

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

_____))
In re:))
CYNERGY DATA, LLC, et al.,) Chapter 11
) Case No. 09-13038 (KG)
) (Jointly Administered)
Debtors.))
_____) Related Docket No. 13

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 105, 363, 365, 503 AND 507 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004, 6006, 9007 AND 9014 (I) (A) AUTHORIZING AND SCHEDULING AN AUCTION AT WHICH THE DEBTORS WILL SOLICIT HIGHER AND BETTER OFFERS IN CONNECTION WITH THE SALE OF CERTAIN ASSETS, (B) APPROVING THE BID PROCEDURES FOR SUCH ASSETS, (C) APPROVING BREAK-UP FEE AND EXPENSE REIMBURSEMENT AND (D) APPROVING THE FORM AND SCOPE OF NOTICE OF THE BID PROCEDURES AND AUCTION; (II) APPROVING THE SALE OF THE ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, AND ENCUMBRANCES; (III) APPROVING PROCEDURES FOR ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (IV) GRANTING RELATED RELIEF [Docket No. 13]

The Official Committee of Unsecured Creditors (the “Committee”) of Cynergy Data, LLC, Cynergy Data Holdings, Inc., and Cynergy Prosperity Plus, LLC (collectively, the “Debtors”), debtors and debtors in possession, hereby objects to the *Motion for an Order Pursuant to Sections 105, 363, 365, 503 and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, 9007 and 9014 (I)(A) Authorizing and Scheduling an Auction at Which the Debtors Will Solicit Higher and Better Offers In Connection With the Sale of Certain Assets, (B) Approving the Bid Procedures for Such Assets, (C) Approving Break-Up Fee and Expense Reimbursement and (D) Approving the Form and Scope of Notice of the Bid Procedures and Auction; (II) Approving the Sale of the Assets Free and Clear of All Liens, Claims, and Encumbrances; (III) Approving Procedures for Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief* (the “Motion”).

As set forth herein, the Committee objects at this time¹ to so much of the Motion that seeks Court approval of: (i) the form of the APA² annexed thereto as Exhibit A; (ii) the Break-Up Fee and Expense Reimbursement, and the Minimum Initial Overbid Amount, individually, and in combination; and (iii) a Bid Deadline and final hearing on the proposed sale of the Debtors' assets on less notice than that proscribed by the applicable rules of procedure.

In support of this objection, the Committee respectfully states as follows:

I. Relevant Background and Procedural History

1. On September 1, 2009 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date the Debtors have continued in the possession of their assets and in the management of their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107 and 1108.

2. On the Petition Date the Court entered an order allowing the Debtors' motions for the joint administration of their respective Chapter 11 cases.

3. On the Petition Date the Debtors filed the Motion, among other substantive requests, and on September 2, 2009, the Court scheduled a hearing on certain relief requested in the Motion for September 15, 2009 at 2:00 p.m. (the "Hearing").

4. On September 11, 2009, the Office of the United States appointed the Committee pursuant to Bankruptcy Code § 1102 and, on the same date, the Committee selected Jager Smith

¹ As stated therein, in addition to sale and bidding procedures relief sought in the Motion, the Debtors also seek authority to sell all, or substantially all of their assets free and clear of all liens, claims, encumbrances, and interests. While the Court has not established a deadline by which the Committee and other parties in interest must file and serve their objections to such a sale, the Committee nonetheless expressly reserves all rights with respect the ultimate relief sought in the Motion, including the Debtors' request that they be authorized to immediately turn over the proceeds of any such sale to one or more of the Debtors' purported prepetition secured lenders.

² Capitalized terms used but not specifically defined herein shall have the meanings ascribed to such terms in the Motion.

P.C. and Ashby & Geddes P.A. as its proposed co-counsel along with Deloitte Financial Advisory Services LLP as its proposed financial advisor, subject to the Court's approval of their retention.. Due to its formation after the Debtors' first days hearings, the deadline for the Committee to file and serve its objection to the Motion was established as 4:00 p.m. on September 14, 2009.

