

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

In re:	)	
	)	Chapter 11
CYNERGY DATA, LLC, <u>et al.</u> ,	)	Case No. 09-13038 (KG)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	<b>Related to Docket No. 30</b>

**LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS TO THE DEBTORS' 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 STIFEL, NICOLAUS  
& COMPANY, INCORPORATED AND PETER J. SOLOMON SECURITIES  
COMPANY, LLC AS ADVISORS TO THE DEBTORS**

The Official Committee of Unsecured Creditors (the "Committee") of Cynergy Data, LLC, Cynergy Data Holdings, Inc., and Cynergy Prosperity Plus, LLC (collectively, the "Debtors"), by and through its proposed undersigned counsel, submits this Limited Objection to the *Debtors' Application for Order Pursuant to 11 U.S.C. §§ 327(a) and 328 and Bankruptcy Rules 2014 and 2016 Authorizing the Employment and Retention of Stifel, Nicolaus & Company, Incorporated and Peter J. Solomon Securities Company, LLC as Advisors to the Debtors* [Docket No. 30] (the "Application").<sup>1</sup> In furtherance of its Limited Objection, the Committee respectfully states as follows:

**PRELIMINARY STATEMENT**

1. The Committee does not question the Debtors' need for competent advisory services. These are large and complex Chapter 11 cases, and the Debtors require assistance in achieving a successful outcome whether through an asset sale or other strategy. Moreover, the Committee does not question the competency of Stifel, Nicolaus & Company, Incorporated

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<sup>1</sup> All capitalized terms used but otherwise not defined herein shall have the meanings set forth in the Application.

(“Stifel Nicolaus”) and Peter J. Solomon Securities Company, LLC (“PJS” and, together with Stifel Nicolaus, the “Financial Advisors”) to perform such tasks. Nor does the Committee dispute that, should the Financial Advisors perform their function well, the firms should receive appropriate compensation for their efforts.

2. But, the Financial Advisor’s compensation structure (the “Compensation Structure”) is currently proposed under the “improvidence” standard of section 328(a) of the Bankruptcy Code, not the “reasonableness” standard of section 330. The Compensation Structure includes: (i) a flat monthly retainer fee in the amount of \$50,000 (\$30,000 to Stifel Nicolaus and \$20,000 to PJS) and (ii) if a Sale occurs, or a preliminary understanding or definitive agreement in respect of such Sale is reached, a Sale transaction fee payable upon substantial consummation of the Sale (i) to Stifel Nicolaus in the greater amount of \$600,000 or 1.8% of the Consideration involved in the Sale and (ii) to PJS in the greater amount of \$400,000 or 1.2% of the Consideration involved in the Sale. Given the stalking horse asset purchase agreement currently proposed in these cases, the Compensation Structure could result in fees totaling millions of dollars, regardless of the “success” achieved or the amount of effort dedicated by the Financial Advisors (as opposed to other Cynergy professionals) towards that result. Accordingly, the Application should be denied unless the Compensation Structure is approved subject to future consideration under section 330 of the Bankruptcy Code.

### **GENERAL BACKGROUND**

3. On September 1, 2009 (the “Petition Date”), each of the Debtors 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 sections 1107 and 1108 of the Bankruptcy Code.

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

5. On September 11, 2009, the Office of the United States appointed the Committee pursuant to section 1102 of the Bankruptcy Code and, on the same date, the Committee selected Jager Smith 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 hearing, the deadline for the Committee to file and serve its objection to the Application was established as 4:00 p.m. on September 14, 2009.

### **OBJECTION**

#### **Given the Stage of These Proceedings and in Light of the Size of the Fees Reserved, the Compensation Structure Should Be Subject to Review Under Section 330 of the Bankruptcy Code**

6. Once a professional is engaged under section 328(a) of the Bankruptcy Code, the Court is thereafter substantially limited in its ability to revisit compensation terms, regardless of whether circumstances – subsequently revealed – render such compensation structure entirely inappropriate. See In re Northwestern Corp., 344 B.R. 40 (D. Del. 2006), reversing 324 B.R. 538 (Bankr. D. Del. 2005); In re B.U.M. International, Inc., 229 F.3d 824, 829 (9th Cir. 2000) (“There is no question that a bankruptcy court may not conduct a § 330 inquiry into the reasonableness of the fees and their benefit to the estate, if the court already approved the professional's retention under 11 U.S.C. § 328.”); In re Barron, 225 F.3d 583, 586 (5th Cir. 2000) (“[A] bankruptcy court may only depart from a compensation scheme approved under §

328(a) ‘if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.’” (emphasis added)).

