

**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)

**CERTIFICATION OF COUNSEL**

I, Michael L. Hirschfeld, hereby state the following in support of the *Joint Motion of Dymas Funding Company, LLC, Garrison Credit Investments I LLC, and Garrison Credit Opportunities Holdings L.P. for an Order Under Rule 2004 of the Federal Rules of Bankruptcy Procedure Authorizing Discovery from Harris N.A. and Moneris Solutions, Inc.* (the "Motion")<sup>2</sup>:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy LLP, attorneys for Dymas Funding Company, LLC, as agent (in such capacities, the "Junior Agent") for (a) certain lenders (the "Term B Lenders") under the Credit Agreement, dated as of August 1, 2008, and (b) the lenders (the "Second Lien Lenders") under the Financing Agreement, dated as of November 15, 2007, among Cynergy and the various lenders party thereto from time to time (the "Second Lien Credit Agreement").

2. Prior to the filing of the Motion, I attempted to confer with representatives of Harris N.A. ("Harris") and Moneris Solutions, Inc. ("Moneris") to arrange mutually agreeable date(s) for the depositions of Harris and Moneris personnel, as requested in the Motion, and to determine a mutually agreeable scope of production of documents and information by Harris and

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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 47<sup>th</sup> Avenue, 9<sup>th</sup> Floor, Long Island City, New York 11101.

Moneris, as set forth in the “Schedule of Documents to be Produced by Harris, N.A.” and the “Schedule of Documents to be Produced by Moneris Solutions, Inc.,” attached to the Motion, all to enable and assist the Movants to determine, among other things, the basis for Harris’s/Moneris’s claim of entitlement to funds from the estate to cover an asserted “shortfall” in Rolling Reserve funds that Harris/Moneris contend should have been on deposit with Harris.

3. In particular, at approximately 9:00 a.m. this morning, I caused a letter to be sent via email and hand delivery to counsel for Harris and Moneris, Alison D. Bauer, Esq. of Torys LLP, requesting that Harris and Moneris agree to the discovery requested in the Motion. The letter included as attachments the aforementioned Schedules of Documents to be Produced by Harris and Moneris, as well as listings of deposition topics for the respective Harris and Moneris witnesses. A copy of the letter is attached hereto as Exhibit A. Given upcoming deadlines associated with the sale process, including the October 6, 2009 deadline for filing objections to any request for cure pursuant to Section 365(b) of the Bankruptcy Code, the undersigned requested in the letter that Harris and Moneris respond to the letter and indicate their position on the proposed discovery by no later than 2:00 p.m.

4. Having not heard from counsel for Harris and Moneris, I called counsel for Harris and Moneris at approximately noon on September 21, 2009. Ms. Bauer’s assistant responded that Ms. Bauer was on a call, and I therefore left a message with Ms. Bauer’s assistant noting that I had called in reference to the letter sent earlier in the morning, and requested that Ms. Bauer return the call.

5. Shortly after 2:00 p.m., I received an email message from Ms. Bauer stating that the request made in my letter was being taken “under advisement;” assuring that Harris and Moneris “will not unduly delay getting back to you;” but noting that my “request for a

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

response by an artificial deadline of 2p.m. today is not feasible.” A copy of Ms. Bauer’s email is annexed as Exhibit B.


6. In response to Ms. Bauer’s indication that Harris and Moneris would not be in a position to respond by 2:00 p.m. on September 21, 2009 as requested, my associate, Robert C. Hora, informed Ms. Bauer by email that the Junior Agent would not take action prior to 6:00 p.m., to allow additional time for the parties to engage in discussions with respect to the requested discovery. See Exhibit B. As of the time of this filing, counsel for Harris and Moneris has neither returned my call nor provided a substantive response to the letter, notwithstanding the urgency indicated in the letter.

7. Based on Harris’s and Moneris’s apparent inability or unwillingness to confer regarding the proposed discovery in the timeframe indicated by the Junior Agent, as extended, and given the deadlines associated with the impending sale of assets by the Debtor, Movants believe they have no alternative but to file the Motion in order to protect their interests.

8. During the same period on September 21, 2009 as the Junior Agent attempted to communicate and reach agreement with Harris and Moneris, the Junior Agent also alerted the Debtors to the discovery the Junior Agent proposed to take from the Debtors, forwarding to counsel for the Debtors, Mark Berman, Esq., a copy of the materials annexed hereto as Exhibit C, including a “Schedule of Documents to be Produced by the Debtors” and a list of deposition topics on which it is proposed that the Debtors’ witness(es) be examined. In the course of email and telephonic communications with Mr. Berman on September 21, 2009, a

mutually satisfactory agreement was reached with respect to the production of documents by,  
and the taking of testimony from, the Debtors, as is reflected in the Motion.

Dated: New York, NY  
September 21, 2009



Michael L. Hirschfeld

# **EXHIBIT A**

**Hora, Robert**

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**From:** Hora, Robert  
**Sent:** Monday, September 21, 2009 9:05 AM  
**To:** 'abauer@torys.com'  
**Cc:** Hirschfeld, Michael; Bray, Gregory; Mandel, Lena; 'chipman@lrclaw.com'  
**Subject:** In re Cynergy Data, LLC, Case No. 09-13038(KG) (Bankr. D. Del).  
**Attachments:** DOC001.PDF

Alison,

Please see the attached.

