necessary and appropriate to implement and effectuate the relief granted in this Order without further order of the Bankruptcy Court.

7. The Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Order.

Dated: _____, 2009

UNITED STATES BANKRUPTCY JUDGE