

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

In re:  CYNERGY DATA, LLC, <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 09-_____ (     )  Jointly Administered
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**DEBTORS’ MOTION FOR ORDER UNDER BANKRUPTCY CODE SECTIONS 105, 361, 362, 363, 1107(a) AND 1108 AUTHORIZING DEBTORS TO MAINTAIN EXISTING INSURANCE POLICIES AND PAY ALL POLICY PREMIUMS AND BROKERS’ FEES ARISING THEREUNDER OR IN CONNECTION THEREWITH**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), hereby move this Court (the “Motion”) for entry of an order, under sections 105, 361, 362, 363, 1107(a), and 1108 of Chapter 11 of Title 11 of the United States Code (11 U.S.C. § 101 et. seq. as amended, the “Bankruptcy Code”), authorizing the Debtors to maintain their existing insurance policies and to pay all policy premiums, including financed premiums, and brokers’ fees arising thereunder or in connection therewith. In support of this Motion, the Debtors respectfully state 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.
  
2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105, 361, 362, 363, 1107(a) and 1108.

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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.

## **BACKGROUND**

3. On the date hereof (the "Petition Date"), the Debtors filed their respective voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
4. The Debtors continue to manage and operate their businesses as debtors in possession under Bankruptcy Code sections 1107 and 1108.
5. No trustee, examiner or creditors' committee has been appointed in these cases.
6. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these bankruptcy cases, is set forth in detail in the declaration of Charles M. Moore, filed concurrently herewith and fully incorporated herein by reference (the "Moore Declaration").<sup>2</sup> Additional facts in support of the specific relief sought in this Motion are set forth below.

## **RELIEF REQUESTED**

7. By this Motion, the Debtors seek entry of an order, under Bankruptcy Code sections 105, 361, 362, 363, 1107(a) and 1108 authorizing the Debtors to maintain, and to pay all premiums and brokers' fees arising under, or in connection with, the Debtors' various insurance policies (collectively, the "Insurance Policies") set forth on Exhibit A hereto, which Insurance Policies the Debtors have obtained through several third-party insurance carriers (collectively, the "Insurance Carriers").

## **BASIS FOR RELIEF**

8. In connection with the operation of their business and management of their properties, the Debtors maintain various Insurance Policies. The Insurance Policies include, inter alia, coverage for workers' compensation claims, automobile claims, fiduciary liability

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

claims, claims for losses due to crime, directors' and officers' liability, certain general and excess liability claims and various property-related liabilities. The third-party claims that are covered by the Insurance Policies are neither unusual in amount, nor in number, in relation to the extent of the business operations conducted by the Debtors.

9. Maintenance of insurance coverage under the various Insurance Policies is essential to the continued operation of the Debtors' businesses and is required under the United States Trustee's Operating Guidelines for Chapter 11 Cases (the "Operating Guidelines"), and the laws of the various states in which the Debtors operate. Thus, the Debtors submit that they should be authorized to continue to pay Insurance Policy premiums as such premiums come due in the ordinary course of the Debtors' business.

10. The Debtors have been represented in their negotiations with their various insurance underwriters by Frank Crystal & Company ("Crystal"). The employment of Crystal as the Debtors' insurance broker has allowed the Debtors to obtain the insurance coverage necessary to operate their business in a reasonable and prudent manner and to realize considerable savings in the procurement of such policies. The Debtors believe that it is in the best interests of their creditors and estates to continue their business relationship with Crystal. Accordingly, the Debtors seek the Court's authorization to continue their prepetition practice of paying brokerage fees to Crystal in connection with their representation of the Debtors in various ongoing negotiations with the Debtors' insurers.

11. Prior to the Petition Date, in the ordinary course of business, the Debtors also financed certain of their premium payment obligations under certain Insurance Policies through AICCO, Inc. ("AICCO"). Pursuant to their agreement for policy premium financing with AICCO, the Debtors presently are obligated to make monthly payments to AICCO of

approximately \$20,300 (the “Premium Financing Repayment”). Accordingly, the Debtors hereby request authority to make all Premium Financing Repayments as they come due.