Regards,

**Robert C. Hora**  
**Milbank, Tweed, Hadley & McCloy LLP**  
1 Chase Manhattan Plaza  
New York, NY 10005  
P: (212) 530-5170  
F: (212) 822-5170  
[rhora@milbank.com](mailto:rhora@milbank.com)



DOC001.PDF  
(184 KB)

MILBANK, TWEED, HADLEY & McCLOY LLP

1 CHASE MANHATTAN PLAZA

NEW YORK, N.Y. 10005-1413

LOS ANGELES  
213-892-4000  
FAX: 213-629-5063

WASHINGTON, D.C.  
202-835-7500  
FAX: 202-835-7586

LONDON  
44-20-7615-3000  
FAX: 44-20-7615-3100

FRANKFURT  
49-69-71914-3400  
FAX: 49-69-71914-3500

MUNICH  
49-89-25559-3600  
FAX: 49-89-25559-3700

212-530-5000

FAX: 212-530-5219

MICHAEL L. HIRSCHFELD  
PARTNER  
DIRECT DIAL NUMBER  
212-830-5832  
FAX: 212-822-5832

BEIJING  
8610-5969-2700  
FAX: 8610-5969-2707

HONG KONG  
852-2971-4888  
FAX: 852-2840-0792

SINGAPORE  
65-6428-2400  
FAX: 65-6428-2500

TOKYO  
813-3504-1050  
FAX: 813-3595-2790

September 21, 2009

**BY EMAIL AND HAND DELIVERY**

Alison D. Bauer  
Torys LLP  
237 Park Avenue  
New York, NY 10017.3142

Re: In re: Cynergy Data, LLC, et al., Chapter 11, Case No. 09-13038 (KG) (Bankr. D. Del)

Dear Alison:

We write on behalf of Dymas Funding Company, LLC, agent (in such capacities, the "Junior Agent") for (a) certain lenders (the "Term B Lenders") under the Credit Agreement, dated as of August 1, 2008, among the Debtors in the Chapter 11 proceedings referenced above and the various lenders party thereto from time to time, and (b) the lenders (the "Second Lien Lenders") under the Financing Agreement, dated as of November 15, 2007, among the Debtors and the various lenders party thereto from time to time.

As you know, the Junior Agent disagrees with the contention that Harris NA ("Harris") and Moneris Solutions, Inc. ("Moneris") are entitled to a payment of \$21 million from the estate to cover a claimed "shortfall" in rolling reserves on deposit at Harris. The Junior Agent is prepared today to file a motion pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure requesting an order directing the oral examination of corporate representatives of, and the production of documents from, Harris and Moneris concerning the factual basis and validity of the Harris/Moneris position. A copy of the proposed discovery requests to Harris and Moneris are attached hereto. We are also planning to pursue discovery from the Debtors.

We write, pursuant to Rule 2004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, to arrange mutually agreeable dates, times and places for the requested examinations and productions. Given the impending hearing scheduled for October 7, 2009 on the proposed sale of Debtors'

assets, we ask that you respond to this request by 2:00 p.m. today. I will follow up with a phone call to you this morning.

Sincerely,

*Michael L. Hirschfeld* MLH

Michael L. Hirschfeld

cc: All counsel

## **SCHEDULE OF DOCUMENTS TO BE PRODUCED BY HARRIS N.A.**

### **DEFINITIONS**

1. The term "document" shall have the broadest possible meaning under Rule 34 of the Federal Rules of Civil Procedure and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts of the following items, whether printed or recorded (through a sound, video or other electronic, magnetic, or digital recording system) or published (in print or online) or reproduced by hand, including, but not limited to, letters, correspondence, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, "Post-It" notes, stenographic notes, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, Photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data, tapes or readable computer-produced interpretations or transcriptions thereof, electronic files or documents or any electronically stored information of any kind (including any associated metadata), electronically transmitted messages ("email"), voice-mail messages, interoffice communications, advertising, packaging and promotional materials and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out, within the possession, custody or control of any Plaintiff. Without limiting the term "control" as used in the preceding

sentence, a person is deemed to be in control of a document if the person has the right or practical ability to secure the document or a copy thereof from another person having actual possession thereof.

2. “Concerning” means relating to, referring to, describing, evidencing or constituting.

3. “Communication” means the transmittal of information of whatever sort and by whatever means and includes, but is not limited to, the reduction of thoughts to writing (even if not distributed to individuals or entities other than the transcriber), memoranda, correspondence, notes, facsimiles, e-mails, tape recordings, phone calls and conversations.

4. “Bank of America” means Bank of America, N.A., any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

5. “BIN Agreement” means the BIN Sponsor Agreement dated as of November 1, 2008, by and between Harris N.A. and Cynergy Data, LLC, and any amendments thereto.

6. “Merchant Processing Agreements” means the merchant processing agreements entered into by Harris, Cynergy, and merchants, a form of which is annexed as Exhibit D to the BIN Agreement.

7. “Cynergy” means Cynergy Data, LLC, any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

8. “Harris”, “you”, and “your” means Harris N.A., and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

9. “Moneris” means Moneris Solutions, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

10. The “July 16 Letter” means the letter dated July 16, 2009 from Gregory Cohen of Moneris Solutions, Inc. to Messrs. Charles Moore, Marcelo Paladini, and Dean Leavitt of Cynergy, *inter alia* notifying Cynergy that it was purportedly “in default” under the BIN Agreement.

