

**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. 09-13038 (KG)  Jointly Administered Related Docket No. 5, 9, 29
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**CERTIFICATION OF COUNSEL REGARDING ORDERS ON MOTIONS**

I, Evelyn J. Meltzer, an associate with Pepper Hamilton LLP, co-counsel to the above-referenced debtors and debtors-in-possession (the “Debtors”), hereby certify:

1. On September 1, 2009, the Debtors filed the *Debtors’ Motion for Interim Order Under 11 U.S.C. §§ 105(a), 345, 363, 364, AND 503(b)(1) Authorizing (A) Continued Maintenance of Existing Bank Accounts; (B) Continued Use of Existing Business Forms, (C) Continued Use of Existing Cash Management System; (D) Continued Payments to ISOs and Merchants in Accordance with Customary Practice, (E) Waiver of Certain Guidelines Relating to Bank Accounts, and (F) Scheduling a Final Hearing* (Docket No. 5) (the “Cash Collateral Motion”).

2. On September 1, 2009, the Debtors filed the *Debtors’ Motion for Order Determining Adequate Assurance of Payment for Future Utility Services* (Docket No. 9) (the “Utility Motion”).

3. On September 1, 2009 the Debtors filed the *Application for Order Pursuant to 11 U.S.C. §§ 327(a) and 329 and Bankruptcy Rules 2014 and 2016 Authorizing the*

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<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.

*Employment and Retention of Unicorn Partners, LLC as Advisors to the Debtors* (Docket No. 29) (the “Unicorn Retention Motion” and, together with the Cash Collateral Motion and the Utility Motion, the “Motions”).

4. On September 15, 2009, the Court held a hearing to consider the Motions. At that hearing the Court granted the Motions, and chambers has instructed undersigned counsel to submit proposed forms of Order consistent with the Court’s rulings.

5. Attached hereto as **Exhibits A-C** are proposed forms of Order accurately reflecting the Court’s rulings.

6. The Debtors respectfully requests that the Court enter the proposed Orders attached hereto as **Exhibits A-C** at the Court’s earliest convenience.

Dated: September 15, 2009  
Wilmington, Delaware

Respectfully submitted,

PEPPER HAMILTON LLP

/s/ Evelyn J. Meltzer

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*Proposed Counsel for the Debtors  
and Debtors in Possession*

# **EXHIBIT A**

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

In re:

CYNERGY DATA, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

Related Docket No. 5

**FINAL ORDER UNDER 11 U.S.C. §§ 105(a), 345, 363, 364, AND 503(b)(1)  
AUTHORIZING (A) CONTINUED MAINTENANCE OF EXISTING BANK  
ACCOUNTS; (B) CONTINUED USE OF EXISTING BUSINESS FORMS;  
(C) CONTINUED USE OF EXISTING CASH MANAGEMENT SYSTEM; AND  
(D) WAIVER OF CERTAIN GUIDELINES RELATING TO BANK ACCOUNTS**

Upon the motion (the "Motion")<sup>2</sup> of the Debtors for an Order, under Bankruptcy Code sections 105, 345, 363, 364, and 503(b)(1) of the Bankruptcy Code, authorizing (a) continued maintenance of existing Bank Accounts, (b) continued use of existing business forms, (c) continued use of existing cash management system, (d) a waiver of certain operating guidelines relating to the Bank Accounts, and (e) scheduling a final hearing; and upon the Moore Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that the Rule 6003(b) standard has been met; 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, their creditors and other parties in interest; and after due deliberation thereon and sufficient cause appearing therefor, it is hereby

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<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.

