

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

In re:

CYNERGY DATA, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 09-_____ ()

Jointly Administered

**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
NIXON PEABODY LLP AS COUNSEL FOR THE DEBTORS**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) file this application (the “Application”) to employ and retain Nixon Peabody LLP (“Nixon Peabody”) as counsel for the Debtors. In support of the Motion, the Debtors rely on and incorporate by reference the declaration of Charles M. Moore filed in support of the Debtors’ chapter 11 petition and various first day applications and motions (the “Moore Declaration”), and the affidavit of Dennis J. Drebsky, Esq. (the “Drebsky Affidavit”) filed with the Court concurrently herewith. In further support of the Motion, the Debtors, by and through its undersigned attorneys, respectfully represents as follows:

JURISDICTION

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

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. The statutory predicates for the relief requested herein are Bankruptcy Code sections 327(a) and 329. Such relief is warranted pursuant to Bankruptcy Rules 2014 and 2016.

BACKGROUND

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

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

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

6. 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 Moore Declaration. Additional facts in support of the specific relief sought in this Application are set forth below.²

RELIEF REQUESTED

7. By this Application, the Debtors seek authority, pursuant to § 327(a) of the Bankruptcy Code, as modified by § 1107(b) of the Bankruptcy Code, to employ Nixon Peabody LLP as their attorneys to perform the legal services set forth herein including, among other things, preparation for the commencement and prosecution of its case under chapter 11 of the Bankruptcy Code. In addition, the Debtors desire to retain Nixon Peabody as their counsel to provide such other legal services as are necessary and requested by the Debtors, including, without limitation, corporate finance, real estate, and litigation services. The Debtors are seeking the retention of Nixon Peabody LLP *nunc pro tunc* to the Petition Date.

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

8. The Debtors have selected Nixon Peabody as their general bankruptcy counsel because Nixon Peabody and its attorneys have extensive experience and knowledge in the fields of debtors' and creditors' rights, debt restructuring and corporate reorganizations, tax law, real estate matters, employee benefits and commercial litigation, among other areas.

9. When it became apparent that a Chapter 11 filing would be necessary, the Debtors requested Nixon Peabody to provide advice regarding, among other things, the preparation for the commencement and prosecution of a case under chapter 11 of the Bankruptcy Code. In addition to their extensive experience and knowledge as set forth above, Nixon Peabody has become intimately involved in the Debtors' efforts to locate a buyer for its assets, the Debtors' business and documents and the preparation for these chapter 11 cases. Accordingly, the Debtors believe that Nixon Peabody is particularly well qualified and able to represent the Debtors for the matters in respect of which the firm is to be engaged in this case in a most efficient and timely manner.

10. If the Debtors are required to retain attorneys other than Nixon Peabody in connection with these chapter 11 cases, the Debtors and their estates would be prejudiced by the time and expense necessary for such attorneys to become familiar with the Debtors' business operations, documents and the planning relative to these chapter 11 cases. In addition, the Debtor has directed Nixon Peabody to work cooperatively with Pepper Hamilton LLP ("Pepper Hamilton") as Delaware counsel for the Debtors, CM&D Management Services LLC (CM&D"), as restructuring expert, Unicorn Partners, LLC ("Unicorn Partners"), as industry expert, Stifel, Nicolaus & Company, Incorporated ("Stifel Nicolaus") and Peter J. Solomon Company L.P. and Peter J. Solomon Securities LLC ("PJSC") as financial advisers to the

Debtors and any other professionals that may be retained in these cases to avoid duplication and inefficiency.

SERVICES TO BE RENDERED

11. Subject to the control and further order of this court, Nixon Peabody will be expected to render the following services to the Debtors:

- (a) Assist, advise and represent the Debtors in the preparation and prosecution of these chapter 11 cases and in its consultations with the creditors' committee and other parties in interest regarding the administration of this case.
- (b) Assist the Debtors with respect to its powers and duties as debtors and debtors in possession in the continued management and operation of its business and properties.
- (c) Assist the Debtors in connection with any contemplated sales of assets or business combinations, including negotiating any asset, stock purchase, merger or joint venture agreements, formulating and implementing any bidding procedures, evaluating competing offers, drafting appropriate corporate documents with respect to the proposed sales, and counseling the Debtors in connection with the closing of any such sales.
- (d) Advise the Debtors in connection with the postpetition financing and cash collateral arrangements, negotiate and draft documents relating thereto, provide advice and counsel with respect to the Debtors' prepetition financing arrangements, provide advice to the Debtors in connection with issues relating to financing and capital structure under any plan of reorganization, and negotiate and draft documents relating thereto.
- (e) Advise the Debtors on matters relating to the evaluation of the assumption or rejection of unexpired leases or executory contracts.
- (f) Advise the Debtors with respect to legal and regulatory issues arising in or relating to the Debtors' ordinary course of business, including meetings with the Debtors' financial advisors, and meetings of the board of directors.
- (g) Assist, advise and represent the Debtors in any investigation of the acts, conduct, assets, liabilities and financial condition of the Debtors, the operation of the Debtors' business and the desirability of the continuation of such business, and any other matter relevant to this case or to the formulation of a plan.
- (h) Prepare on behalf of the Debtors all motions, applications, answers, orders, report and papers necessary to the administration of the estates.
- (i) Assist, advise and represent the Debtors with respect to the negotiation of a plan of reorganization and related agreements, and take any actions necessary to obtain confirmation of a plan, including the collection and filing with the Bankruptcy Court of any acceptances of a plan.

(j) Assist, advise and represent the Debtors in the performance of all of its duties and powers under the Bankruptcy Code and the Bankruptcy Rules and in the performance of such other services as are in the best interests of the Debtors, the creditors and the estate generally.

(k) Perform all other necessary legal services and provide all other necessary legal advice to the Debtor in connection with these chapter 11 cases.

12. Nixon Peabody has indicated its willingness to act as general bankruptcy counsel on behalf of the Debtors. Applicant respectfully submits that the retention of Nixon Peabody as general bankruptcy counsel to perform such services is appropriate pursuant to § 327(a) of the Bankruptcy Code and in the best interests of the Debtors' estates and creditors generally.

13. Except as set forth in the Drebsky Affidavit, to the best of Applicant's knowledge, Nixon Peabody, its members, counsel and associates: (a) do not have any connection with the Debtors, their affiliates, their creditors, the Office of the United States Trustee for the District of Delaware or any other party-in-interest, or their respective attorneys and accountants; (b) are "disinterested persons" as that term is defined in § 101(14) of the Bankruptcy Code; and (c) do not hold or represent any interest adverse to the estates.

14. More specifically, as set forth in the Drebsky Affidavit, and to the best of the Debtor's knowledge, information and belief:

(a) Neither Nixon Peabody, nor any attorney at the firm, holds or represents an interest adverse to the Debtors' estate;³

(b) Nixon Peabody is not a creditor, an equity holder, or an insider of the Debtors; Nixon Peabody has agreed to waive any prepetition claim it may have against the Debtors for services previously rendered except in connection with the preparation of these chapter 11 cases.

(c) Neither Nixon Peabody, nor any attorney at the firm, was, within 2 years before the date of the filing of the Debtors' chapter 11 cases, a director, officer, or employee of the Debtors; and

³ See footnote 2 to the Drebsky Affidavit.

(d) Nixon Peabody does not have an interest materially adverse to the interest of the Debtors' estates or of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in the Debtors or an investment banker specified in the foregoing paragraphs, or for any other reason.

15. Section 1107(b) of the Bankruptcy Code provides that "a person is not disqualified for employment under § 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case." 11 U.S.C. § 1107(b). To the best of the Debtors' knowledge, with the exception of those matters set forth in the Drebsky Affidavit, the members and associates of Nixon Peabody do not have any connection with the Debtors, their creditors or any other party in interest, or their respective attorneys. Accordingly, the Debtors believe Nixon Peabody is "disinterested" and does not hold or represent an interest adverse to the Debtors' estates.

COMPENSATION AND RETAINER

16. During the 90 days before the Petition Date, Nixon Peabody provide services relative to these chapter 11 cases, including, but not limited to, advising the Debtors with respect to restructuring alternatives, counseling on general corporate issues and preparing appropriate pleadings and documents necessary for these filings. During this same period, Nixon Peabody also provided services to the Debtors unrelated to these chapter 11 cases in the ordinary course of the Debtors' business. In connection with all of these services, Nixon Peabody received payments totaling approximately \$1,539,512 in satisfaction of its outstanding fees and expenses. Additionally, in connection with these prepetition services, and the services Nixon Peabody will render in this case, Nixon Peabody received a prepetition retainer of \$200,000.00 which Nixon Peabody is holding for application toward and payment of post-petition fees and expenses allowed by this Court that are still due and owing at the conclusion of these cases.