11. The “Forbearance Agreement” means the letter agreement dated as of July 24, 2009, between Cynergy Data, LLC, Cynergy Prosperity Plus, LLC, Cynergy Data Holdings, Inc., Harris, Moneris, Comerica Bank, Wells Fargo Foothill, LLC, Dymas Funding Company, LLC, Ableco Finance LLC, A3 Funding LP, and Garrison Credit Investments I LLC.

12. The “Reserves” means the reserves referenced in the July 16 Letter, or any part thereof, which, according to the July 16 Letter, Cynergy purportedly had been “holding” instead of “turning over” to Harris/Moneris.

13. The “Association Rules” means the credit card “association rules” referenced in the July 16 Letter.

14. “TSYS” means Total System Services, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers,

employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

15. "Person" shall mean natural persons, corporations, partnerships, joint ventures, unincorporated associations, trusts, government entities and all other entities.

16. The terms "and" and "or" mean "and/or" and the terms "any" and "all" mean "any and all." "Including" means "including but not limited to."

17. The use of a verb in any tense shall be construed as the use of the verb in all other tenses whenever necessary to bring within the scope of the request all documents and things that might otherwise be construed outside their scope.

18. A plural noun shall be construed as a singular noun and a singular noun shall be construed as a plural noun whenever necessary to bring within the scope of the request all documents and things that might otherwise be construed outside their scope.

19. The singular form of the masculine gender, when used herein, shall include, respectively, the plural and feminine and/or neuter as appropriate. The feminine gender, when used herein, shall include the masculine and/or neuter as appropriate.

### **INSTRUCTIONS**

1. The documents covered by this request include all documents in your possession, custody or control. Unless otherwise specified, each request herein seeks all documents generated or received by you during the period from January 1, 2008 through and including the date of production.

2. Documents are to be produced in the same form and the same order as they are kept in the ordinary course of business. Documents are to be produced in the boxes, file folders, bindings, or other containers in which the documents are found. The titles, labels, and any other descriptions on the boxes, file folders, bindings, or other containers are to be left intact.

Documents from any single file should be produced in the same order as they were found in such file. If copies of documents are produced, such copies should be legible and bound or stapled in the same manner as their respective originals.

3. In the event that you claim that a request is overbroad, you are requested to respond to that portion of the request which is unobjectionable and specifically to identify the respect in which the request is allegedly overbroad.

4. In the event you claim that a request is unduly burdensome, you are requested to respond to that portion of the request that is unobjectionable and specifically to identify the respect in which the request is allegedly unduly burdensome.

5. For purposes of these requests, terms not specifically defined shall be given their ordinary meanings as you understand them to be used in the trade.

6. If you object to any portion of a request, please provide all documents and things requested by any portion of the request to which you do not object.

7. If any document responding to all or any part of the request for documents is not currently available, include a statement to that effect and furnish whatever documents are available. Include in your statement when such documents were most recently in your possession or subject to your control and what disposition was made of them, and identify the name, job title and the last known address of each person currently in possession or control of such documents. If any such documents were destroyed, identify the name, job title and the last known address of each person who directed that the documents be destroyed, and state the reasons the documents were destroyed.

8. If any documents or portion thereof which is relevant to any request is withheld under a claim of privilege, furnish a list identifying each such document or portion

thereof for which the privilege is asserted, together with (a) the date of the document; (b) the name(s) and title(s) of the author(s) and address(es) of the document; (c) a description of the subject matter of the document; and (d) the reasons for asserting the privilege. For purposes of this request, the term "privilege" includes the work product doctrine.

9. Each request calls not only for information known to you, but also calls for information available to you through reasonable inquiry, including, but not limited to, inquiry of your representatives and agents.

10. These requests shall be deemed continuing so as to require supplemental responses if you obtain other documents called for these requests between the time the responses are served and the time of arbitration.

11. If you believe that any request herein is ambiguous in any respect, set forth the portion deemed ambiguous and the construction used in responding.

### **ITEMS TO BE PRODUCED**

1. All documents concerning the construction or interpretation of any provision of the BIN Agreement or the Merchant Processing Agreements that you contend relates in any way to the Reserves.

2. Copies of the Association Rules referenced in the July 16, 2009 Letter, and all documents concerning the construction or interpretation of any provision of the Association Rules that you contend relates in any way to the Reserves.

3. All documents concerning the July 16, 2009 Letter, including but not limited to all documents concerning the Letter's assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

4. All documents concerning any diligence materials or reports concerning the creation or maintenance of any reserves under the Bank of America sponsoring bank relationship with Cynergy.

5. All documents concerning whether the Reserves include reserves created or maintained pursuant to the Bank of America sponsoring bank relationship with Cynergy.

6. All documents concerning the Reserves, including, but not limited to, all documents concerning any oral or written communications, meetings, deliberations, analyses, summaries, reports, or memoranda regarding the Reserves and regarding the discovery that the Reserves were not held at Harris.

7. All documents concerning any communications between you and Moneris concerning the Reserves.

8. All documents concerning any communications between you or Moneris and any credit card association, including, but not limited to, Visa or MasterCard, concerning the Reserves.