II. The Relief in Question Requested in the Motion

5. In the Motion the Debtors seek, *inter alia*, approval of:
 - a. the form of the APA, notwithstanding that no objection deadline has been established with respect to the further sale relief sought therein, and that the form of the APA will dictate the parties rights, duties, and obligations regarding the proposed sale of the Debtors' assets;
 - b. a Minimum Initial Overbid Amount of \$4,468,000, comprised of (x) the Break-Up Fee of \$1,620,000, (y) an Expense Reimbursement of \$648,000, and (z) an initial overbid amount of \$2,200,000;
 - c. what appears to the Committee to be an exceptionally abbreviated time period for Potential Bidders to conduct reasonable diligence, and to formulate and submit potential Qualified Bids; and
 - d. bidding terms and conditions that either exclude the Committee, or otherwise limit its ability to locate and bring additional value to the sale process.

For the reasons states herein, the Committee asserts that the sale and bidding procedures relief sought in the Motion is not in the best interests of the Debtors, their estates, or their creditors, are not otherwise warranted under the circumstances, nor are they likely to create a competitive

bidding environment that will achieve the highest and best possible consideration for the Debtors' assets.

III. The Committee's Objections to the Motion

6. The Committee objects to so much of the Motion that seeks approval of (a) the form of the APA, (b) the Minimum Initial Overbid Amount and its component parts, (c) any Bid Deadline, and any Auction and sale hearing date that do not provide Potential Bidders with a meaningful period of time in which to conduct due diligence and formulate and submit potential Qualified Bids.

A. Court Approval of the Form of the APA Is Premature

7. The Court should not approve the form of the APA at this time because the issue of whether or not to approve the sale ultimately proposed the Motion is not yet before the Court. Were the Court to approve the form of the APA at this time as it requires, see APA at Art. 6.2(iv), the Committee and other parties in interest may arguably be precluded from later objecting to some or all of the provisions of the APA that are legitimately issues for consideration under Bankruptcy Code §§ 363 and 365, while the only matters properly before the Court at this time are the *procedural* aspects of the manner in which the Debtors shall notice the proposed sale, accept and qualify bids for their assets, conduct an Auction if necessary, and schedule a hearing for the approval of such a sale. Accordingly, the form of the APA, and the rights, duties, and obligations that document purports to create and confer are not now properly before the Court, and should not be approved by any sale procedures order.

B. The Components of the Minimum Initial Overbid Are Unjustified and Will Chill Competitive Bidding

8. The Court should not approve the Minimum Initial Overbid because, whether separately in its component parts or in combination, it will not confer a benefit upon the Debtors'

estates, and will otherwise discourage Potential Bidders from exploring the possibility of submitting a bid or attempting to participate in the Auction. The determination of the amount of required overbids in sales conducted under Bankruptcy Code § 363 belongs to the bankruptcy court. See In re Mama's Original Foods, Inc., 234 B.R. 500, 505 (Bankr. C.D. Ca. 1999). Minimum overbids that are unduly low delay proceedings, while those that are excessive discourage competition. Id. An appropriate overbid amount is one that advances the sale proceeding through robust competition toward the highest bid for the subject assets. Id. In this case, the Minimum Initial Overbid does not qualify as an appropriate overbid amount because it will chill competitive bidding to the benefit of the Purchaser at the expense of the Debtors and their creditors.