12. As of the Petition Date, the Debtors believe that they are current on all prepetition payments owed under their Insurance Policies. They file this Motion in an abundance of caution to obtain authority to satisfy any prepetition payments related to the Insurance Policies that are determined to be unpaid.

### **APPLICABLE AUTHORITY**

13. Courts have routinely granted to large business debtors the same or substantially similar relief to that requested in this Motion. See, e.g., In re Tweeter Home Entm’t. Group, Inc., et al., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Musicland Holding Corp., et al., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006); In re Collins & Aikman Corp., Case No. 05-55927 (SWR) (Bankr. E.D. Mich. May 17, 2005).

14. The Debtors believe that the ordinary course maintenance of their insurance financing programs and the renewal of or entry into new financing arrangements as may be required as the annual terms of existing arrangements expire, without further order of the Court, is necessary and essential to the Debtors’ operation of their business during their reorganization.

15. The Debtors, operating their business as debtors in possession under Bankruptcy Code sections 1107(a) and 1108, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” Id.

16. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” Id. The

CoServ court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," and also when the payment was to "sole suppliers of a given product." Id. at 498. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary duty:

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

Id. at 498.

17. Payment of the insurance premiums and brokers' fees meets each element of the CoServ court's standard. As described above, in the event that the Debtors were unable to pay the Brokers' Fees, it is likely that the Debtors would lose the services of a knowledgeable broker and be forced to find another entity willing to serve as its broker. Moreover, the Debtors' current broker, Crystal, has a unique knowledge of the Debtors' business and insurance needs that would be difficult if not impossible to replace in the event that Crystal no longer agreed to serve as the Debtors' insurance broker.

18. As fiduciaries for the bankruptcy estate, the Debtors would be violating their duties if they permitted any of the Insurance Policies to lapse. Accordingly, the Debtors seek authority, but not direction, to pay all premiums that may become due with respect to the Insurance Policies if such payment is necessary in the Debtors' judgment in order to avoid cancellation or interruption of insurance coverage.

19. The Debtors' proposed payment of prepetition fees and obligations should also be authorized under Bankruptcy Code section 105 and under the "doctrine of necessity."

20. The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. See In re Just for Feet, Inc., 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment);<sup>3</sup> see also In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

21. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. See Just For Feet, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); In re Payless Cashways, Inc., 268 B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994).

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<sup>3</sup> The Court’s power to use the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in Miltenberger v. Logansport, C. & S.W. R. Co., 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. See Id. at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in Miltenberger. See In re Lehigh & New Eng. Ry., 657 F.2d 570, 581-82 (3d Cir. 1981) (“In order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

22. As set forth above, the Debtors believe that payment of policy premiums, including the Premium Financing Repayment, and brokers' fees is necessary to maintain good relationships with the Debtors' insurers, thereby ensuring the continued availability of insurance coverage and reasonable pricing of such coverage.

23. The Debtors' payment of the Insurance Carriers' claims, Premium Financing Repayment obligations and Crystal's claims, including any prepetition claims, if any, is similarly appropriate under the "doctrine of necessity" and Bankruptcy Code section 105(a).

24. As described above, in the event that the Debtors were unable to pay the Brokers' Fees, it is likely that the Debtors would lose the services of a knowledgeable broker and be forced to find another entity willing to serve as its broker. Moreover, the Debtors' current broker, Crystal, has a unique knowledge of the Debtors' business and insurance needs that would be difficult if not impossible to replace in the event that Crystal no longer agreed to serve as the Debtors' insurance broker. Similarly, the Debtors must make the Premium Financing Repayments to AICCO or risk default under their agreement with AICCO.

25. As fiduciaries for the bankruptcy estate, the Debtors would be violating their duties if they permitted any of the Insurance Policies to lapse. Accordingly, the Debtors seek authority, but not direction, to pay all premiums that may become due with respect to the Insurance Policies if such payment is necessary in the Debtors' judgment in order to avoid cancellation or interruption of insurance coverage.

26. As set forth above, the Debtors believe that payment of policy premiums and brokers' fees is necessary to maintain good relationships with the Debtors' insurers, thereby ensuring the continued availability of insurance coverage and reasonable pricing of such coverage.