9. All documents concerning any communications between you or Moneris and any potential purchasers of Cynergy concerning the Reserves.

10. All documents concerning any communications between you or Moneris and Cynergy concerning the Reserves.

11. All documents concerning any communications between you or Moneris and any of Cynergy's lenders concerning the Reserves.

12. All documents concerning any intention, threat or attempt, whether or not completed, to set off monies flowing to Cynergy to fund deposit of the Reserves at Harris.

13. All documents concerning any efforts by Harris or Moneris (a) to establish accounts to hold Reserves, (b) to withhold Reserves from Cynergy, (c) to direct Cynergy to place Reserves in one or more segregated accounts, or (d) to monitor Cynergy's treatment or use of Reserves.

14. All documents and information provided to or available to you or Moneris concerning the Reserves, including, but not limited to, all documents and information provided to you or Moneris by Cynergy concerning the Reserves or supplied by Cynergy to TSYS or any other Person or information system to which you or Moneris had access.

15. All agreements between you and TSYS, or between TSYS and Cynergy, that relate to TSYS's provision of services in connection with the processing of electronic payments to Cynergy merchant customers.

16. All documents concerning any communications between you and TSYS concerning the Reserves or otherwise concerning the withholding of funds to create reserves under the BIN Agreement or the Merchant Processing Agreements.

17. All documents concerning any requests by merchants for the return of Reserves.

18. All documents concerning any instances in which Cynergy failed to fund an obligation that you contend was to be funded by a payment from the Reserves.

19. All documents concerning any losses you or Moneris claim to have incurred related to the Reserves.

20. All documents concerning any instances in which you contend or believe that Cynergy committed fraud or otherwise misled you or Moneris with respect to Reserves or

otherwise supplied you or Moneris with incomplete or inaccurate information with respect to Reserves.

21. All documents concerning the Forbearance Agreement.

22. All documents concerning any audits of Cynergy's performance under the BIN Agreement or Merchant Processing Agreements.

### **TOPICS OF EXAMINATION**

1. The respective roles of Harris, Moneris, Cynergy, issuing banks, merchants, the credit card associations, and other parties in processing or facilitating the processing of credit card, debit card, or other electronic transactions.

2. The Reserves, including, but not limited to, Harris's/Moneris's treatment of Reserves before July 16, 2009, and Harris's/Moneris's treatment of Reserves on and after July 16, 2009, and communications concerning the Reserves.

3. The flow of funds from Harris/Moneris to Cynergy, including the transmittal of revenue and Reserves withheld from (or received from) merchants from Harris/Moneris to Cynergy.

4. Cynergy's treatment and accounting of the Reserves.

5. Any efforts by Harris or Moneris to establish accounts to house Reserves, to withhold Reserves from Cynergy, to direct Cynergy to place Reserves in segregated accounts, or to otherwise monitor Cynergy's treatment or use of Reserves.

6. Any instances in which you contend or believe that Cynergy committed fraud or otherwise misled you or Moneris with respect to Reserves or otherwise supplied you or Moneris with incomplete or inaccurate information with respect to Reserves.

7. Harris's access or lack of access to information concerning the Reserves, including, but not limited to, access to information provided by Cynergy or access to information supplied by Cynergy to TSYS or any other Person or information system.

8. The BIN Agreement, including, but not limited to, due diligence performed in connection with Harris's entry into the BIN Agreement.

9. The Merchant Processing Agreements.

10. Any audits of Cynergy performed by Harris or Moneris.

11. The July 16 Letter, including, but not limited to, the assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

12. The Forbearance Agreement.

13. Requests by merchants for the return of Reserves and any instances in which Cynergy failed to fund an obligation that you contend was to be funded by a payment from the Reserves.

**SCHEDULE OF DOCUMENTS TO BE PRODUCED BY MONERIS SOLUTIONS, INC.**

**DEFINITIONS**

1. The term "document" shall have the broadest possible meaning under Rule 34 of the Federal Rules of Civil Procedure and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts of the following items, whether printed or recorded (through a sound, video or other electronic, magnetic, or digital recording system) or published (in print or online) or reproduced by hand, including, but not limited to, letters, correspondence, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, "Post-It" notes, stenographic notes, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, Photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data, tapes or readable computer-produced interpretations or transcriptions thereof, electronic files or documents or any electronically stored information of any kind (including any associated metadata), electronically transmitted messages ("email"), voice-mail messages, interoffice communications, advertising, packaging and promotional materials and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out, within the possession, custody or control of any Plaintiff. Without limiting the term "control" as used in the preceding

sentence, a person is deemed to be in control of a document if the person has the right or practical ability to secure the document or a copy thereof from another person having actual possession thereof.

2. "Concerning" means relating to, referring to, describing, evidencing or constituting.

3. "Communication" means the transmittal of information of whatever sort and by whatever means and includes, but is not limited to, the reduction of thoughts to writing (even if not distributed to individuals or entities other than the transcriber), memoranda, correspondence, notes, facsimiles, e-mails, tape recordings, phone calls and conversations.

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8. “Harris” means Harris N.A., and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

9. “Moneris”, “you”, and “your” means Moneris Solutions, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

10. The “July 16 Letter” means the letter dated July 16, 2009 from Gregory Cohen of Moneris Solutions, Inc. to Messrs. Charles Moore, Marcelo Paladini, and Dean Leavitt of Cynergy, *inter alia* notifying Cynergy that it was purportedly “in default” under the BIN Agreement.