ORDERED, ADJUDGED AND DECREED that:

1. The Motion is GRANTED as set forth in this Order.

**II. MAINTENANCE OF BANK ACCOUNTS.**

2. Under sections 105 and 363 of the Bankruptcy Code, the Debtors, in their sole discretion, are authorized, but not directed, to (a) designate, maintain and continue to use any and all of their respective Bank Accounts in existence as of the Petition Date, with the same account numbers, including, without limitation, the accounts identified in Exhibit A annexed hereto; (b) if necessary, open new accounts and give the U.S. Trustee prompt notice of each such newly opened account, wherever they are needed, whether or not such banks are designated depositories in the District of Delaware; provided, however, that any new bank account shall be with a bank that is insured by the FDIC or FSLIC and organized under the laws of the United States of America or any state therein and shall be designated a “debtor-in-possession” or “DIP” account by the respective bank; (c) treat the Bank Accounts and any such newly opened accounts for all purposes as accounts of the Debtors in their capacity as debtors-in-possession and (d) to pay their tax obligations out of their existing Bank Accounts rather than opening new Bank Accounts solely for tax payments.

**III. USE OF BUSINESS FORMS.**

3. The Debtors are authorized to continue to use their existing business forms and checks without alteration or change and without the designation “Debtor In Possession” or a “debtor in possession case number” imprinted upon them provided, however, in the event that the Debtors need to purchase new check stock or any other business forms during the pendency of these chapter 11 cases, such check stock or other business forms will include a legend referring to the Debtors as “Debtor-in-Possession” or “DIP”.

#### **IV. CASH MANAGEMENT SYSTEM.**

4. The Debtors are authorized to continue to use their existing cash management system, and shall maintain through the use thereof detailed records reflecting all transfers of funds under the terms and conditions provided for by the existing agreements with the institutions participating in the Debtors' cash management system, except as modified by this Order. In connection with the ongoing utilization of the cash management systems, the Debtors shall continue to maintain records with respect to all transfers of cash so that all transactions may be readily ascertained, traced and recorded properly on the applicable accounts.

5. The Debtors are authorized, in connection with maintaining their cash management system, to continue to satisfy, postpetition, the Operating Obligations, including any of those obligations that arose prepetition.

6. Debtors are authorized to perform all of their obligations under the Prepetition Harris Documents, and Harris shall perform all of its obligations under the Prepetition Harris Documents (provided, that Debtors and their Merchants are in compliance with their respective obligations thereunder.)

7. After the Petition Date, and subject to the terms of this Order, all Banks at which the Bank Accounts are maintained are authorized and directed to continue to administer the Bank Accounts as such accounts were maintained prepetition, without interruption and in the usual and ordinary course, and to pay any and all checks, wire transfers, ACH transfers, electronic fund transfers or other items presented, issued or drawn on the Bank Accounts on account of a claim arising on or after the Petition Date, so long as sufficient funds are in the Bank Accounts.

8. Except as expressly authorized hereby, the Banks shall be restrained from honoring any check, draft, wire or ACH Transfer presented, issued or drawn on the Bank Accounts on account of a prepetition claim unless (a) authorized by an order of this Court,

(b) not otherwise prohibited by a “stop payment” request received by the Banks from the Debtors and (c) supported by sufficient funds in the Bank Account in question.

9. Subject to the provisions of this Order, the Banks are authorized to accept and honor all representations from the Debtors as to which checks, drafts, wires or ACH transfers should be honored or dishonored consistent with any order(s) of this Court and governing law, whether such checks, drafts, wires or ACH transfers are dated prior to, on or subsequent to the Petition Date. To the extent that the Debtors direct that any prepetition checks, drafts, wires or ACH Transfers be dishonored, the Debtors may issue replacement checks, drafts, wires or ACH Transfers to pay the amounts related to such dishonored checks, drafts, wires or ACH Transfers consistent with the orders of this Court.

10. Each Bank that maintains any checking account shall implement reasonable handling procedures designed to effectuate the terms of this Order. No Bank that implements such handling procedures and then honors a prepetition check, draft, wire, ACH transfer (excluding any ACH Transfer that the Banks are obligated to settle) or other item presented, issued or drawn on any Bank Account that is the subject of this Order (a) at the direction of the Debtors to honor such prepetition check, draft, ACH transfer or other item, (b) in good-faith belief that the Court has authorized such prepetition check, draft, wire, ACH transfer or other item to be honored or (c) as a result of an innocent mistake made despite implementation of such handling procedures shall be deemed to be liable to the Debtors or their estates or otherwise in violation of this Order.