27. Accordingly, the Debtors seek authorization to continue their insurance financing programs, including payment of all monthly obligations, whether prepetition or postpetition, and to renew or enter into new financing arrangements as may be required as the annual terms of existing arrangements expire, without further order of the Court, in the ordinary course of business.

28. To the extent that the Insurance Policies or related agreements may be deemed executory contracts within the meaning of Bankruptcy Code section 365, the Debtors do not at this time seek authority to assume such contracts.

29. Similarly, Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. Although there has not yet been a published decision in the Third Circuit interpreting Bankruptcy Rule 6003, it has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court instructed that irreparable harm is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. See e.g., Norfolk S. Ry. Co. v. City of Pittsburgh, 235 Fed. Appx. 907, 910 (3d Cir. 2007) (citing references omitted). The Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm.

30. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” As described above, the relief that the Debtors seek in this Motion is immediately necessary in order for the Debtors to be able to continue to operate

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

**NOTICE**

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

**NO PRIOR REQUEST**

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

**CONCLUSION**

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

Dated: September 1, 2009  
Wilmington, Delaware

Respectfully submitted,  
PEPPER HAMILTON LLP

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

-and-

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

*Proposed Counsel for the Debtors  
and Debtors in Possession*

**EXHIBIT A**

**Policy Schedule**

<b>Policy Type</b>	<b>Policy Number</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Carrier</b>
Excess Errors & Omission	287392169	6/1/2009	6/1/2010	Continental Casualty
Executive Protection	ELU11158809	6/1/2009	6/1/2010	XL Specialty Insurance Co.
Technology E&O	W15L9F09PNPT	6/1/2009	6/1/2010	Beazley Insurance Co.
Commercial Liability	FS06805613	5/1/2009	5/1/2010	Travelers
Automobile Policy	FS06805727	5/1/2009	5/1/2010	Travelers
Workers Comp	4543N534 UB	5/1/2009	5/1/2010	Travelers

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

In re:  CYNERGY DATA, LLC, <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 09-_____ (     )  Jointly Administered
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**ORDER UNDER BANKRUPTCY CODE SECTIONS 105, 361, 362, 363, 1107(a) AND 1108 AUTHORIZING DEBTORS TO MAINTAIN EXISTING INSURANCE POLICIES AND PAY ALL POLICY PREMIUMS AND BROKERS' FEES ARISING THEREUNDER OR IN CONNECTION THEREWITH**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtors for an order, under Bankruptcy Code sections 105, 361, 362, 363, 1107(a) and 1108 authorizing the Debtors to maintain their existing insurance policies and pay all policy premiums, financed premiums and brokers’ fees arising thereunder or in connection therewith; and upon the Moore Declaration; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. 1334; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of these proceedings and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and the Debtors having satisfied the standard for immediate relief under Fed R. Bankr. P 6003(b); and after due deliberation 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.
2. The Debtors are authorized, but not directed, to continue their Insurance Policies and to pay the premiums, including, without limitation, the Premium Financing Repayments (as defined in the Motion), broker's fees and related charges arising under or in connection with the Insurance Policies as such premiums and charges become due, provided such prepetition payments do not exceed \$26,770.73 in the aggregate, monthly.
3. Neither the provisions contained herein, nor any actions or payments made by the Debtor under this Order, shall be deemed an assumption of any executory contract arising out of an insurance program, agreement or contract, or otherwise shall constitute a waiver of the Debtors' rights under Bankruptcy Code section 365 or an admission by the Debtors that any such insurance program, agreement or contract constitutes an executory contract within the meaning of Bankruptcy Code section 365.
4. Neither the provisions contained herein, nor any actions or payments made by the Debtors under this Order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtors may have to subsequently dispute such obligation on any ground that applicable law permits.
5. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.
6. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062 or 9014, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. The relief granted herein shall be binding upon any chapter 11 trustee appointed in these chapter 11 cases, or upon any chapter 7 trustee appointed in the event of a subsequent conversion of these chapter 11 cases to cases under chapter 7.

8. 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