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12. The “Reserves” means the reserves referenced in the July 16 Letter, or any part thereof, which, according to the July 16 Letter, Cynergy purportedly had been “holding” instead of “turning over” to Harris/Moneris.

13. The “Association Rules” means the credit card “association rules” referenced in the July 16 Letter.

14. “TSYS” means Total System Services, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers,

employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

15. "Person" shall mean natural persons, corporations, partnerships, joint ventures, unincorporated associations, trusts, government entities and all other entities.

16. The terms "and" and "or" mean "and/or" and the terms "any" and "all" mean "any and all." "Including" means "including but not limited to."

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19. The singular form of the masculine gender, when used herein, shall include, respectively, the plural and feminine and/or neuter as appropriate. The feminine gender, when used herein, shall include the masculine and/or neuter as appropriate.

### **INSTRUCTIONS**

1. The documents covered by this request include all documents in your possession, custody or control. Unless otherwise specified, each request herein seeks all documents generated or received by you during the period from January 1, 2008 through and including the date of production.

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5. For purposes of these requests, terms not specifically defined shall be given their ordinary meanings as you understand them to be used in the trade.

6. If you object to any portion of a request, please provide all documents and things requested by any portion of the request to which you do not object.

7. If any document responding to all or any part of the request for documents is not currently available, include a statement to that effect and furnish whatever documents are available. Include in your statement when such documents were most recently in your possession or subject to your control and what disposition was made of them, and identify the name, job title and the last known address of each person currently in possession or control of such documents. If any such documents were destroyed, identify the name, job title and the last known address of each person who directed that the documents be destroyed, and state the reasons the documents were destroyed.

8. If any documents or portion thereof which is relevant to any request is withheld under a claim of privilege, furnish a list identifying each such document or portion

thereof for which the privilege is asserted, together with (a) the date of the document; (b) the name(s) and title(s) of the author(s) and address(es) of the document; (c) a description of the subject matter of the document; and (d) the reasons for asserting the privilege. For purposes of this request, the term "privilege" includes the work product doctrine.

9. Each request calls not only for information known to you, but also calls for information available to you through reasonable inquiry, including, but not limited to, inquiry of your representatives and agents.

10. These requests shall be deemed continuing so as to require supplemental responses if you obtain other documents called for these requests between the time the responses are served and the time of arbitration.

11. If you believe that any request herein is ambiguous in any respect, set forth the portion deemed ambiguous and the construction used in responding.

### **ITEMS TO BE PRODUCED**

1. All documents concerning the construction or interpretation of any provision of the BIN Agreement or the Merchant Processing Agreements that you contend relates in any way to the Reserves.

2. Copies of the Association Rules referenced in the July 16, 2009 Letter, and all documents concerning the construction or interpretation of any provision of the Association Rules that you contend relates in any way to the Reserves.

3. All documents concerning the July 16, 2009 Letter, including but not limited to all documents concerning the Letter's assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

4. All documents concerning any diligence materials or reports concerning the creation or maintenance of any reserves under the Bank of America sponsoring bank relationship with Cynergy.

5. All documents concerning whether the Reserves include reserves created or maintained pursuant to the Bank of America sponsoring bank relationship with Cynergy.

6. All documents concerning the Reserves, including, but not limited to, all documents concerning any oral or written communications, meetings, deliberations, analyses, summaries, reports, or memoranda regarding the Reserves and regarding the discovery that the Reserves were not held at Harris.

7. All documents concerning any communications between you and Harris concerning the Reserves.

8. All documents concerning any communications between you or Harris and any credit card association, including, but not limited to, Visa or MasterCard, concerning the Reserves.

9. All documents concerning any communications between you or Harris and any potential purchasers of Cynergy concerning the Reserves.

10. All documents concerning any communications between you or Harris and Cynergy concerning the Reserves.

11. All documents concerning any communications between you or Harris and any of Cynergy's lenders concerning the Reserves.

12. All documents concerning any intention, threat or attempt, whether or not completed, to set off monies flowing to Cynergy to fund deposit of the Reserves at Harris.

13. All documents concerning any efforts by Moneris or Harris (a) to establish accounts to hold Reserves, (b) to withhold Reserves from Cynergy, (c) to direct Cynergy to place Reserves in one or more segregated accounts, or (d) to monitor Cynergy's treatment or use of Reserves.

14. All documents and information provided to or available to you or Harris concerning the Reserves, including, but not limited to, all documents and information provided to you or Harris by Cynergy concerning the Reserves or supplied by Cynergy to TSYS or any other Person or information system to which you or Harris had access.

15. All agreements between you and TSYS, or between TSYS and Cynergy, that relate to TSYS's provision of services in connection with the processing of electronic payments to Cynergy merchant customers.

16. All documents concerning any communications between you and TSYS concerning the Reserves or otherwise concerning the withholding of funds to create reserves under the BIN Agreement or the Merchant Processing Agreements.

17. All documents concerning any requests by merchants for the return of Reserves.

18. All documents concerning any instances in which Cynergy failed to fund an obligation that you contend was to be funded by a payment from the Reserves.