9. First, while the Break-Up Fee at first glance may not appear excessive or disproportionate to the Purchase Price, the reality is that under the terms of the APA the actual amount of *cash* consideration to be paid by the Purchaser is unknown, and therefore not capable of being measured against the Break-Up Fee. The Purchase Price proposed in the APA is \$81 million, *less* Cure Costs, which the Committee is informed by the Debtors potentially aggregate \$21 million. If the Debtors and the Committee's fears are realized as to Cure Costs, the Purchase Price will be reduced to as little as \$60 million, and of that only \$46 million will be paid in cash, insofar as the APA provides that \$14 million of the Purchase Price will be paid by the Purchaser's promissory note. Moreover, the Expense Reimbursement component of the Minimum Initial Overbid demonstrates that the Break-Up Fee is more than simply a reimbursement to the Purchaser for its diligence costs if its transaction is lost to the bankruptcy process. See In re EWI, Inc., 208 B.R. 885, 888 (Bankr. N.D. Ohio 1997). At bottom then, the Break-Up Fee amounts to a flat fee to be paid to the Purchaser by the Debtors' estates to be their

stalking horse bidder, and, worse yet, under circumstances (as discussed below) that do not truly generate a competitive bidding environment in return for that Break-Up. Consequently, the Court should not approve the Break-Up Fee.

10. In addition to the Break-Up Fee being excessive and unjustified under the circumstances, the Expense Reimbursement component of the Minimum Initial Overbid does not appear to be a cap, further qualified or is limited to the *actual* expenses incurred by the Purchaser in anticipation of the proposed transaction. As such, even if the Court approves the Expenses Reimbursement, it should do so only on the conditions that such an entitlement is limited to the actual, necessary, and reasonable costs of Purchaser in conducting its diligence and negotiating the APA, and that its reimbursement is limited to a maximum of \$648,000. Any reimbursement to the Purchaser for other than actual, necessary, and reasonable expenses would not be in the best interests of the Debtors and their estates, and would not otherwise create a competitive auction.

11. Finally, the \$2.2 million initial overbid, above and beyond the sum of the Break-Up Fee and the Expense Reimbursement is excessive, and will in all likelihood chill competitive bidding, particularly when viewed alongside the \$250,000 incremental increases required for subsequent bidding if an auction is conducted. Unlike so much of the overbid requirement that equals the sum of the Break-Up Fee and the Expense Reimbursement, which bears a demonstrable relationship to those components, the only purposes for the remainder of the Minimum Initial Overbid are perhaps to reimburse the Debtors' estates for the administrative costs of the Auction, and rendering a competing Qualified Bid a higher and better offer than the Purchaser's stalking horse bid. In neither case is \$2.2 million a reasonable incremental requirement, and requiring Potential Bidders to top the stalking horse bid by such a lofty

premium will serve only the Purchaser by discouraging competitive bidding. The Court should therefore deny the Motion and instead require the Debtors to qualify Potential Bidders that submit bids that would make the estates whole for closing a transaction with a party other than the Purchaser, and foster bidding by providing the Debtors' estates with a *reasonably* higher value than required by the Motion.

C. The Compressed Marketing and Sale Period Does Not Permit Meaningful Diligence to Occur and Will Not Create a Competitive Bidding Environment

12. The Court should not approve the sale process duration proposed by the Debtors and the Purchaser because it will not permit time for a truly competitive Auction. When a debtor seeks to auction bankruptcy assets pursuant to Bankruptcy Code § 363, that process must be fair and give each potential bidder adequate opportunity to bid. See In re Mama's Original Foods, Inc., 234 B.R. at 505; see also In re Barnhill's Buffet, Inc., 2008 WL 4489687, *2 (Bankr. M.D. Tenn., Feb. 11, 2008). The Committee submits the truncated process before the Court -- likely as few as 10 but no more than 14 bidding days -- falls well short of this standard, and that additional time is needed to ensure that the Auction is robust, and that the Debtors' assets are optimally marketed both to strategic and financial buyers. The Committee and its advisors can and will play a productive role in ensuring that a comprehensive marketing process -- including both strategic and financial buyers -- is undertaken prior to the Auction if allowed sufficient additional time to adequately contact and solicit the participation of Potential Bidders and to facilitate the marketing of the assets to a wider audience.