17. It is anticipated that Nixon Peabody's fees and expenses will be funded by the Debtors upon application therefor in accordance of the provisions of the Bankruptcy Code or in accordance with any other order establishing procedures for the payment of professionals in this case. Nixon Peabody intends to apply to the Court for all such postpetition fees and expenses. However, since the Debtors may require Nixon Peabody to render extensive legal services, the cost of which cannot be estimated, it is necessary and essential for the Debtors, as debtors in possession, to employ attorneys under a general retainer.

18. Subject to this Court's approval and in accordance with Bankruptcy Code §§ 330 and 331, the Federal Rules of Bankruptcy Procedure, the Debtors request that Nixon Peabody be compensated on an hourly basis, plus reimbursement of actual and necessary expenses incurred by Nixon Peabody, as more fully set forth in the Drebsky Affidavit.

NOTICE

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


20. No previous application for the relief sought herein has been made by Applicant to this or any other Court.

WHEREFORE, Applicant respectfully requests entry of the attached order authorizing it to employ and retain Nixon Peabody as counsel in connection with the prosecution of this case and granting such other and further relief as is just and proper.

Dated: 8/31/09

Respectfully submitted,

CYNERGY DATA, LLC
CYNERGY DATA HOLDINGS, INC.
CYNERGY PROSPERITY PLUS, LLC

By: 
Name: Charles M. Moore
Title: Chief Restructuring Officer

**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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**AFFIDAVIT OF DENNIS J. DREBSKY IN SUPPORT OF
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
NIXON PEABODY LLP AS COUNSEL FOR THE DEBTORS**

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DENNIS J. DREBSKY, being duly sworn, deposes and says:

1. I am an attorney at law, duly admitted to practice in the State of New York, as well as the United States District Courts for the Southern District of New York, and the United States Court of Appeals for the Second Circuit, as well as the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits. I am a partner of the law firm known as Nixon Peabody LLP (“NP”). NP maintains an office for the practice of law at 437 Madison Avenue, New York, New York 10017.

2. NP has a prior connection with Cynergy Data, LLC, Cynergy Data Holdings, Inc., and Cynergy Prosperity Plus, LLC, the debtors and debtors in possession herein (the “Debtors”). NP has been counsel to Cynergy Data, LLC since April 2007.

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. To the best of my knowledge, after due inquiry, except as provided for in paragraph 11 below, NP: (a) is not a creditor (including by reason of unpaid fees for pre-petition services), an equity security holder or an “insider” of the Debtors, as that term is defined in § 101(31) of title 11, United States Code (the “Bankruptcy Code”); (b) is not and has not been, within two years before August 27, 2009 (the “Petition Date”), a director, officer, or employee of the Debtors; and (c) does not have an interest materially adverse to the interests of the Debtors’ estates, or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors, or for any other reason.² Accordingly, I believe NP is “disinterested”, as that term is defined in § 101(14), as modified by § 1107(b), of the Bankruptcy Code.

4. NP maintains records of all of its clients, of the matters on which it represents such clients, and the other parties which have a substantial role in such matters. I have reviewed such records to determine NP’s connections with the Debtors, their creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, and any person employed in the office of the United States Trustee. In addition, I have reviewed NP’s relationships with potential parties in interest to determine if any of such relationships give rise to an actual or potential conflict of interest or otherwise affect my disinterestedness.

5. In so far as I have been able to ascertain, the following are the only potential conflicts that the Debtors’ chapter 11 petitions present.

- a. **Wells Fargo & Company, Wells Fargo Bank and Wachovia/Wells Fargo** are open clients, although Nixon Peabody has not represented any of these entities in connection with any of their dealings with the Debtors.

² One possible exception to this proposition may arise inasmuch as NP received approximately \$48,000 from Cynergy Data, LLC in November, 2008 in payment of a legal bill issued to one Marcelo Paladini and for Mr. Paladini’s account.

- b. **Comerica Bank** is a party in a matter Nixon Peabody is handling for AIMRRG. That matter does not involve the Debtors.
- c. **Marcelo Paladini**, an Officer, Director and Shareholder of the Debtors has been, in the past, a client of Nixon Peabody in connection with certain estate planning and contract dispute matters. Nixon Peabody's representation of Mr. Paladini terminated prior to the commencement of these cases.
- d. **Merchant Services, Inc.** d/b/a EVO is a client of Nixon Peabody for employment law matters. EVO has also made an offer to purchase the Debtors' assets. Nixon Peabody does not represent EVO in connection with the Debtors and both the Debtors and EVO have consented to Nixon Peabody's representation of the Debtors in these bankruptcy cases.
- e. **Bank of Montreal**, the ultimate parent of adverse/lender, **Harris, N.A.**, is a client of Nixon Peabody's. Harris is represented in these cases by other counsel.
- f. **J.P. Morgan Chase**, the ultimate parent of Paymentech, LP, is a client of Nixon Peabody. Paymentech is not represented by Nixon Peabody in these bankruptcy cases.