19. All documents concerning any losses you or Harris claim to have incurred related to the Reserves.

20. All documents concerning any instances in which you contend or believe that Cynergy committed fraud or otherwise misled you or Harris with respect to Reserves or

otherwise supplied you or Harris with incomplete or inaccurate information with respect to Reserves.

21. All documents concerning the Forbearance Agreement.

22. All documents concerning any audits of Cynergy's performance under the BIN Agreement or Merchant Processing Agreements.

### **TOPICS OF EXAMINATION**

1. The respective roles of Moneris, Harris, Cynergy, issuing banks, merchants, the credit card associations, and other parties in processing or facilitating the processing of credit card, debit card, or other electronic transactions.

2. The Reserves, including, but not limited to, Harris's/Moneris's treatment of Reserves before July 16, 2009, and Harris's/Moneris's treatment of Reserves on and after July 16, 2009, and communications concerning the Reserves.

3. The flow of funds from Harris/Moneris to Cynergy, including the transmittal of revenue and Reserves withheld from (or received from) merchants from Harris/Moneris to Cynergy.

4. Cynergy's treatment and accounting of the Reserves.

5. Any efforts by Moneris or Harris to establish accounts to house Reserves, to withhold Reserves from Cynergy, to direct Cynergy to place Reserves in segregated accounts, or to otherwise monitor Cynergy's treatment or use of Reserves.

6. Any instance in which you contend or believe that Cynergy committed fraud or otherwise misled you or Harris with respect to Reserves or otherwise supplied you or Harris with incomplete or inaccurate information with respect to Reserves.

7. Moneris's access or lack of access to information concerning the Reserves, including, but not limited to, access to information provided by Cynergy or access to information supplied by Cynergy to TSYS or any other Person or information system.

8. The BIN Agreement, including, but not limited to, due diligence performed in connection with Harris's entry into the BIN Agreement.

9. The Merchant Processing Agreements.

10. Any audits of Cynergy performed by Moneris or Harris.

11. The July 16 Letter, including, but not limited to, the assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

12. The Forbearance Agreement.

13. Requests by merchants for the return of Reserves and any instances in which Cynergy failed to fund an obligation that you contend was to be funded by a payment from the Reserves.

# **EXHIBIT B**

**Hora, Robert**

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**From:** Hora, Robert  
**Sent:** Monday, September 21, 2009 3:19 PM  
**To:** 'abauer@torys.com'  
**Cc:** Bray, Gregory; Mandel, Lena; chipman@lrclaw.com; Gray, William; Martin, Timothy; Wawro, David; Hirschfeld, Michael  
**Subject:** RE: In re Cynergy Data, LLC, Case No. 09-13038(KG) (Bankr. D. Del).

Alison,

In light of your position that you are unable to respond to our letter by 2:00 p.m. today as requested, we will wait to hear from you regarding the proposed discovery until 6:00 p.m. today. We reserve our rights if we have not heard from you by then.

Regards,

Robert

**Robert C. Hora**  
**Milbank**  
1 Chase Manhattan Plaza  
New York, NY 10005  
P: (212) 530-5170  
F: (212) 822-5170  
[rhora@milbank.com](mailto:rhora@milbank.com)

---

**From:** Bauer, Alison D. [<mailto:abauer@torys.com>]  
**Sent:** Monday, September 21, 2009 2:20 PM  
**To:** Hora, Robert; Hirschfeld, Michael  
**Cc:** Bray, Gregory; Mandel, Lena; chipman@lrclaw.com; Gray, William; Martin, Timothy; Wawro, David  
**Subject:** RE: In re Cynergy Data, LLC, Case No. 09-13038(KG) (Bankr. D. Del).

Robert and Michael,

I am in receipt of your request pursuant to Rule 2004-1 of the Local Rules of Bankruptcy Practice and Procedure for examinations and productions of Moneris and of Harris N.A. I am taking it under advisement with my client, Moneris, who is the agent for Harris N.A. with respect to the Bin Sponsorship Agreement for Cynergy Data LLC. I assure you that we will not unduly delay getting back to you but given that I received your 22 page letter slightly after 9a.m. this morning, your request for a response by an artificial deadline of 2p.m. today is not feasible. On behalf of Moneris and as agent for Harris N.A., we reserve all rights with respect to the propriety of the request under Rule 2004.

Regards,  
Alison

**Alison D. Bauer**  
**Torys LLP**  
Dir. Tel: 212.880.6048  
Fax: 212.682.0200  
General Tel: 212 880-6000  
<mailto:abauer@torys.com>  
[www.torys.com](http://www.torys.com)

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---

**From:** Hora, Robert [mailto:RHora@milbank.com]  
**Sent:** Monday, September 21, 2009 9:05 AM  
**To:** Bauer, Alison D.  
**Cc:** Hirschfeld, Michael; Bray, Gregory; Mandel, Lena; chipman@lrclaw.com  
**Subject:** In re Cynergy Data, LLC, Case No. 09-13038(KG) (Bankr. D. Del).

Alison,

Please see the attached.

Regards,

**Robert C. Hora**  
**Milbank, Tweed, Hadley & McCloy LLP**  
1 Chase Manhattan Plaza  
New York, NY 10005  
P: (212) 530-5170  
F: (212) 822-5170  
[rhora@milbank.com](mailto:rhora@milbank.com)

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9/21/2009

# **EXHIBIT C**

## **SCHEDULE OF DOCUMENTS TO BE PRODUCED BY DEBTORS**

### **DEFINITIONS**

1. The term “document” shall have the broadest possible meaning under Rule 34 of the Federal Rules of Civil Procedure and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts of the following items, whether printed or recorded (through a sound, video or other electronic, magnetic, or digital recording system) or published (in print or online) or reproduced by hand, including, but not limited to, letters, correspondence, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, “Post-It” notes, stenographic notes, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, Photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data, tapes or readable computer-produced interpretations or transcriptions thereof, electronic files or documents or any electronically stored information of any kind (including any associated metadata), electronically transmitted messages (“email”), voice-mail messages, interoffice communications, advertising, packaging and promotional materials and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out, within the possession, custody or control of any Plaintiff. Without limiting the term “control” as used in the preceding

sentence, a person is deemed to be in control of a document if the person has the right or practical ability to secure the document or a copy thereof from another person having actual possession thereof.

2. “Concerning” means relating to, referring to, describing, evidencing or constituting.

3. “Communication” means the transmittal of information of whatever sort and by whatever means and includes, but is not limited to, the reduction of thoughts to writing (even if not distributed to individuals or entities other than the transcriber), memoranda, correspondence, notes, facsimiles, e-mails, tape recordings, phone calls and conversations.

4. “Bank of America” means Bank of America, N.A., any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

5. “BIN Agreement” means the BIN Sponsor Agreement dated as of November 1, 2008, by and between Harris N.A. and Cynergy Data, LLC, and any amendments thereto.

6. “Merchant Processing Agreements” means the merchant processing agreements entered into by Harris, Cynergy, and merchants, a form of which is annexed as Exhibit D to the BIN Agreement.

7. “Cynergy”, “you”, and “your” means Cynergy Data, LLC, any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

8. “Harris” means Harris N.A., and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

9. “Moneris” means Moneris Solutions, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers, employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

10. The “July 16 Letter” means the letter dated July 16, 2009 from Gregory Cohen of Moneris Solutions, Inc. to Messrs. Charles Moore, Marcelo Paladini, and Dean Leavitt of Cynergy, *inter alia* notifying Cynergy that it was purportedly “in default” under the BIN Agreement.

11. The “Forbearance Agreement” means the letter agreement dated as of July 24, 2009, between Cynergy Data, LLC, Cynergy Prosperity Plus, LLC, Cynergy Data Holdings, Inc., Harris, Moneris, Comerica Bank, Wells Fargo Foothill, LLC, Dymas Funding Company, LLC, Ableco Finance LLC, A3 Funding LP, and Garrison Credit Investments I LLC.

12. The “Reserves” means the reserves referenced in the July 16 Letter, or any part thereof, which, according to the July 16 Letter, Cynergy purportedly had been “holding” instead of “turning over” to Harris/Moneris.

13. The “Association Rules” means the credit card “association rules” referenced in the July 16 Letter.

14. “TSYS” means Total System Services, Inc. and any of its subsidiaries, divisions, affiliates, partners, corporate parents, predecessors, successors, directors, officers,

employees, agents, assigns, representatives, advisors, attorneys, accountants, consultants, associates or any other person acting, or purporting to act, on its behalf.

15. "Person" shall mean natural persons, corporations, partnerships, joint ventures, unincorporated associations, trusts, government entities and all other entities.

16. The terms "and" and "or" mean "and/or" and the terms "any" and "all" mean "any and all." "Including" means "including but not limited to."

17. The use of a verb in any tense shall be construed as the use of the verb in all other tenses whenever necessary to bring within the scope of the request all documents and things that might otherwise be construed outside their scope.

18. A plural noun shall be construed as a singular noun and a singular noun shall be construed as a plural noun whenever necessary to bring within the scope of the request all documents and things that might otherwise be construed outside their scope.

19. The singular form of the masculine gender, when used herein, shall include, respectively, the plural and feminine and/or neuter as appropriate. The feminine gender, when used herein, shall include the masculine and/or neuter as appropriate.

### **INSTRUCTIONS**

1. The documents covered by this request include all documents in your possession, custody or control. Unless otherwise specified, each request herein seeks all documents generated or received by you during the period from January 1, 2008 through and including the date of production.

2. Documents are to be produced in the same form and the same order as they are kept in the ordinary course of business. Documents are to be produced in the boxes, file folders, bindings, or other containers in which the documents are found. The titles, labels, and any other descriptions on the boxes, file folders, bindings, or other containers are to be left intact.

Documents from any single file should be produced in the same order as they were found in such file. If copies of documents are produced, such copies should be legible and bound or stapled in the same manner as their respective originals.

3. In the event that you claim that a request is overbroad, you are requested to respond to that portion of the request which is unobjectionable and specifically to identify the respect in which the request is allegedly overbroad.

4. In the event you claim that a request is unduly burdensome, you are requested to respond to that portion of the request that is unobjectionable and specifically to identify the respect in which the request is allegedly unduly burdensome.

5. For purposes of these requests, terms not specifically defined shall be given their ordinary meanings as you understand them to be used in the trade.

6. If you object to any portion of a request, please provide all documents and things requested by any portion of the request to which you do not object.