13. While the Motion does not state the proposed Bid Deadline, working backwards off certain APA and Bidding Procedures dates, the Committee estimates that the Bid Deadline sought by the Debtors and the Purchaser will be on or about October 2, 2009 to permit the Auction to take place on or about October 5, 2009, so the APA may be approved by the Court

prior to the October 10, 2009 APA deadline. See APA at Art. 11.1(h). Assuming, optimistically, that the Debtors manage to deliver notice of a Bid Deadline to all Potential Bidders to the postal service on September 16, 2009, the day after the Hearing, that timeline would afford the Debtors, the Committee and their advisors insufficient time to make meaningful contact with all Potential Bidders. Moreover, even those Potential Bidders with which contact is made will have little, if any time to conduct diligence of any quality with respect to the Debtors' operations and assets, thereby discouraging Potential Bidders from participating.³

14. The Committee submits that an appropriate extension of time to allow for proper marketing will strike a fair and reasonable balance between the desire of the Debtors and their lenders for an expeditious resolution of the Debtors' cases and the need for an open and thorough marketing process that will produce a robust Auction generating the highest and best value for the Debtors' assets. By insisting on a sale timeline that does not provide Potential Bidders with sufficient diligence time, the Purchaser can hardly be said to have conferred a benefit upon the Debtors' estates in exchange for the Break-Up Fee, insofar as such consideration is only warranted for creating an *actual* process that has a real prospect of attracting Potential Bidders to a *truly* competitive Auction. Therefore, the Court should deny the Motion and not authorize any Bid Deadline that does not generate a competitive bidding environment.

³ The Committee is particularly concerned about the length of time it will take for Potential Bidders to obtain, organize, and analyze due diligence materials. During its short existence, the Committee has learned that there are substantial amounts of information and data that Potential Bidders would be required to review with respect to the Debtors' assets. If the Committee's experience is any indication of what Potential Bidders will encounter, given the tight bid deadline proposed, they will be effectively excluded from the sale process. This may be desirable from the perspective of the Purchaser, which has had the luxury of conducting its diligence since June or July of 2009, the same will not be true of Potential Bidders the Committee hopes to attract.

D. The Bidding Procedures Unfairly Limit the Committee

15. Finally, the Court should only approve the Bidding Procedures on terms that will allow the Committee broad participation in the sale process, and permit it the longest possible amount of time to locate and assist in the tendering of any Qualified Bid it identifies prior to any final hearing on the Motion. For example, while the Bidding Procedures do include some consultation rights for the Committee, as set forth at page 7 thereof the Bidding Procedures do not include Committee consultation where the Debtors elect to exercise what they contend is their sole discretion to reject any Qualified Bid. Clearly, if the Debtors declare a bid to be a Qualified Bid, the Committee should be consulted if a decision is to be made whether or not to reject any such Qualified Bid. In addition, the Bidding Procedures also permit the Debtors to adopt such additional rules that are not inconsistent with the Bidding Procedures with respect to how the Auction is to be conducted, another aspect of the Bidding Procedures that should include Committee input.

16. Similarly, the Bidding Procedures at page 10 also purport to prohibit the Committee from considering any Qualified Bids received following the conclusion of the Auction. While such a prohibition may be appropriate with respect to the Debtors, there should not be any prohibition on the Committee from considering and, if appropriate, raising a belated Qualified Bid with the Court in the event it poses the possibility of additional recovery to the estates. In order to permit the highest and best possible recovery for the Debtors' estates for their assets, then, the Committee should be permitted to search for, and solicit higher and better offers right up to the date of any final hearing on Motion.

IV. Notice

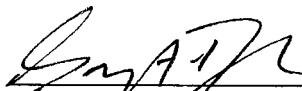
17. Notice of this objection has been served, via electronic mail, upon: (i) counsel to the Debtors; (ii) counsel to the United States Trustee; (iii) the respective counsel to each of the Secured Lenders; (iv) counsel to Harris; and (v) counsel to the Purchaser. The Committee respectfully submits that, in light of the nature of the issues raised herein, such notice is good and sufficient under the circumstances, and that no other or further notice is required.