6. Subject to this Court's approval in accordance with § 330(a) of the Bankruptcy Code, all compensation will be payable to NP's office on an hourly basis, plus reimbursement of actual, necessary expenses incurred. I have a current standard hourly rate of \$840.00; other partners of the firm are currently billed between \$355.00 and \$840.00 per hour; associates of the firm are currently billed between \$230.00 and \$580.00 per hour; and paralegals are currently billed between \$135.00 and \$265.00 per hour. The hourly rates are subject to periodic adjustments to reflect economic and other conditions and are typically increased on January 1 each year.

7. The hourly rates set forth above are the firm's standard hourly rates for work of this nature. These rates are set at a level designed to fairly compensate NP for its work, the work of its associates and its paralegals, and any other professionals it may utilize and to cover fixed and routine overhead expenses. NP's policy is to charge its clients in all areas of practice for all other expenses incurred in connection with its clients' cases. The expenses charged to clients

include, among other things, telephone and telecopier toll charges, mail and express mail charges, special or hand delivery charges, document processing, photocopying charges, travel expenses, expenses for “working meals”, and computerized research and transcription costs, in accordance with the Guidelines of this Court. NP believes that it is appropriate to charge these expenses to the clients incurring them rather than to increase the hourly rates and thereby spreading the expenses among all clients.


8. This Affidavit is intended to comply with Federal Rule of Bankruptcy Procedure 2016(b). NP intends to apply to this Court for compensation for professional services rendered in connection with this case. During its pre-petition representation of the Debtors, NP received a retainer payment from the Debtors in the amount of \$200,000.00 (the “Retainer”) on account of services to be rendered and expenses incurred in connection with the contemplated Chapter 11 filings.

9. NP has not received any promises as to compensation in connection with these cases other than in accordance with the provisions of the Bankruptcy Code. NP does not have an agreement with any other entity to share with such entity any compensation NP receives.

10. Insofar as I have been able to ascertain, NP does not represent any interest adverse to the Debtors or their estates in the matters for which NP is to be engaged. Except as may be stated above, I believe that NP is a “disinterested person” as that term is defined in § 101(14), as modified by § 1107(b), of the Bankruptcy Code. To the extent that, through continued investigation, it is discovered that circumstances relating to the interests represented by NP and those of the Debtor change, a supplemental affidavit will be provided and filed with this Court.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

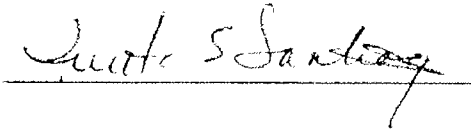
Executed on this 1 day of September, 2009.



Dennis J. Drebsky, Esq.

Sworn to and subscribed before me

this 1 day of September 2009



IVETTE E. SANTIAGO
Notary Public, State of New York
No. 31-4802301
Qualified in New York County
Commission Expires Nov. 30, 2010

**I 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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**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
NIXON PEABODY LLP AS COUNSEL FOR THE DEBTORS**

Upon the Application of the above-referenced debtors and debtors-in-possession (the “Debtors”), for an order, pursuant to § 327(a) of title 11, United States Code (the “Bankruptcy Code”), authorizing the Debtors to employ and retain Nixon Peabody LLP as its counsel, *nunc pro tunc* to the Petition Date (the “Application”); and upon the affidavit of Dennis J. Drebsky, Esq., a shareholder of the firm, (the “Drebsky Affidavit”) and annexed to such Application; and it appearing that the Court has jurisdiction to consider the Application; and it appearing that Nixon Peabody LLP 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, it is

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ORDERED, that the Application is granted; and it is further

ORDERED, that in accordance with § 327(a) of the Bankruptcy Code, the Debtors be, and hereby are, authorized to employ and retain Nixon Peabody LLP as their counsel as of the Petition Date to perform all of the services set forth in the Application, on the terms set forth in the Application and in the Drebsky Affidavit; and it is further

ORDERED, that the compensation to be paid Nixon Peabody LLP for professional services rendered and expenses incurred shall be as determined by this Court upon proper application therefor pursuant to §§ 330 and 331 of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure or as otherwise prescribed by any Order of this Court setting forth the procedures for the payment of professionals in this case.

Dated: Wilmington, Delaware

_____, 2009

UNITED STATES BANKRUPTCY JUDGE