

**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

Hearing Date: September 15, 2009 at 2:00 p.m. (ET)

Ref: Nos: 76, 80, and 90

**OMNIBUS RESPONSE OF THE DEBTORS TO:**

**(1) OBJECTION OF MERCHANT CASH AND CAPITAL, LLC TO DEBTORS' MOTION FOR ORDER (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 AS REQUESTED HEREIN [Dkt. No. 80];**

**(2) OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ORDER (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 AS REQUESTED HEREIN [Dkt No. 90];**

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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.

AND

**(3) LIMITED OBJECTION OF U.S. ONLINE AMERICA GROUP, LLC TO DEBTORS' MOTION AUTHORIZING (A) CONTINUED MAINTENANCE OF EXISTING BANK ACCOUNTS, (B) CONTINUED USE OF EXISTING BUSINESS FORMS, (C) CONTINUED USE OF EXISTING CASH MANAGEMENT SYSTEM, (D) CONTINUED PAYMENTS TO ISOs AND MERCHANTS IN ACCORDANCE WITH CUSTOMARY PRACTICE, AND (E) WAIVER OF CERTAIN GUIDELINES RELATING TO BANK ACCOUNTS [Dkt. No. 76]**

The above-captioned debtors and debtors-in-possession herein (collectively, the "Debtors"), file this Omnibus Response to:

(1) The Objection of Merchant Cash and Capital, LLC ("MCC") to the Motion (the "Bid Procedures Motion"), pursuant to sections 105(a), 363, 365, 503 and 507 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") for entry of orders approving, among other things, Bid Procedures and the sale of substantially all assets of the Debtors and the assumption of certain liabilities, free and clear of any and all claims, encumbrances and interests, except to the extent identified in the Purchaser's APA (as defined below) [Dkt No. 13]; and

(2) The Objection of the Official Committee of Unsecured Creditors (the "Committee") to the Bid Procedures Motion; and

(3) The Limited Objection of U.S. Online America Group, LLC ("U.S. Online") to the Debtors' Motion (the "Cash Management Motion") for entry of an interim order and a final order, under sections 105(a), 345, 363, 364, and 503(b)(1) of the Bankruptcy Code authorizing, but not directing (a) continued maintenance of existing bank accounts; (b) continued use of existing business forms; (c) continued use of existing cash management system; (d) continued

payment of ISOs (defined below) and Merchants (defined below) in accordance with customary practice; (e) a waiver of certain operating guidelines relating to bank accounts; and (f) scheduling a final hearing, to be held on or before the day that is thirty (30) days after the filing of the Debtors' chapter 11 petition. [Dkt. No 05].

By way of response to the specific Objections, the Debtors respectfully state as follows:

### **BACKGROUND**

1. On September 1, 2009 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. No trustee or examiner has been appointed.

3. On September 10, 2009, the Office of the United States Trustee formed the Committee.

4. A full description of the Debtors' business operations, corporate structures, capital structures, and reasons for commencing these cases is set forth in full detail in the declaration of Charles M. Moore in Support of chapter 11 petitions and various first-day motions (the "Moore Declaration").

### **RESPONSES TO THE OBJECTIONS**

#### **The MCC Objection.**

5. According to the MCC Objection, the Debtors own 31.5% of the membership interests (the "MCC Membership Interest") in MCC, pursuant to that certain MCC Amended and Restated Limited Liability Agreement dated October 2, 2006 ("MCC Agreement"). Pursuant to the MCC Agreement, any sale by a member, such as the Debtors' proposed sale under the APA, to a third party is subject to a 20-day notice period and a right by another holder of a membership

interest under the MCC Agreement to purchase the seller's membership interest on the same terms and conditions offered by the third-party purchaser.

6. The Debtors do not dispute that they hold the MCC Membership Interest, however that interest was altered by dilution in prepetition such that the Debtors now hold a 15.75% membership interest. Other than clarifying the extent of their membership interest, the Debtors do not oppose the relief requested by the MCC Objection. The Debtors do, indeed, propose to sell their MCC Membership Interest under the APA. In accordance with Section 2.1(k) of the APA, the MCC Membership Interest is part of Transferred Equity "to the extent transferrable."

7. It is not the Debtors intention, however, to sell the MCC Membership Interest free and clear of the MCC Agreement provisions and the Debtors intend to proceed with the sale of such interest subject to the terms of the MCC Agreement.

8. Accordingly, in an effort to resolve the MCC Objection, the Debtors propose amending the Bid Procedures to include the following language:

Notwithstanding the foregoing, the Debtors own 15.75% of the membership interests (the "MCC Membership Interest") in Merchant Cash and Capital, LLC, a Delaware limited liability company ("MCC"), pursuant to that certain MCC Amended and Restated Limited Liability Agreement dated October 2, 2006 ("MCC Agreement"). Pursuant to Section 8.2.2 of the MCC Agreement, any sale by a member to a third party is subject to a 20 day notice period and a right by another member to purchase the membership interest on the same terms and conditions offered by the third party. In accordance with Section 2.1(k) of the APA, the MCC Membership Interest is part of Transferred Equity "to the extent transferrable." The Purchaser has allocated \$\_\_\_\_\_ of the Purchase Price to the MCC Membership Interest. The sale of the MCC Membership Interest is not free and clear of the MCC Agreement provisions and the Debtors intend to proceed with the sale of such interest subject to the terms of the MCC Agreement. Should another member of MCC exercise its rights in accordance with the MCC Agreement, then the MCC Membership Interest will be transferred in accordance with the MCC Agreement without any impact upon the Purchase Price under the APA.