7. The Committee submits that at this early juncture in the Debtors’ cases, and given the size of the fees contemplated, compensation of the Financial Advisors under section 328(a) is inappropriate. Rather, the Financial Advisors should be compensated pursuant to section 330 of the Bankruptcy Code, thereby rendering the Financial Advisor’s compensation subject to review under the “reasonableness” standard contained therein and affording appropriate safe-guards. If the Financial Advisors’ efforts ultimately yield an appropriate case result, they will then have access to all amounts reserved under the Compensation Structure, notwithstanding the more relaxed legal standard of review.

8. To the extent the Court is willing to subject the compensation to review only under the improvidence standards of section 328(a), the Committee requests that the Application be modified to permit later review of the reasonableness of the compensation to be awarded after the Financial Advisors have submitted a final fee application. See In re Federal Mogul-Global Inc., 348 F.3d 390 (3d Cir. 2003) (Bankruptcy Court may modify retention application under section 328(a) to impose condition that compensation be subject to later review); see also Zolfo, Cooper & Co. v. Sunbeam-Oster Co., 50 F.3d 253, 261 (3d Cir. 1997) (Bankruptcy Court need not approve or reject an application as presented but may approve an application with modified terms that the Court finds necessary to render the proposed employment reasonable); In re B.U.M. Int’l, Inc., 229 F.3d 824, 829 (9th Cir. 2000) (“[A] bankruptcy court may not conduct an . . . inquiry into the reasonableness of [a professional’s] fees and their benefit to the estate if the court already has approved the professional’s employment under 11 U.S.C. § 328” but section

328(a) also permits a Bankruptcy Court to approve a professional's retention and “specifically reserve[] the right to approve the fees”); In re Northeast Express Reg'l. Airlines, Inc., 235 B.R. 695, 699 (Bankr. D. Maine 1999) (holding that section 328(a) authorizes a Bankruptcy Court to approve a professional's employment with the caveat that “all fees and expenses shall remain subject to court approval”); In re Olympic Marine Servs., 186 B.R. 651, 654 (Bankr. E.D. Va. 1995) (holding that section 328(a) permits a Bankruptcy Court to approve an employment application while making the “compensation award . . . subject to the court's ‘further review’”).

9. As the Court in In re Stations Holding Company noted, “Bankruptcy courts have a duty to review the fee requests of professionals in chapter 11 cases. . . . This duty protects the public interest by monitoring the Debtor’s estate and ensuring that all fees assessed are reasonable in light of the benefits received.” In re Stations Holding Company, Case No. 02-10822, 2004 WL 1857116, at \*2 (Bankr. D. Del. August 18, 2004) (citation omitted); see also In re Northwestern Corporation, 324 B.R. 538 (Bankr. D. Del. 2005). Approving the Application without providing for review under section 330 may effectively strip the Bankruptcy Court from carrying out its duty to protect the public interest and, of particular concern to the Committee, to allow the Bankruptcy Court to assess professional fees in light of the benefits received.

### **RESERVATION OF RIGHTS**

10. The Committee is working hard to learn the facts and circumstances surrounding the Debtors’ Chapter 11 filings, with all deliberate speed. It has, however, only just formed and is perhaps now unaware of facts furthering this Limited Objection. It must, therefore, reserve all rights to assert additional objections to the Application either at or prior to any hearing thereon.

**NOTICE**


11. Notice of this Limited Objection has been served, via electronic mail, upon: (i) counsel to the Debtors; (ii) counsel to the United States Trustee; and (iii) the respective counsel to each of the Secured Lenders. 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.

**CONCLUSION**

WHEREFORE, for the reasons discussed herein, the Committee respectfully requests that this Court (a) approve the Application pursuant to section 330 of the Bankruptcy Code; and (b) grant the Committee such other and further relief as is just and proper.

Dated: September 14, 2009  
Wilmington, Delaware

**ASHBY & GEDDES, P.A.**

  
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*Proposed Counsel to The Official Committee of  
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**CERTIFICATE OF SERVICE**

I, Karen B. Skomorucha, 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**

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