WHEREFORE, the Committee respectfully requests that this Court enter an order: (i) sustaining the Committee's objection, and denying the Motion to the extent it seeks approval of (a) the form of the APA, (b) the Minimum Initial Overbid Amount, (c) any Bid Deadline that does not provide Potential Bidders with a meaningful period of time to conduct reasonable diligence and formulate and submit Qualified Bids, and (d) Bidding Procedures that limit the Committee's participation in the sale process, or its ability to locate and have tendered any Qualified Bid; and (ii) granting to the Committee such other and further relief as the Court deems proper and just.

Date: September 14, 2009

Respectfully submitted,

ASHBY & GEDDES, P.A.



Gregory A. Taylor (I.D. #4008)
Karen B. Skomorucha (I.D. #4759)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899
Telephone: (302) 654-1888
Facsimile: (302) 654-2067

-- and --

JAGER SMITH P.C.
Bruce F. Smith
Steven C. Reingold
Michael J. Fencer
One Financial Center
Boston, Massachusetts 02111
Telephone: 617-951-0500
Facsimile: 617-951-2412

*Proposed Counsel to The Official
Committee of Unsecured Creditors*

CERTIFICATE OF SERVICE

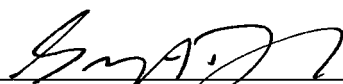
I, Gregory A. Taylor, hereby certify that, on September 14, 2009, I caused one copy of the foregoing to be served upon the parties listed below in the manner indicated.

ELECTRONIC MAIL AND HAND DELIVERY

David B. Stratton, Esq. PEPPER HAMILTON LLP 1313 North Market Street Wilmington, DE 19801 strattond@pepperlaw.com <i>(Counsel to the Debtors)</i>	T. Patrick Tinker, Esq. OFFICE OF THE UNITED STATES TRUSTEE J. Caleb Boggs Federal Building 844 King Street, Room 2207, Lockbox #35 Wilmington, DE 19801 thomas.p.tinker@usdoj.gov
--	---

ELECTRONIC MAIL AND U.S. MAIL

Dennis J. Drebsky, Esq. NIXON PEABODY LLP 437 Madison Avenue New York, NY 10022 ddrebsky@nixonpeabody.com <i>(Counsel to the Debtors)</i>	Robert J. Diehl, Jr., Esq. BODMAN LLP 6 th Floor at Ford Field 1901 St. Antoine Street Detroit, MI 48336 rdiehl@bodmanllp.com <i>(Counsel to Comerica Bank)</i>
Peter S. Burke, Esq. PAUL HASTINGS JANOFSKY & WALKER LLP 515 South Flower Street, 25 th Floor Los Angeles, CA 90071 peterburke@paulhastings.com <i>(Counsel to Wells Fargo Foothill LLC)</i>	Gregory A. Bray, Esq. MILBANK TWEED HADLEY & MCCLOY LLP 1 Chase Manhattan Plaza New York, NY 10005 gbray@milbank.com <i>(Counsel to Dymas Group)</i>
Peter J. Antoszyk, Esq. PROSKAUER ROSE LLP 1585 Broadway New York, NY 10005 pantoszyk@proskauer.com <i>(Counsel to Garrison Credit Investment)</i>	Alison D. Bauer, Esq. TORYS LLP 237 Park Avenue New York, NY 10017 abauer@torys.com <i>(Counsel to Harris, NA and Moneris Solutions, Inc.)</i>
Susan F. Balaschak, Esq. AKERMAN SENTERFITT LLP 335 Madison Avenue, Suite 2600 New York, NY 10017 susan.balaschak@akerman.com <i>(Counsel to Purchaser)</i>	



Gregory A. Taylor (#4008)