11. Nothing contained in this Order shall prevent the Debtors and the Banks from implementing reasonable changes to the Debtors’ cash management system, including, but not limited to, the opening of any additional bank accounts or closing of any Bank Account(s) as

they may deem necessary and appropriate, and the Banks are authorized to honor the Debtors' requests to open or close, as the case may be, such Bank Accounts; provided, however, that any new account shall be with a Bank that is insured by the FDIC or the FSLIC and organized under the laws of the United States of America or any state therein and shall be designated a "debtor-in-possession" or "DIP" account by the respective Bank.

**V. INVESTMENT GUIDELINES.**

12. The Debtors are authorized to deposit and invest funds in accordance with the Investment Guidelines (as they may be modified by the requirements of any order of the Court approving the proposed postpetition financing), notwithstanding that the Investment Guidelines may not strictly comply in all respects with the investment guidelines expressly set forth in section 345 of the Bankruptcy Code. The Debtors' Banks are authorized and directed to accept and hold funds, at the Debtors' direction, in accordance with the Investment Guidelines.

13. The Debtors are hereby authorized to take such actions and execute such documents as may be required to carry out the intent and purpose of this Order.

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

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

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

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UNITED STATES BANKRUPTCY JUDGE

**Exhibit A**

**Debtors' Bank Accounts**

<b><u>BANK NAME</u></b>	<b><u>ACCOUNT NUMBER</u></b>
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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## **EXHIBIT B**

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

In re:

CYNERGY DATA, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

Related Docket No. 9

**FINAL ORDER DETERMINING ADEQUATE  
ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtors for interim and final orders under Bankruptcy Code section 366 determining adequate assurance of payment for future utility services; 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 this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; 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 to take all actions necessary to effectuate the relief granted under this Order in accordance with the Motion.
3. A Utility Company who accepts an Adequate Assurance Deposit shall be and hereby is deemed to have stipulated that the Adequate Assurance Deposit constitutes adequate assurance of future payment to such Utility Company within the meaning of section

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<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.

366 of the Bankruptcy Code, and shall further be deemed to have waived any right to seek additional adequate assurance during the course of the Debtors' chapter 11 cases except upon a showing of changed circumstances and further order of this Court.

4. The Adequate Assurance Procedures are hereby approved as follows:
  - (a) Except as provided by the Adequate Assurance Procedures, the Utility Companies are forbidden to discontinue, alter or refuse service on account of any unpaid prepetition charges, or require additional adequate assurance of payment other than the Proposed Adequate Assurance.
  - (b) Within five (5) business days after entry of the Interim Order, the Debtors shall furnish each Utility Company with a deposit equal to two (2) weeks of utility service, calculated as a historical average over the past twelve (12) months (the "Adequate Assurance Deposit"), provided that such Utility Company does not already hold a deposit equal to or greater than two (2) weeks of utility services, and provided further that such Utility Company is not currently paid in advance for its services (the "Proposed Adequate Assurance").
  - (c) In the event that a Utility Company maintains that the Proposed Adequate Assurance is not satisfactory adequate assurance of payment as contemplated by Bankruptcy Code section 366(c)(2), the Utility Company must serve a request (an "Adequate Assurance Request") so that it is received by the Debtors and their counsel no later than five (5) business days before the Final Hearing (the "Adequate Assurance Request Deadline").
  - (d) Any Adequate Assurance Request must: (i) be made in writing, (ii) set forth the location for which utility services are provided, (iii) include a summary of the Debtors' payment history relevant to the affected account(s), including any security deposits, (iv) set forth why the Utility Company believes the Proposed Adequate Assurance is not sufficient, (v) set forth what the Utility Company would accept as satisfactory adequate assurance of payment, and (vi) set forth a fax and electronic mail address to which the Debtors may respond to the Adequate Assurance Request.
  - (e) Upon the Debtors' receipt of an Adequate Assurance Request, the Debtors will either (a) advise the Utility Company in writing on or before a day that is no less than three (3) business days before the Final Hearing that the Adequate Assurance Request is acceptable or (b) contest the Utility Company's request under Bankruptcy Code section 366(c)(3) at the Final Hearing to be held on before the day that is thirty (30) days after the Petition Date, or such other date as the Debtors and the Utility Company may agree.