### **The Committee Objection.**

9. The Committee Objects to the Bid Procedures Motion on a number of grounds, including: (i) the Debtors seeking a “premature” approval of the APA; (ii) the extent to the proposed Break-up Fee; (iii) the extent of the proposed Expense Reimbursement; (iv) the extent of the proposed Overbid amount; and (v) the time frame proposed by the Debtors for the sale process. As discussed below, the Debtors welcome the Committee’s input into the sale process but believe, nevertheless, that the proposed terms of the sale, including the proposed bid protections, and the need to conduct the sale in an expeditious manner are in the estates’ best interest.

10. First, the Debtors are not, as the Committee suggests, seeking approval of the APA. Rather, the Debtors are asking that that Court approve the form of agreement that will be used by the stalking horse purchaser (the “Purchaser”) or another successful bidder through the auction and sale process to memorialize the Debtors’ asset sale.

11. Additionally, by its Objection, the Committee seeks to delay the auction process to some indeterminate time in the future, while failing to address several critical issues.

12. Under the terms of the APA, the Purchaser can rescind the APA if an order approving the Bid Procedures and related relief is not entered by September 15, 2009, thereby leaving the Debtors with no bidders and in danger of ceasing all operations by no later than October 16, 2009, because the DIP Lenders have stipulated that the debtor in possession loan terminates on October 16, 2009 if a sale is not consummated by that date.

13. The Debtors anticipate that a facile response from the Committee to these legitimate timing concerns would be the easy response that, of course, the lenders and the Purchaser will agree to extend the time periods required for the sale process. However, to date,

that has not occurred. Moreover, the above dates were been heavily negotiated and the Debtors do not view additional extension as a certainty. The Debtors simply are not willing to play Russian roulette with the contemplated sale process that, if it falls through by reason of delay or for any reason, will leave all constituents of these estates with little or no recovery.

14. Second, the Committee overlooks the extensive marketing process that has already taken place as outlined in the Bid Procedures Motion and the Moore Declaration. The Debtors' professionals spent several months contacting potential bidders and setting up an extensive data room for prospective purchasers. As a result, several interested parties did due diligence and counsel, as well as financial professionals, negotiated with all interested parties finally settling upon the Purchaser's as the highest and best offer. The Debtors and their lenders are satisfied that the process was wide ranging and extensive. However, the process to ferret out the best bid possible at the auction continues to this day with the Debtors' professionals renewing contacts with parties who previously expressed an interest in the estates' assets, in the hope that these parties will participate in the auction and create the robust sale process sought by the Committee.

15. Third, as to the extent of the Break-Up Fee, Expense Reimbursement and Initial Overbid, these were all the result of painful negotiations. The Break-Up Fee itself is well within standards recognized and approved in this jurisdiction as is the provision for Expense Reimbursement. It should be noted that while the Initial Overbid may seem somewhat high, it was negotiated with the Purchaser and, as a result of those efforts, the Purchaser agreed to enrich its offer by several millions of dollars. At the time of those negotiations, and continuing today, the Debtors believe that this represents a fair trade-off that should be approved because it adds significant value to the estate.

16. As to the Committee's involvement in the sale process, the Debtors welcome the Committee's input and have no objection to giving the Committee the right to consult with the Debtors as to who is Qualified Bidder or what is the highest and best bid for the Debtors' assets. If the Committee is unsatisfied with the Debtors' determinations after such consultation, the Committee is, of course, free to bring its objections before the Court for resolutions.

**The U.S. Online Limited Objection.**

17. By the U.S. Online Limited Objection, U.S. Online seeks an explanation as to where a certain ten percent reserve (the "U.S. Online Reserve") that the Debtors are required to maintain in a segregated account for the benefit of U.S. Online is held.

18. Since September, 2004, U.S. Online has had a direct relationship with the Debtors pursuant to an agreement between the parties (the "U.S. Online Contract"). U.S. Online continues to process with the Debtors postpetition.

19. U.S. Online builds, host, and maintains custom made websites. Merchant businesses are identified based on the industry in which merchants operate. In the world of credit card processing, there are generally-recognized industries categories that are used to identify merchants. The Debtors categorize merchants into to six specific industry types: retail; restaurant; service; MOTO; e-commerce; and high risk. Each of the identified industries carries a different level of risk assessed by the Debtors. U.S. Online falls within the e-commerce industry, an industry premised on a purchase model that does not involve face-to-face transactions. E-commerce purchases are accomplished by use of a computer, and payment is accepted via the use of an electronic "shopping cart." Because the Debtors deem e-commerce merchants of a higher risk, U.S. Online was required to fund a rolling reserve.

20. Prior to the Petition Date, any reserve funds provided to the Debtors by U.S. Online were deposited into the Debtors' account. If the U.S. Online Contract is assumed and assigned to the Purchaser or higher and better bidder, any default will have to be cured prior to assumption. As to any reserve funds that are deposited in the Debtors' accounts, the amounts contingently due will be resolved during the cure process. At present the Debtors expect most, if not all, merchant contracts to be assumed as part of the sale.

### CONCLUSION

WHEREFORE the Debtors respectfully request that the Bankruptcy Court (i) overrule the MCC Objection, the Committee's Objection and the U.S. Online Limited Objection and grant the relief requested by the respective motions by entry of appropriate final orders and (ii) grant such other and further relief as is just and proper.

Dated: September 14, 2009  
Wilmington, Delaware

Respectfully submitted,

PEPPER HAMILTON LLP

/s/ Evelyn J. Meltzer

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