7. If any document responding to all or any part of the request for documents is not currently available, include a statement to that effect and furnish whatever documents are available. Include in your statement when such documents were most recently in your possession or subject to your control and what disposition was made of them, and identify the name, job title and the last known address of each person currently in possession or control of such documents. If any such documents were destroyed, identify the name, job title and the last known address of each person who directed that the documents be destroyed, and state the reasons the documents were destroyed.

8. If any documents or portion thereof which is relevant to any request is withheld under a claim of privilege, furnish a list identifying each such document or portion

thereof for which the privilege is asserted, together with (a) the date of the document; (b) the name(s) and title(s) of the author(s) and address(es) of the document; (c) a description of the subject matter of the document; and (d) the reasons for asserting the privilege. For purposes of this request, the term "privilege" includes the work product doctrine.

9. Each request calls not only for information known to you, but also calls for information available to you through reasonable inquiry, including, but not limited to, inquiry of your representatives and agents.

10. These requests shall be deemed continuing so as to require supplemental responses if you obtain other documents called for these requests between the time the responses are served and the time of arbitration.

11. If you believe that any request herein is ambiguous in any respect, set forth the portion deemed ambiguous and the construction used in responding.

#### **ITEMS TO BE PRODUCED**

1. All documents concerning any communications between you and Harris or Moneris concerning the Reserves or the withholding of funds to create reserves under the BIN Agreement or the Merchant Processing Agreements.

2. All documents concerning any efforts by Harris or Moneris (a) to establish accounts to hold Reserves, (b) to withhold Reserves from Cynergy, (c) to direct Cynergy to place Reserves in one or more segregated accounts, or (d) to monitor Cynergy's treatment or use of Reserves.

3. All documents provided or made available to Harris or Moneris concerning the Reserves, including but not limited to diligence materials provided to Harris and Moneris in connection with the BIN Agreement or Merchant Processing Agreements and

information supplied to TSYS or any other Person or information system to which Harris or Moneris had access.

4. All documents concerning whether the Reserves include reserves created or maintained pursuant to the Bank of America sponsoring bank relationship with Cynergy.

5. All documents concerning the July 16, 2009 Letter, including but not limited to all documents concerning the Letter's assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

6. Documents sufficient to show the types and categories of information supplied to TSYS by Cynergy's VIMAS software, including but not limited to information concerning the Reserves and other deductions to be made by Harris before transmitting funds to Cynergy's merchant customers.

7. All documents concerning the Reserves, including, but not limited to, all documents concerning any oral or written communications, meetings, deliberations, analyses, summaries, reports, or memoranda regarding the Reserves and regarding the claimed discovery by Harris or Moneris that the Reserves were not held at Harris.

8. All agreements between Harris or Moneris and TSYS, or between TSYS and Cynergy, that relate to TSYS's provision of services in connection with the processing of electronic payments to Cynergy merchant customers.

9. All documents concerning any requests by merchants for the return of Reserves.

10. All documents concerning any instances in which Cynergy failed to fund an obligation that Harris or Moneris contends was to be funded by a payment from the Reserves.

11. All documents concerning any losses Harris or Moneris claims to have incurred related to the Reserves.

12. All documents concerning any assertion by Harris or Moneris of fraud or other attempt to mislead with respect to the Reserves.

13. All documents concerning any assertion by Harris or Moneris that Cynergy provided them incomplete or inaccurate information with respect to the Reserves.

14. All documents concerning the Forbearance Agreement.

15. All documents concerning any audits of Cynergy's performance under the BIN Agreement or Merchant Processing Agreements.

#### **TOPICS OF EXAMINATION**

1. The respective roles of Cynergy, Harris, Moneris, issuing banks, merchants, the credit card associations, and other parties in processing or facilitating the processing of credit card, debit card, or other electronic transactions.

2. The Reserves, including, but not limited to, Cynergy's treatment and accounting of the Reserves, Harris's/Moneris's treatment of Reserves before July 16, 2009, Harris's/Moneris's treatment of Reserves on and after July 16, 2009, and communications concerning the Reserves.

3. The flow of funds from Harris/Moneris to Cynergy, including the transmittal of revenue and Reserves withheld from (or received from) merchants from Harris/Moneris to Cynergy.

4. Any efforts by Moneris or Harris to establish accounts to house Reserves, to withhold Reserves from Cynergy, to direct Cynergy to place Reserves in segregated accounts, or to otherwise monitor Cynergy's treatment or use of Reserves.

5. Any assertion by Harris or Moneris of fraud or other attempt to mislead with respect to the Reserves and any assertion by Harris or Moneris that Cynergy provided them incomplete or inaccurate information with respect to the Reserves.

6. Harris's and Moneris's access or lack of access to information concerning the Reserves, including, but not limited to, access to information provided by Cynergy or access to information supplied by Cynergy to TSYS or any other Person or information system.

7. The BIN Agreement, including, but not limited to, due diligence performed in connection with Harris's entry into the BIN Agreement.

8. The Merchant Processing Agreements.

9. Any audits of Cynergy performed by Moneris or Harris.

10. The July 16 Letter, including, but not limited to, the assertions that Cynergy has been improperly "holding merchant reserves rather than turning over these reserves to Harris/Moneris," "is in default under the [BIN Agreement]," and is in "violation of association rules."

11. The Forbearance Agreement.

12. Requests by merchants for the return of Reserves and any instances in which Cynergy failed to fund an obligation that Harris or Moneris contends was to be funded by a payment from the Reserves.