- (f) The Final Hearing will be an evidentiary hearing at which the Court will determine whether the Proposed Adequate Assurance and the additional adequate assurance of payment requested by the Utility Company should be modified under Bankruptcy Code section 366(c)(3)(A).
- (g) Pending resolution of any such Final Hearing, such particular Utility Company shall be restrained from discontinuing, altering, or refusing service to the Debtors on account of unpaid charges for prepetition services or on account of any objections to the Proposed Adequate Assurance.

5. The Utility Companies, including any subsequently added Utility Companies, are prohibited from altering, refusing, or discontinuing service to or discriminating against the Debtors on account of unpaid prepetition invoices or due to the commencement of these cases, or requiring the Debtors to pay a deposit or other security in connection with the provision of postpetition Utility Services, other than in accordance with the Adequate Assurance Procedures contained herein.

6. Any Utility Company that does not serve an Adequate Assurance Request by the Adequate Assurance Request Deadline shall be deemed to have received adequate assurance of payment that is satisfactory to such Utility Company within the meaning of Bankruptcy Code section 366(c)(2), and shall further be deemed to have waived any right to seek additional adequate assurance during the course of the Debtors' chapter 11 cases, except as provided in Bankruptcy Code section 366(c)(3).

7. The Debtors are authorized, in their sole discretion, to amend Exhibit A to the Motion to add or delete any Utility Company, and this order shall apply to any such Utility Company that is subsequently added to Exhibit A to the Motion. For those Utility Companies that are subsequently added to Exhibit A, the Debtors shall serve a copy of this order on such Utility Company, along with an amended Exhibit A, and such subsequently added entities shall have twenty (20) days from service of this order to make an Adequate Assurance Request.

8. In the event that any Utility Company, including a subsequently added Utility Company, files and/or serves an Adequate Assurance Request after the Adequate Assurance Request Deadline, such request shall be treated as a request under Bankruptcy Code sections 366(b) and shall be granted, if at all, only after the Utility Company making such request schedules such request for hearing, on notice, in accordance with the provisions of the Bankruptcy Code, including section 366(b), and the Federal Rules of Bankruptcy Procedure.

9. The Debtors may, in their discretion, resolve any Adequate Assurance Request by mutual agreement with the Utility Company and without further order of the Court, and may, in connection with any such agreement, in their discretion, provide a Utility Company with additional adequate assurance of future payment, including but not limited to cash deposits, prepayments and/or other forms of security, without further order of this Court if the Debtors believe such additional assurance is reasonable.

10. A Utility Company shall be deemed to have adequate assurance of payment under section 366 of the Bankruptcy Code and not entitled to any additional adequate assurance unless and until (i) the Debtors, in their discretion, agree to an Adequate Assurance Request or (ii) this Court enters an order at the Final Hearing requiring that additional adequate assurance of payment be provided.

11. Nothing herein constitutes a finding that any entity is or is not a Utility Company hereunder or under section 366 of the Bankruptcy Code, whether or not such entity is listed on the Exhibit A attached to the Motion.

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

13. The Debtors are authorized to pay on a timely basis in accordance with their prepetition practices all undisputed invoices in respect of postpetition Utility Services rendered by the Utility Companies to the Debtors.

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

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

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UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT C**

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

In re:

CYNERGY DATA, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

Related Docket No. 29

**ORDER GRANTING APPLICATION FOR ORDER PURSUANT TO  
11 U.S.C. §§ 327(a) AND 329 AND BANKRUPTCY RULES 2014 AND 2016  
AUTHORIZING THE EMPLOYMENT AND RETENTION OF  
UNICORN PARTNERS, LLC AS ADVISERS TO THE DEBTORS**

Upon the Application of the above-referenced debtors and debtors-in-possession (the “Debtors”), for an order, pursuant to § 327(a) and § 328(a) of title 11, United States Code (the “Bankruptcy Code”), authorizing the Debtors to employ and retain Unicorn Partners, LLC (“Unicorn Partners”) as their advisers, *nunc pro tunc* to Petition Date<sup>2</sup> (the “Application”); and upon the affidavit of Dean M. Leavitt (the “Leavitt Affidavit”), which is annexed to such Application; and it appearing that the Court has jurisdiction to consider the Application; and it appearing that Unicorn Partners is a “disinterested” person within the meaning of § 101(14) and 327(a) of the Bankruptcy Code; and that the relief requested in the Application is in the best interests of the Debtors, their creditors, and all parties-in-interest; and it appearing that due and appropriate notice of the Application has been given under the circumstances; and it appearing that no other or further notice need be given; and upon the Application and all of the proceedings before the Court; and after due deliberation; and sufficient cause appearing therefor:

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<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> Terms not defined herein shall have the meaning ascribed to them in the Application.

**IT IS HEREBY ORDERED THAT:**

1. The Application is GRANTED.
2. In accordance with §§ 327(a) and 328(a) of the Bankruptcy Code, the Debtors be, and hereby are, authorized to employ and retain Unicorn Partners as their advisers to perform all of the services set forth in the Application, on the terms set forth in the Application and in the Leavitt Affidavit *nunc pro tunc* to the Petition Date.
3. Notwithstanding anything to the contrary in this Order, the US Trustee shall retain the right and be entitled to object to each Unicorn Partners fees and expenses based on the reasonableness standard under Bankruptcy Code sections 330 and 331. The Debtors and Unicorn Partners further stipulate and agree that this Order and the record relating to the Court's consideration of the Application shall not prejudice or otherwise affect the rights of the US Trustee to challenge the reasonableness of each Unicorn Partners' compensation under Bankruptcy Code sections 330 and 331. Accordingly, nothing in this Order or the record shall constitute a finding of fact or conclusion of law binding the US Trustee, on appeal or otherwise, with respect to the reasonableness of each Unicorn Partners' compensation.
4. The indemnification provisions found in the Engagement Letter are hereby modified as follows:
  - a. subject to the provisions of subparagraph (c), *infra*, the Debtors are authorized to indemnify, and to provide contribution and reimbursement to, and shall indemnify, and provide contribution and reimbursement to, Unicorn Partners in accordance with the Engagement Letter, for any claim arising from, related to, or in connection with the services described therein;

b. notwithstanding any provisions of the Engagement Letter to the contrary, the Debtors shall have no obligation to indemnify Unicorn Partners, or to provide contribution or reimbursement to Unicorn Partners, (i) for any claim or expense that is judicially determined (the determination having become final) to have arisen from Unicorn Partners' bad faith, self-dealing, breach of fiduciary duty (if any), willful misconduct or gross negligence, (ii) for a contractual dispute in which the Debtors allege the breach of Unicorn Partners' contractual obligations if the Court determines that the indemnification, contribution, or reimbursement would not be permissible pursuant to In re United Artists Theatre Company, et al., 315 F.3d 217 (3d Cir. 2003), or (iii) for any claim or expense that is settled prior to a judicial determination as to the exclusions set forth in clauses (i) and (ii) above, but determined by the Court, after notice and a hearing pursuant to subparagraph (c), infra, to be a claim or expense for which Unicorn Partners should not receive indemnity, contribution or reimbursement under the terms of the Engagement Letter, as modified by this Order;

c. if, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order no longer subject to appeal), and (ii) the entry of an order closing these chapter 11 cases, Unicorn Partners believes that it is entitled to payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution and/or reimbursement obligations under the Engagement Letter (as modified by this Order), including without limitation the advancement of defense costs, Unicorn Partners must file an application therefore with this Court, and the Debtors may not pay any such amounts to Unicorn Partners before the entry of an order by this Court approving the payment. This subparagraph (c) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by Unicorn Partners for indemnification,

contribution, or reimbursement and not a provision limiting the duration of the Debtor's obligation to indemnify Unicorn Partners.

5. This Court retains jurisdiction over this Order and all related proceedings.

This Order shall be immediately effective and enforceable upon its entry.

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

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THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE