IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CD LIQUIDATION CO., LLC f/k/a CYNERGY DATA, LLC, et al., Debtors.	Chapter 11 Case No. 09-13038 (KG) Substantively Consolidated

NOTICE OF FILING PROPOSED FINAL PRETRIAL ORDER

PLEASE TAKE NOTICE that on January 26, 2012, counsel for the Tribul Parties filed the Proposed Final Pretrial Order attached hereto as **Exhibit A**.

Dated: January 26, 2011
Wilmington, Delaware

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EXHIBIT A

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TRIBUL PARTIES' PROPOSED FINAL PRETRIAL ORDER

This matter came before the Court at a final pretrial conference held pursuant to Rule 7016 of the Federal Bankruptcy Rules on January 25, 2012:

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I. State the Nature of the Case

Tribul LLC ("Tribul"), Tribul Cash LLC ("Tribul Cash") and Second Source Funding, LLC ("Second Source") (collectively, the "Tribul Parties") were independent sales organizations ("ISOs") with Cynergy Data LLC ("Cynergy"), one of the Debtors. Tribul and Second Source signed ISO Conduit Processing Agreements with Cynergy dated October 11, 2006 (the "ISO Agreements"). Both ISO Agreements were assumed by Debtors and assigned to the purchaser of certain assets of the estate, Cynergy Holdings, LLC. (the "Purchaser"). The Tribul Parties filed Proofs of Claim alleging amounts due to them arising out of Cynergy breaches of the ISO Agreements that were assumed by the Purchaser.

This case centers around a determination of amounts of and rights to residuals and reserves claimed by the Tribul Parties, the damages suffered by the Tribul Parties as a result of Cynergy's breaches of the ISO Agreements, as well as fees, charges, losses and setoffs claimed by the Trustee. Between October 11, 2006 and October 26, 2009, the Tribul Parties boarded more than seven thousand merchants to Cynergy's processing platform under the ISO Agreements, and these merchants processed more than $1.5 billion worth of credit and debit card transactions (including cash advance transactions, a very small percentage of which, approximately 2.3%, was processed by creditor Tribul Cash). The Tribul Parties contend that, according to Cynergy's records available to the Tribul Parties at the time, more than $7 million in residuals that were otherwise due and owing the Tribul Parties were withheld (and recent discovery indicates that more than $8 million was withheld) by Cynergy. The Tribul Parties suffered damages from Cynergy's breaches which far exceed the amount of the residuals withheld, which in turn far exceed the $3.956 million that the parties stipulated be placed into escrow for the Tribul Parties' claims.

The Trustee asserts counterclaims for various setoffs, including fees, charges, and losses that he contends Cynergy suffered on the Classic Closeouts Merchant Account (the "Classic Closeouts account"). Cynergy had a direct merchant named Classic Closeouts which was not a merchant processing through the Tribul Parties' ISO Agreements and for which the Tribul Parties received no residuals. Cynergy alleged that it sustained losses as a result of fraudulent activity of this merchant. Significant issues in this case involve whether any or all of the Tribul Parties are liable for any fees, charges or losses on the Classic Closeouts account and if so, (a) whether there was actually a loss suffered by the Cynergy on the Classic Closeouts account, and (b) if so, which charges and fees on the Classic Closeouts account Cynergy was entitled to collect from any or all of the Tribul Parties, and (c) if so, whether the Cynergy was entitled to set-off such charges, fees or losses against the residuals to be paid the Tribul Parties under the ISO Agreements, and (d) if so, whether the Trustee can assert this counterclaim as part of this proceeding.

II. Jurisdiction

A. This is an action for damages arising from, among other things, the Debtors' defaults under the ISO Agreements.

B. The jurisdiction of the Court is not disputed.

C. This is a core proceeding. The Tribul Parties reserve their right to challenge whether any issues not arising from and directly related to the assumed contracts (i.e., the ISO Agreements), including without limitation the Classic Closeouts account indemnity and the MPS Residual Purchase agreement are part of the core proceeding.

III. Statement of Facts Which are Admitted and Require No Proof

(1) Charles M. Moore is Trustee of the CD Liquidation Trust and Successor-in-Interest to the substantively consolidated bankruptcy estate of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC and Cynergy Data Holdings, Inc.

(2) Cynergy was one of the Debtors in the above-captioned case. CD Liquidation Co., LLC was formerly known as Cynergy Data LLC.

(3) Tribul, Tribul Cash, and Second Source are ISOs in the business of, among other things, marketing and providing merchants with credit and debit card processing services. These entities all operated under two ISO Agreements that Cynergy, Tribul and Second Source signed on or about October 11, 2006. Cynergy was in the business, among other things, of providing merchants with access to banks and bank networks for the processing of credit and debit card transactions as well as maintaining, monitoring and transmitting data relating to such transactions, and instructing the various financial institutions involved in the transaction to collect the funds for such transactions, deduct the fees owed to the card organizations and the acquiring bank (and have those entities retain the sums due to them), deduct the fees owed to Cynergy and pay such sums to Cynergy, deduct the residuals to be paid to ISOs (and to the ISOs' downlines and sales representative) and pay such sums to the ISOs, and pay the remaining balance to the merchant.

(4) Tribul and Cynergy are signatories to an ISO Conduit Processing Agreement dated October 11, 2006. This contract was assumed by Debtors and assigned to Cynergy Holdings, LLC, the purchaser of certain assets from the estate of the Cynergy.

(5) Second Source and Cynergy are signatories to an ISO Conduit Processing Agreement dated October 11, 2006 that is virtually identical to that described in item (4) above. This contract was also assumed by Debtors and assigned to the Purchaser.

(6) The Tribul Parties filed Proofs of Claim on January 29, 2010.

(7) By Order dated August 3, 2011, certain of the proofs of claim of Tribul, Second Source Funding, and Tribul Merchant Services, LLC ("Tribul Merchant Services") were consolidated with Proofs of Claim Nos. 199 and 257 on the grounds that the Debtors' estates were substantively consolidated in connection with the Debtors' Joint Plan of Liquidation. (D.I. 1202). Tribul, Second Source, Tribul Merchant Services and Tribul Cash (collectively, the "Tribul Parties") are all related entities.

IV. Statement of Facts Which Are in Dispute

A. Facts in dispute that the Tribul Parties contend are uncontroverted.

(1) According to the residual reports provided by Cynergy, the Tribul Parties should have received more than $21,000,000 in gross residuals under the ISO Agreements, of which they were actually paid less than $14,000,000 (a percentage of which the Tribul Parties then paid their downline offices and sales representatives in accordance with the Tribul Parties' independent agreements with their own Downlines).

(2) Cynergy and Second Source are parties to a Residual Purchase Agreement regarding a book of business referred to as the MPS portfolio and over which Second Source handled certain administrative functions, dated March 5, 2008.

(3) Cynergy Prosperity Plus LLC as lender and Second Source as borrower are parties to a revolving line of credit loan agreement and related documents dated February 19, 2008 whereby Cynergy Prosperity Plus loaned $8 million to Second Source.

(4) The ISO Agreements provided, among other things, that Cynergy pay the ISOs merchant revenues that were collected by Cynergy from merchants brought on or "boarded" by the ISOs in excess of the Cynergy fees set forth in Exhibit A to the contracts and losses as defined in the ISO Agreements. These amounts paid to the ISOs are referred to as residuals.

(5) Classic Closeouts was a direct merchant of Cynergy and not a merchant boarded by any of the Tribul Parties. As such, Classic Closeouts was not processed through the Tribul Parties as ISOs to Cynergy under the ISO Agreements. There was a significant amount of chargeback activity on the Classic Closeouts account beginning in or about June 2008. Cynergy claimed that it suffered significant losses as a result of allegedly fraudulent activity by Classic Closeouts.

(6) Suspended funds or so-called questionable merchant ("QM") funds are funds of the merchants boarded by the ISOs which are held by the sponsor bank and used to recover credit and transaction losses which are determined to be fraudulent or improper as a result of the merchant activity. Funds from the suspended fund or QM accounts were released to Classic Closeouts in the amount of $630,496.89. Cynergy depleted the Classic Closeouts QM account.

(7) On or about June 13, 2008, Rick Blesofsky signed a letter addressed to Cynergy (which was prepared by Cynergy, on Cynergy letterhead), and which states that "Rick Blesofsky: President of Operations/Tribul LLC, New York does hereby accept 100% (one hundred percent) liability for this merchant account for any and all uncollected Chargebacks and for all and any uncollected fees for the life of the account."

(8) There is no evidence that Mr. Chanin, Mr. Blesofsky or any other principal or officer of the Tribul Parties had any ownership interest or benefited in any way from the Classic

Closeouts business, nor that they had any knowledge or reason to believe that Classic Closeouts was a risky account or would engage in any fraudulent activity.

(9) Mr. Chanin was a "partner" of the principal of Classic Closeouts, Daniel Greenberg, in a charity venture that was intended to provide impoverished families with overstocked clothing at prices at or under cost, using Mr. Greenberg's connections in the far east, excess stock and warehouse space, and Mr. Chanin's connection with needy charities and financing sources. That venture never went forward.

(10) An Executive Partner Reserve or so called EP Reserve is a type of rolling reserve established from residuals otherwise due and owing to an ISO that qualifies as an "Executive Partner" that are set aside by holding back a percentage of an ISO's residuals in a separate account. The EP Reserve is then held in a financial institution as an emergency reserve to offset potential future losses by a merchant within an ISO's portfolio.

(11) Cynergy was required to keep a separate account for every Executive Partner's EP Reserves.

(12) Cynergy failed to maintain a separate account for every Executive Partner's EP Reserves, and instead commingled these accounts with Cynergy's operating account and used those funds for Cynergy's operating expenses. Cynergy's rolling reserve accounts were underfunded by approximately Twenty Million Dollars ($20 million).

(13) The Tribul Parties were considered an EP and had an EP Reserve established from the funds otherwise due to the Tribul Parties and governed by the ISO Agreement provisions regarding a Reserve Account. Cynergy withdrew $336,236.84 from the EP Reserves of the Tribul Parties in November 2008 and informed the Tribul Parties that those funds were being used to cover losses from the Classic Closeouts account. From November 2008 to October

2009, the Tribul Parties funded a second EP Reserve in the amount of $169,065.08 (the "Second EP Reserve Fund"). According to Cynergy's books and records, the Tribul Parties' EP Reserve Fund had that amount in it immediately prior to the Petition Date.

(14) The Debtors' records indicate that approximately 3,500 merchants were transferred from the Tribul Parties' merchant portfolio between July and October 2009 and were transferred back after the APA (the "missing merchants"). Cynergy's records indicate that those missing merchants processed a transaction volume that exceeded $104 million during while they were "missing," which would have resulted in the Tribul Parties' EP Reserve fund increasing by $31,099.06. The Second EP Reserve Fund should have totaled $200,164.14 as of October 26, 2009.

(15) Cynergy and the Purchaser's financial records have no record of the Second EP Reserve Fund being transferred to the Purchaser or repaid to the Tribul Parties.

(16) According to the Cynergy residual reports, it withheld residuals in November 2008 from the Tribul Parties in the amount of $436,657.40. Cynergy informed the Tribul Parties that those funds were being used to cover losses from the Classic Closeouts account.

(17) According to Cynergy's residual reports, it withheld residuals in December 2008 from the Tribul Parties in the amount of $964,036.22 Cynergy informed the Tribul Parties that those funds were being used to cover losses from the Classic Closeouts account.

(18) In January 2009, Cynergy wired $350,000 to the Tribul Parties, and Cynergy's accountant booked that wire against a portion of the December residuals owed to the Tribul Parties that had not been paid.

(19) Cynergy's records indicate that it sent funds to Tolleson Bank on the account of 6M, a company owned by John Martillo (Cynergy's former President) in December 2008 in the amount of $557,242.

(20) The Tribul Parties' records indicate that a wire transfer in the amount of $547,242 was received from Tolleson Bank on the account of 6M, on January 19, 2009.

(21) The term "chargeback" means a transaction (purchase by a cardholder of goods or services from a merchant by use of a credit or debit card) that has been returned by the card issuer.

(22) On or about May 15, 2009, Cynergy and Cynergy Prosperity Plus sent a Notice of Foreclosure, declaring a default under the Second Source Prosperity Plus Loan Agreement and seeking to seize the Tribul Parties' merchant portfolio.

(23) The Tribul Parties commenced a civil litigation in New York State Supreme Court, New York County against Cynergy, Cynergy Prosperity Plus and certain executives of Cynergy, including Marcelo Paladino, Dean Leavitt and Stephen Aschettino. NYS Justice Melvyn Schweitzer signed a temporary restraining order in order to prevent the Cynergy from continuing to withhold the Tribul Parties residuals and to prevent Cynergy from foreclosing on the Tribul Parties. Pursuant to the TRO, Cynergy was restrained from (among other things) foreclosing on the Tribul Parties' merchants accounts and was affirmatively ordered to restore the Tribul Parties' access to the VIMAS system and to pay the Tribul Parties their full residuals. At the direction of the Court, the Parties entered into an escrow agreement dated June 5, 2009 whereby Cynergy deposited $601,167.54 into escrow, which funds were then distributed by the escrow agent to paying the Downlines and sales agents of the Tribul Parties in order to maintain the integrity of the merchant portfolio. (This escrowed amount of $601,167.54 is an off-set

against any amounts owed by Cynergy to the Tribul Parties.) The Escrow fee was fifty thousand dollars ($50,000.00), and each party properly paid its half. Cynergy never restored the Tribul Parties' access to VIMAS through the date of the APA. That State Court action was dismissed by the Court as a result of the automatic stay provision of the bankruptcy code.

(24) During that same period of time, Cynergy directly paid the following sub-ISOs or downlines of the Tribul Parties in the following amounts: (a)10576/Rocky Mountain - $53,068.32 (b) BPS Worldwide - $160,744.56 (c) Rueven Cypress - $47,184.15.

(25) According to Cynergy's residual reports, it withheld residuals in the months of April through October 25, 2009 in the total amount of $2,420,516.98 from the Tribul Parties. Cynergy informed the Tribul Parties that those funds were being used to cover losses from the Classic Closeouts account.

(26) The Tribul Parties did not have full access to VIMAS during that period of time.

(27) The transaction volume and business processed for the "missing merchants" were not included on the Tribul Parties' residual reports for July-October 2009. Those missing merchants' volume of business would have increased the residuals due to the Tribul Parties' during those months by at least an additional $880,000.

(28) In January 2009, Mastercard assessed a fine in the amount of $357,155.90 relating to the Classic Closeouts account. Cynergy claimed that the Tribul Parties were responsible for this fine and attempted to set-off this fine against the Tribul Parties' residuals.

(29) Charles Moore, the Liquidation Trustee, served as the restructuring agent for Cynergy during the months prior to the Petition Date, including the period of time when Cynergy was withholding the Tribul Parties' residuals and attempting to foreclose on the Tribul Parties' merchant portfolio.

(30) Jesse York worked with Mr. Moore in connection with Mr. Moore's work as restructuring agent of Cynergy.

(31) During that same time period, Lorraine Ossolinski, then a member of Mr. Moore's team at CMD (now Conway Mackenzie) served as the acting CFO of Cynergy.

(32) Derek Daniels was the Accountant of Cynergy from 2005 through the Petition Date, and has been the Accounting Manager of the Purchaser since that time. Mr. Daniels has been responsible for the content and accuracy of the residual reports and payments to ISOs throughout that period.

(33) Claudine Epps was the Collections Manager of Cynergy from 2004 through the Petition Date, and has held the same position with the Purchaser since that time. Mrs. Epps reported to various CFOs and Controllers of the Debtor, including Gustavo Ceballos, Lorraine Ossolinski, Michael DAlauro and Michael Kennedy.

(34) Marcelo Paladini was the Founder and CEO of Cynergy until the Petition Date, and was the signatory on the ISO Agreements and the Cynergy Prosperity Plus Loan Agreement. Mr. Paladini was the primary negotiator of those agreements on behalf of the Debtor and had the actual and apparent authority to modify, revise or alter the terms of the ISO Agreements until the Petition Date.

(35) Stephen Aschettino was an officer of Cynergy and held the title of general counsel.

(36) Andres Ordonez was the CIO of Cynergy and continues to serve as the CIO of the Purchaser.

(37) Although the Tribul Parties argued that they were owed in excess of $7 million in cure claims, based on Cynergy's record available at the time (which number appears to be far

greater than $8 million), the Tribul Parties agreed to have $3,956,009 placed into escrow and to limit any recovery from the Estate arising out of the Tribul Parties' cure claims to that amount.

B. Additional Facts in Dispute

(1) Whether any or all of the Tribul Parties agreed to accept liability for any fees, charges, fines or losses on the Classic Closeouts account.

(2) Whether Mr. Blesofsky or any of the Tribul Parties received any consideration for signing the purported agreement in which Mr. Blesofsky agree to take liability for all "chargebacks and other fees" on the Classic Closeouts account.

(3) Whether that purported agreement signed by Mr. Blesofsky was induced by fraudulent means by Cynergy and thus is unenforceable by virtue of Cynergy's unclean hands or other applicable legal principles.

(4) Whether there was actually a loss suffered by the Debtors on the Classic Closeouts account, given the amounts that Cynergy retained as the "ISO" on the account.

(5) Which charges and fees on the Classic Closeouts account, if any, Cynergy was entitled to collect from any or all of the Tribul Parties.

(6) Whether Cynergy was entitled to set-off charges, fees or losses on the Classic Closeouts account against the residuals to be paid the Tribul Parties under the ISO Agreements.

(7) The dollar amount of the losses to Cynergy, if any, as a result of the activities of Classic Closeouts.

(8) Whether the Suspended Funds report provided to the Tribul Parties by Megan Lozano of Cynergy in September 2011 is a complete and accurate accounting of all uncollected charges and fees, and thus the total maximum loss of $390,425,92 on the Classic Closeouts account.

(9) Whether residuals from December 2008 in the amount of $547,242 residuals were paid to the Tribul Parties (either by Cynergy or through a third party) (e.g., whether the payment by Tolleson Bank on behalf of John Martillo/6M/Signapay on June 19, 2009 was a payment of residuals).

(10) Whether the Tribul Parties are liable for "soft losses" or "soft costs," which are a component of the fees that Cynergy charged to Classic Closeouts and when uncollected, attempted to collect from the Tribul Parties.

(11) Whether the Tribul Parties are liable for arbitration compliance fees assessed against Cynergy as a result of the Classic Closeouts account activity and if so, the dollar amount for such fees.

(12) Whether the Tribul Parties are liable for chargeback fees assessed against Cynergy as a result of the Classic Closeouts account activity and, if so, the dollar amounts for such fees.

(13) Whether the Tribul Parties are liable for chargeback fees assessed against Cynergy as a result of the Classic Closeouts account activity and, if so, the dollar amounts for such fees.

(14) Whether the Tribul Parties are liable for ACH fees assessed against Cynergy as a result of the Classic Closeouts account activity and, if so, the dollar amounts for such fees.

(15) Whether the Tribul Parties are liable for NSF fees assessed against Cynergy as a result of the Classic Closeouts account activity and, if so, the dollar amounts for such fees.

(16) Whether Tribul and Second Source are liable for a Mastercard fine assessed due to acts or omissions on the Classic Closeouts account.

(17) Whether Cynergy is entitled to a setoff for losses due to merchant attrition pursuant to a Residual Purchase Agreement dated March 5, 2008 in which Cynergy purchased a portfolio of merchants, and if so, the dollar amount of such set-off.

(18) Whether Cynergy is entitled to a setoff for any unpaid interest due Cynergy as a setoff pursuant to a loan agreement with Second Source dated February 19, 2008, and if so, the dollar amounts of such interest owed.

(19) Whether Cynergy is entitled to a credit against residuals due to the Tribul Parties for amounts paid by it directly to sub-ISOs or Downlines of the Tribul Parties (other than the payments made into the Court-ordered escrow account) and the dollar amounts of such credits.

(20) Whether Cynergy is entitled to a credit for escrow fees with respect to an escrow agreement relating to payments required by Tribul and Second Source to the Downlines and the dollar amount for such fees.

(21) Whether Cynergy was entitled to charge a "BIN sponsorship fee" under the ISO Agreements without procuring a separate BIN for the Tribul Parties pursuant to the terms of the ISO Agreements.

(22) Whether Marcelo Paladini, founder and CEO of Cynergy, agreed to reduce certain fees to be charged the Tribul Parties (including BIN sponsorship fees and excess transaction fees) and to eliminate certain other fees (including minimum billing fees), and if so, the amounts that Cynergy improperly withheld from the Tribul Parties' residual payments for such fees.

(23) Whether Cynergy was entitled to charge fees for failure to provide original merchant documents and if not, the amount improperly withheld from the Tribul Parties' residuals on account of such fees.

(24) Whether the Trust is liable to the Tribul Parties for the payment of suspended funds or so-called Questionable Merchants ("QM") funds or merchant rolling reserve funds which are funds held for specific merchants based upon the merchants' transaction processing history, by reducing the ISOs' residuals to create the fund, and which funds are typically returned to the ISO who is responsible for the merchants' funds in the event that there has been a loss or if the merchant terminates its contract and is entitled to a return of a withheld balance.

(25) Whether the Trust is liable to the Tribul Parties for approximately $200,000 in depleted, missing, and/or commingled EP Reserves that should have been held in a segregated account by Cynergy for the Tribul Parties and either transferred to the Purchaser or repaid to the Tribul Parties.

V. Agreed to Issues of Law

A. The parties agree that the following are the issues to be decided by the Court:

1. Whether Tribul and Second Source are entitled to seek recovery for residuals from December 2008 in the amount of $557,242.00, which amount the Trustee claims was paid (less $10,000.00) to 6M (a company owned by former Cynergy President John Martillo) in December 2008 and then forwarded by 6M to the Tribul Parties in January 2009.

2. Whether the Tribul Parties were entitled to a reduction in fees (BIN sponsor fee, minimum billing fee and excess transaction fee) governed by Exhibit A to the ISO Conduit Processing Agreements based upon an alleged subsequent agreement to do so by Marcelo Paladini.

3. Whether the Tribul Parties are liable for any chargebacks, fees or the losses directly sustained by Cynergy for arbitration fees, chargeback fees and losses, and

a MasterCard fine as a result of Classic Closeouts as setoffs against amounts otherwise owed as Cure Claims to Tribul and Second Source.

V. Tribul Parties' Issues of Law

1. Whether Cynergy was obligated to provide the Tribul Parties with a segregated BIN upon request, and whether Cynergy was permitted to charge a BIN Sponsorship fee under the terms of the ISO Agreements after failing to provide dedicate BIN as requested by the Tribul Parties.

2. Whether Cynergy was obligated to continue to include the MPS portfolio within the Aggregate Minimum Billing calculation after Cynergy purchased the MPS portfolio, and if so, whether Cynergy was permitted to charge minimum billing fees after the MPS portfolio purchase.

3. Whether the October 2, 2008 email from Marcelo Paladini to Sam Chanin was a valid amendment to the ISO Agreement.

4. Whether the Trust is liable to the Tribul Parties for damages mitigated by the Tribul Parties and caused by Cynergy suspending funds, which the Trustee has previously been overruled for classifying as post-closing, and which were merchant funds held by the sponsor bank despite Cynergy settling claims for suspended merchant funds with the Purchaser, and if so, the amounts associated with such damages.

5. Whether the Trust is liable to the Tribul Parties for $169,065.08 (or more than $200,000) in depleted, missing, underfunded, and/or commingled EP Reserves held and lost by Cynergy despite Cynergy settling claims for some EP Reserves with the Purchaser and previously being overruled in its contention that these amounts are "post-closing."

6. Whether the separate indemnification/liability agreement regarding the "chargebacks and other fees" on the Classic Closeouts account is an enforceable agreement, and if so, against which of the Tribul Parties.

7. Whether the separate indemnification/liability agreement only applies if Cynergy demonstrates that it actually suffered a total loss on the Classic Closeouts account.

8. Whether the separate indemnification/liability agreement allows Cynergy to attempt to collect soft costs/soft losses on the Classic Closeouts merchant account.

9. Whether the Trustee has the right to assert counterclaims to set-off amounts owed to the Tribul Parties under the ISO Agreements by using amounts allegedly owed under a separate alleged liability agreement, which separate agreement was not assumed by the Purchaser.

10. Whether Tribul and Second Source are liable for all losses (including arbitration fees, chargeback fees and MasterCard fines) sustained by Cynergy as a result of the activities of the merchant Classic Closeouts.

11. Whether the losses, including arbitration fees, chargeback fees, losses and a MasterCard fine assessed against Cynergy constitute setoffs against amounts otherwise due Tribul and Second Source on its cure claims.

12. Whether the Tribul Parties are permitted to recover as cure claims residuals due and owing to Tribul Cash.

13. Whether the Trustee's failure to timely comply with the Tribul Parties' discovery demands precludes the Trustee from challenging the proof of the Tribul

Parties' cure claims or the authenticity of documents supporting the Tribul Parties' cure claim amounts provided by the Purchaser.

14. Whether the Trustee is precluded from asserting any set-offs or counterclaims against the Tribul Parties based on his unclean hands in having participated in (or at least consciously ignored and thus aided and abetted) Cynergy's unfounded attempt to foreclose on the Tribul Parties' merchant portfolio in May 2009, Cynergy's willful flouting of the New York State Court's restraining order in June, July and August of 2009, Cynergy's unauthorized moving of more than 3,000 merchant accounts from the Tribul Parties' portfolio between June and August 2009, and the incredible, ex-poste facto attempts to justify Cynergy's withholding of more than $7 million in residuals from the Tribul Parties in order to advance Cynergy's own business goals and address Cynergy's precipitous financial situation.

VI. Witnesses (Including those that will testify by deposition.)

A. List of names and addresses of witnesses in the order the Tribul Parties (Creditors) expects to call them,

1. Expert witnesses and their areas of expertise. – None

2. Non-expert witnesses

Yeruchem ("Rick") Blesofsky
Shmuel ("Sam") Chanin
Cynergy Data LLC – by Rule 30(b)(6) representatives (presumably by deposition excerpts)
Derek Daniels (by deposition excerpts)
Claudine Epps (by deposition excerpts)
Megan Lozano (presumably by deposition excerpts)
Charles Moore
Andres Ordonez (presumably by deposition excerpts)
Marcelo Paladini (presumably by deposition excerpts)

B. List of witnesses in the order the Trustee expects to call them, including experts:

1. Expert witnesses and their areas of expertise. – None

2. Non-expert witnesses:

Marcelo Paladini
Rick Blesofksy (upon cross examination)
Andres F. Ordonez
Derek Daniels
Jesse York
Sam Chanin (upon cross examination)
Charles Moore

C. Identify any witnesses for whom there is an objection. The Tribul Parties object to the Trustee calling of any witnesses that have not been made available for a deposition in advance of trial, currently Messrs. Paladini and Ordonez.

D. The Tribul Parties' lists of deposition designations that they intend to offer at trial with respect to depositions which have been completed is attached as Exhibit A. There have not been any objections and counter-designations to the deposition designations, which presumably will be provided before trial.

E. Rebuttal Witnesses. Each of the parties may call such rebuttal witnesses as may be necessary, without prior notice thereof to the other party.

VII. Exhibits

The Tribul Parties' Exhibit List is attached as Exhibit G.

VIII. Statement of Tribul Parties' Intended Proofs.

A. States what the Tribul Parties intend to prove in support of their claims.

A. <u>TOTAL AMOUNT OF RESIDUALS OWED:</u>

According to the records provided by Cynergy, merchants boarded to Cynergy by the Tribul Parties conducted more than 26,439,298 Visa and MasterCard transactions and $1,566,930,629.59 in transaction volume. Of those figures, Tribul Cash accounted for

approximately 2.3% of the Tribul Parties' total business. Under the ISO Agreements, the Tribul Parties were owed more than twenty one million dollars ($21,000,000.00) in residuals, of which they were actually paid less than $14,000,000. The Tribul Parties' thus have cure claims of more than $7 million (far in excess of the $3.956 million currently held in escrow for the Tribul Parties' claims). Any inability of the Tribul Parties to detail the precise amount of their cure claims and damages claims is immaterial to the proof of their claims, because (i) the claims far exceed the amount held in escrow, and (ii) the Tribul Parties' inability to provide the precise calculation is due to the Trustee and the Purchaser refusing to provide the backup information to the Tribul Parties, dating back to Cynergy having locked the Tribul Parties out of the VIMAS system maintained by Cynergy and the Trustee.

1. In violation of New York State Supreme Court Justice Melvyn Schweitzer's restraining order ("the TRO"), Cynergy did not restore the Tribul Parties access to VIMAS prior to the APA, and the Tribul Parties were unable to track their merchant portfolio or to calculate the amount of residuals due and owing or ascertain the amount of fees improperly withheld.

2. In violation of New York State Supreme Court Justice Melvyn Schweitzer's TRO, Cynergy intentionally removed approximately three thousand five hundred (3,500) merchants from the Tribul Parties' portfolio beginning in July 2009.

3. There was no legitimate justification for Cynergy's acts, which were to

a) prevent the Tribul Parties from being able to access the VIMAS data in order to know that Cynergy was violating the TRO and effectively seizing the Tribul Parties' merchant accounts; and

b) (i) enable Cynergy to impermissibly establish direct relationships with the Tribul Merchants' Downlines (including certain terminated Downlines

that were conspiring with Cynergy) and to avoid having to pay the Tribul Parties their portion of the residuals on those thousands of merchant accounts, thus effectively giving Cynergy direct control over a significant portion of the Tribul Parties' portfolio (the stated goal of Cynergy's thwarted attempt to foreclose on the Tribul Parties' portfolio), or (ii) move the merchants into a Cynergy house account, thus decreasing the expense obligations on Cynergy's balance sheet by hundreds of thousands of dollars per month and increasing Cynergy's Ebitda at a time that the Cynergy team was attempting to sell the assets of Cynergy, both before and after the Petition Date.

B. UNJUSTIFIED FEES AND CHARGES (SET-OFFS):

Cynergy improperly charged the Tribul Parties various fees and used these fees to justify withholding the Tribul Parties' residuals.

1. Cynergy improperly charged the Tribul Parties for a "BIN Sponsorship Fee" after not providing a dedicated Bank Identification Number ("BIN") for the Tribul Parties.

a) Cynergy agreed to provide the Tribul Parties with a dedicated bank identification number (BIN);

b) A dedicated BIN was a valuable commodity;

c) Schedule A of the ISO Agreements includes charges that are only charged if the particular service is provided to the ISO; BIN sponsorship is one such fee;

d) Cynergy never obtained a separate BIN for the Tribul Parties, despite the Tribul Parties' repeated requests for, and Marcelo Paladini's repeated promises to provide, a dedicated BIN;

e) Charge the Tribul Parties a BIN Sponsorship fee for the Tribul Parties to receive a dedicated BIN;

f) Cynergy withheld $309,489.83 from the Tribul Parties' residuals by charging them BIN Sponsorship fees.

2. Cynergy improperly charged the Tribul Parties "Minimum Billing Fees" and used these fees to justify withholding the Tribul Parties' residuals.

a) The Tribul Parties met their aggregate minimum billing obligations under the ISO Agreements, and should not have been charged minimum billing fees.

b) Cynergy has acknowledged in emails that the Tribul Parties were wrongly charged minimum billing fees and that no minimum billing fees were to be charged.

c) Cynergy improperly charged the Tribul Parties $70,140.94 in Minimum Billing fees.

3. Cynergy improperly charged the Tribul Parties Excess Transaction Fees and used these fees to justify withholding the Tribul Parties' residuals.

a) Schedule A to the ISO Agreements contains no mention of excess transaction fees.

b) Cynergy overcharged the Tribul Parties $483,858.40 in excess transaction fees.

4. Cynergy improperly charged the Tribul Parties "Missing Original Fees" and used these fees to justify taking the Tribul Parties residuals.

a) Cynergy charged the Tribul Parties $436,657.40 in Missing Original fees.

b) Cynergy had no right to charge the Tribul Parties missing original fees under the ISO Agreements.

C. IMPROPERLY WITHHELD RESIDUALS:

The Tribul Parties intend to prove that Cynergy improperly withheld residuals of at least $4 million in violation of the ISO Agreements as follows:

1. Cynergy improperly withheld the Tribul Parties' residuals for merchant activity in November and December 2008 in violation of the ISO Agreements.

a) Cynergy withheld residuals due for November 2008 from the Tribul Parties in the amount of $374,584.83.

b) Cynergy withheld residuals due for December 2008 from the Tribul Parties in the amount of $964,036.22.

c) Cynergy did pay $350,000 in December residuals to the Tribul Parties in January 2009;

d) Cynergy wrongly, and without authorization, paid $547,242 of Tribul's December 2008 residuals to 6M instead of to the Tribul Parties after booking the withholding of this amount to the Classic Closeouts account;

e) The total amount of residuals improperly withheld for November and December 2008 (some of which was withheld in January 2009) was $1,050,693.60.

2. Cynergy improperly withheld the Tribul Parties' residuals from April to October 2009 in violation of the ISO Agreements.

a) Cynergy withheld residuals from the Tribul Parties in the months of April through October 2009 in the total amount of **at least** $2,420,516.98.

b) The additional amount of residuals that were attributable to the Tribul Parties' missing merchants that reappeared in the Tribul Parties' merchant portfolio after the APA and the reinstatement of the Tribul Parties' VIMAS access and should have been paid to the Tribul Parties under the ISO Agreements was at least $880,000. The total amount of residuals withheld from the Tribul Parties from April through October 2009 was **at least** $3,300,516.98.

D. CLASSIC CLOSEOUTS:

The Tribul Parties intend to prove that the primary counterclaims of the Trustee – that all or most of the residuals withheld were purportedly to set-off "losses" associated with the Classic Closeouts account – are belied by the applicable documents and records:

1. The Tribul Parties never agreed to assume liability for ANY losses associated with the Classic Closeouts account, and the purported indemnification agreement is unenforceable against the Tribul Parties.

a) The Tribul Parties never received any consideration for assuming liability for losses associated with Classic Closeouts.

b) The Tribul Parties never agreed to assume liability.

c) If any of the Tribul Parties agreed to assume liability, it was only Tribul, not Second Source Funding.

d) Cynergy's unclean hands, including knowledge or suspicion of Classic Closeouts' fraudulent activity prior to the alleged assumption of liability, would render any alleged assumption of liability unenforceable. If any liability for Classic Closeouts was assumed, it only covered actual losses suffered by Cynergy, not "soft costs" or "soft losses," which were Cynergy's expected profits.

e) If any liability for Classic Closeouts was assumed, it only covered actual losses suffered by Cynergy, not "soft costs" or "soft losses," which were Cynergy's expected profits on transactions.

f) If any liability for Classic Closeouts was assumed, it only covered "chargebacks and other fees" that Mr. Blesofsky reasonably expected to be incurred by Cynergy on that account (and not arbitration/compliance fees, a MasterCard fine or other charges and fees that Mr. Blesofksy had not known could, would or should be charged to an ISO assuming liability for a merchant account);

g) If any liability for Classic Closeouts was assumed, it only covered actual losses suffered by Cynergy, not "soft costs" or "soft losses", which were Cynergy's expected profits.

2. If any liability for Classic Closeouts was assumed by the Tribul Parties and if there were any losses on the account, Cynergy miscalculated and overstated the losses associated such losses.

a) Cynergy did not suffer a net loss on the Classic Closeouts account, and in fact made a profit on the account, given the amount of residuals that it

collected and retained on the account as a direct merchant (*i.e.*, during the period of time that Cynergy was the ISO on the account).

b) If Cynergy did suffer a net loss, according to Cynergy's own records, the total net loss did not exceed $390,425.92.

3. The Trustee cannot use losses on the Classic Closeouts account as a setoff to residuals owed to the Tribul Parties, since there is no mutuality of capacity between the parties (ISO:superISO v. indemnity:indemnitor)

a) Any liability that the Tribul Parties may have for losses associated with Classic Closeouts arises out of a separate indemnity contract.

b) That separate indemnity agreement is unrelated (with no mutuality) to the ISO Agreements.

c) The separate indemnity agreement does not provide Cynergy with the right to take set-offs against residuals due under the ISO Agreements or from the Tribul Parties' EP Reserves or from the QM or rolling reserve accounts set up for the Tribul Parties' other merchants.

d) The Trustee is precluded from asserting set-offs and counterclaims under the separate Classic Closeouts indemnification agreement in this proceeding.

E. <u>DEPLETED/MISSING RESERVES</u>

Cynergy violated the ISO Agreements by misappropriating the Tribul Parties' EP Reserves and the Merchants Suspended Funds, including the QM Reserves and the Merchant Rolling Reserves

1. Cynergy violated the ISO Agreements by misappropriating the Tribul Parties' First EP Reserve.

a) Under the ISO Agreements, Cynergy withheld from the Tribul Parties' residual payments .0003 (3 basis points) from each transaction, to cover potential future liabilities on that ISO's merchant portfolio.

b) Cynergy withdrew $336,236.84 from the EP Reserves of the Tribul Parties in November 2008.

c) Cynergy justified taking the First EP Reserve by claiming it was to cover losses associated with Classic Closeouts. This was not justified or proper.

2. Cynergy violated the ISO Agreements by misappropriating the Tribul Parties Second EP Reserve account.

a) From November 2008 to October 2009, the Tribul Parties funded a Second EP Reserve in the amount of $169,065.08. According to the Debtor's books and records, the Tribul Parties' EP Reserve Fund had that amount in it immediately prior to the Petition Date.

b) Based upon the estimated volume of the "missing merchants" during July, August, September and October 2009 (approximately $104,033,021.62), the Tribul Parties believe that the Tribul Parties' Second EP Reserve was under-reported by $31,099.06, and should have totaled $200,164.14 as of October 26, 2009.

c) Cynergy breached the ISO Agreements by failing to maintain the Tribul Parties' Second EP Reserves in a separate account.

d) Cynergy commingled the the Tribul Parties' Second EP Reserves in an underfunded rolling reserve account, also used to fund operating expenses.

e) Cynergy's and Purchaser's financial records have no record of the Tribul Parties' Second EP Reserve Fund being transferred to the Purchaser or repaid to the Tribul Parties.

f) The Tribul Parties were thus damaged in the amount of $200,164.14.

F. MPS PORTFOLIO ATTRITION: CYNERGY IS NOT PERMITTED TO MISAPPROPRIATE RESIDUALS THAT IT CLAIMED WAS AN OFFSET TO COVER ATTRITION UNDER THE MPS RESIDUAL PURCHASE AGREEMENT

1. The Tribul Parties owned part of a merchant portfolio that the parties referred to as the MPS Portfolio and served as an administrator on the MPS Portfolio. A separate company owned a significant portion of the MPS Portfolio.

2. The MPS Portfolio was sold to Cynergy by MPS (with Second Source as the signatory) under an "MPS Residual Purchase Agreement."

3. Under the terms of the MPS Residual Purchase Agreement, in the event that there was attrition to the MPS Portfolio over time, MPS (not the Tribul Parties) was obligated to replace attrited accounts with other merchant accounts.

4. Instead of requesting attrited accounts from MPS (for which the Tribul Parties would have been responsible for, at most, only a percentage of the attrited), Cynergy and the Trustee contend that they can calculate the dollar amount that the MPS Portfolio attrited, and offset that amount against the Residuals due to the Tribul Parties.

5. Such an offset is not permitted under the ISO Agreements and would be improper to allow in this proceeding.

IX. Statement of Trustee's Intended Proofs.

A. The Trustee intends to prove that the Trust is entitled to setoffs against the cure claims of the Tribul Parties as follows:

Classic Closeouts

(1) Tribul and Second Source agreed to assume liability for all losses associated with the Classic Closeouts account.

(2) The Trust is owed $997,193.30 attributable to losses sustained on behalf of the merchant Classic Closeouts. Cynergy ultimately bore the losses for which the Tribul Parties are liable.

(3) Cynergy experienced outflows of $3,316,203.98, identified in Cynergy's analysis as rejects, which Cynergy was unable to recover from the merchant's account after several attempts. This amount includes a $357,155.90 Mastercard fine levied and charged against Cynergy due to the excessive chargeback activity at Classic Closeouts. This amount also includes $283,250.00 of ACH NSF fees automatically produced by Cynergy's data system. These fines are levied on the merchant. However, when Cynergy is unable to collect from the merchant, these fines are not passed along to the ISO. Therefore the $283,250 is fully credited back to the Tribul Parties in this analysis. Out of the approximately $3.3M that Cynergy funded, Cynergy was able to recoup $2,984,550.49 through the merchant, merchant reserves, EP reserves and withholding ISO residuals.

(4) The net amount owed to the Trust totals $331,653.49 which is the amount calculated based on VIMAS data.

(5) Further to the net loss from processing activity, Cynergy funded arbitration compliance fees levied on Cynergy by its sponsor bank due to Classic Closeouts processing activity of $184,069.00.

(6) Finally, Cynergy levied a $12/chargeback fee to cover expenses charged to Cynergy by Harris Bank. There were 42,189 chargebacks as a result of the Classic Closeouts merchant activity. Based on the number of chargebacks, this fee totals $481,470.81#.

Residual Purchase Agreement

Under a Residual Purchase Agreement between Cynergy and Second Source, Cynergy purchased a portfolio of merchants for $2,170,560.00 on the condition that merchant attrition remain under 15% during the 18 month period following the sale. Attrition exceeded 15% and, as a result, $424,623.97 of the initial purchase price is due back to Cynergy.

Interest on Loan Agreement

Second Source borrowed $8,000,000 under the Prosperity Plus loan agreement. Outstanding interest from March 21, 2009 – October 25, 2009 equals $553,917.94.

Payments to Sub-ISOs

Cynergy directly paid Sub-ISOs or Downlines of Tribul and Second Source in the amount of $260,997,03.

Escrow Account

Cynergy deposited $601,167.54 into an escrow account for Tribul and Second Source to pay certain of its Sub-ISOs or Downlines. The Parties do not dispute this amount or that it is a credit to amounts otherwise owed to Tribul and Second Source.

Escrow Fee

Cynergy paid $25,000.00 as an Escrow Fee on behalf of Tribul and Second Source relating to the above-reference escrow account.

Based upon all of these amounts, the setoffs of Cynergy exceed the cure claims of Tribul and Second Source as follows:

The Trustee intends to present evidence that the Proofs of Claim of Tribul and Second Source are not valid as follows:

1. Classic Closeouts – Tribul and Second Source do not have the right to assert an affirmative claim for Classic Closeouts for the reasons asserted in the Trustee's Motion for Partial Summary Judgment. In addition, Cynergy sustained substantial losses as a result of Classic Closeouts for which monies are owed to the Trust as a setoff in excess of amounts asserted by Tribul and Second Source. The Trustee will also establish that Cynergy did not withhold amounts relating to chargeback fees, ACH reject fees, and arbitration compliance fees, all of which Tribul and Second Source assert as affirmative claims for monies owed to them.

2. Residuals Withheld December 2008 – The Trustee disputes that Cynergy withheld $557,242.00 in residuals in December 2008.

3. BIN Sponsorship Fee, a Minimum Billing Charge and Excess Transaction Fees – These fees are charged to Tribul and Second Source as established by the terms of the ISO Agreements. The Trustee disputes that Cynergy agreed to reduce these fees.

4. Missing Original Fees – The Trustee disputes that Cynergy was not entitled to charge fees for missing original merchant documents .

5. Suspended Merchant (Questionable Merchant) Funds – The Trustee disputes the claim of Tribul and Second Source to recover merchant funds from the Trust as stated more fully in the Motion for Partial Summary Judgment. In addition, the Trustee disputes the dollar amounts and the basis for any recovery of such funds from the Trust.

6. Executive Partner Reserves – The Trustee disputes the claim of Tribul and Second Source to recover Executive Partner ("EP") reserves from the Trust as stated more fully in the Motion for Partial Summary Judgment. In addition, the Trustee disputes the dollar amounts and the basis for any recovery of such funds from the Trust.

7. MasterCard Fine – Cynergy was assessed a fine in the amount of $357,155.90 from MasterCard as a result of the excess chargebacks of Classic Closeouts. Tribul and Second Source are liable for that loss.

X. Statement by Counterclaimants or Cross-Claimants.

The Trustee's claims for set-offs against the amounts that the Tribul Parties claim to be due and owing to the Tribul Parties under the ISO Agreements are counterclaims.

XI. Amendments to Pleadings Desired by Any Party.

To the extent necessary, the Tribul Parties' original proofs of claim are amended to (i) conform to the proof of the amount of residuals due and owing to the Tribul Parties and improperly withheld by Cynergy, and (ii) make it clear that the proofs of claim filed by Tribul and Tribul Merchant Services included all residuals that were due and owing to Tribul Cash, an affiliate of Tribul and Tribul Merchant Services whose business operations Cynergy, the Purchaser and the Tribul Parties have always considered under the ISO Agreements assumed by the Purchaser.

XII. Certification of Attempted Resolution of the Controversy

A. The parties certify that two-way communication has occurred between persons having authority in a good faith effort to explore the resolution of this controversy by settlement. No agreement has been reached.

XIII. Other Matters

XIV. Damages

A. The Tribul Parties seek a judgment in an amount no less than $6,113,947.83, arising from Cynergy's material breaches of the ISO Agreements by its improper withholding of residuals and otherwise charging fees that were not authorized by the ISO Agreements.

B. The Trustee seeks setoffs against cure claims asserted by Tribul and Second Source as more fully stated in Section VIII, *supra*.

XV. Motions in Limine and Trial Briefs

A. Motions in limine shall not be separately filed. Any in limine requests shall be set forth, with citation to authorities and brief argument, in the proposed pretrial order. Each party shall be limited to five in limine requests, unless otherwise permitted by the Court. Briefing shall not be submitted on in limine requests, unless otherwise permitted by the Court.

TRIBUL PARTIES' MOTION *IN LIMINE*

(1) Motion *in Limine* To Preclude the Trustee From Objecting to the Authenticity or Reliability of Any Documents, Data, or Testimony Produced from the Files of the Debtor of Purchaser And To Preclude the Trustee From Presenting Data and Documents Produced for The Trustee In The Course of This Litigation By New Cynergy Or Offering Testimony from New Cynergy Employees Based On The Failure of the Trustee to Comply With His Obligations To Identify And Produce The Back Up Data and Other Related Documents In Response to the Tribul Parties' Discovery Demands

The Tribul Parties seek an Order *in Limine* precluding the introduction of testimony and other evidence (and other relief) based upon the Trustee's failure to comply with his discovery

obligations and the prior Orders of the Court. In particular, the Tribul Parties seek an Order precluding the Trustee from: (i) affirmatively presenting any data procured from the Purchaser ("New Cynergy") during the course of this litigation, (ii) challenging the authenticity of any documents or data produced by the Debtors or the Purchaser which the Tribul Parties seek to introduce into evidence or otherwise use at trial, (iii) challenging the accuracy of particular documents, data and information produced by the Debtors or the Purchaser which the Tribul Parties seek to introduce into evidence or otherwise use at trial, and (iv) utilizing the testimony of any New Cynergy employees at trial. In sum, the Trustee had the affirmative obligation to search for and produce all responsive documents and information to the Tribul Parties during discovery because the Trustee had the legal right (under Section 7.8(b)(ii) of the APA Agreement) to request and receive such documents and information from the Purchaser. The Trustee availed himself of that right (including the assistance of Purchaser's employees) to assist him in drafting discovery and obtaining information to defend against the Tribul Parties' claims, yet failed to procure and produce the related information that was responsive to the Tribul Parties' discovery demands. New Cynergy has failed to produce witnesses to authenticate the records produced from the files of the Debtor and the Purchaser, yet those same witnesses (who worked for the Debtors on these matters and still work in the same capacity with New Cynergy) cooperated and produced select documents and information for the Trustee. Accordingly, the Trustee should not be able to rely upon the information that he procured from the Purchaser nor should he be able to object to the authenticity or reliability of any documents, data, or testimony from the files of the Purchaser or the Debtor that the Tribul Parties wish to rely upon at trial. Permitting the Trustee to do so would irreparably prejudice the Tribul Parties at trial.

Background

Pursuant to the prior Orders of this Court, the Trustee had the affirmative obligation to maintain and to search an electronic depository of documents and data that was created from certain files of the Debtors and maintained by the Trustee as a depository of documents for use by parties to these proceedings. The third set of estate lawyers -- Trustee's current counsel, McDonald Hopkins and Polsinelli Shughart -- substituted in for former counsel to the Trustee, Jager Smith and Ashby Geddes in August. Sometime thereafter, the Tribul Parties were informed that the coded and indexed database of the document depository that contained selected files from the Debtors books and records (which was created to allow easy access to and searching of the depository) had been destroyed and the depository dismantled. The Trustee then had to go back to the original data culled for the depository and still in the possession of Trustee's counsel, to search for responsive documents and information. The Tribul Parties then received 40gb of data (over 1.4 million pages of documents) in or about the first week of December 2011, all of which was from the select files that had been preserved in the depository during 2009. Nevertheless, this massive production did not include documents and information kept by the Purchaser, including all historical data regarding the Classic Closeouts account, the emails and correspondence files of any more than a select number of Cynergy executives, or any documents from the files of the Trustee, who had served as the Restructuring Agent of the Debtor and participated in meetings and strategy sessions about the Tribul Parties months before the Petition was filed.

The Trustee was under the affirmative obligation to locate and produce all such responsive documents. *See, e.g.,* Debtors' Motion for an Order, dated September 1, 2009, Dkt. No. 13 part 1, at p. 13 (specifically citing Section 7.8(b) of the Asset Purchase Agreement). With respect to the documents and information (and witnesses) of the Purchaser, the Asset

Purchase Agreement (APA) and the Orders of this Court clearly gave the Trustee the legal right to request and receive information and assistance throughout this litigation. *See* Asset Purchase Agreement, dated August 26, 2009, Dkt. No. 13 part 2, § 7.8(b)(ii). Section 7.8(b)(ii), of The APA states:

> For a period of six years after the Closing Date…[e]ach party (the "Requested Party") shall allow the other party (the "Requesting Party") and any of its Representatives reasonable access to all employees and files of the Requested Party relating to the Business for the period preceding the Closing Date which **are reasonably required by the Requesting Party in anticipation of, or preparation for, any existing or future legal proceeding involving the requesting party** or any of its Affiliates…

Asset Purchase Agreement, dated August 26, 2009, Dkt. No. 13 part 2, § 7.8(b)(ii) (emphasis added). The Trustee refused to cooperate until the Court ruled in the Tribul Parties' favor on this dispute during a teleconference on January 18, 2012.[1]

On or about November 23, 2011, the Parties executed a "Stipulation Regarding Scheduling and Discovery" (hereinafter, the "Stipulation"), and the Court entered an Order accepting the Stipulation on November 28, 2011 (hereinafter, the "Order"). Dkt. No. 1449. The Parties stipulated that the Trustee would supplement his interrogatories and identify all documents that were used in making calculations relative to its response to Tribul Parties' contentions. *See*, Stipulation at p. 2. On or about November 30, 2011, the Trustee represented that a VIMAS-generated suspended funds report was used to calculate Classic Closeouts rejects, NSF refunds, suspended funds and ACH activity. *See* The Trustee's Supplemental Answers and Objections to Tribul Parties' First Set of Interrogatories ("Trustee Supp Rog Responses"), ¶¶ 1-

[1] To exacerbate the problem, the Trustee and his counsel had availed themselves of their right to request information and data from the Purchaser throughout these proceedings to assist the Trustee in opposing the Tribul Parties' claims and to attempt to authenticate documents that were created by and for the Trustee, but not those that the Tribul Parties received directly from the Purchaser in the ordinary course of business.

3 (a copy of which is annexed hereto as Exhibit B). The Trustee further identified Tribul and Second Source Funding LLC Profitability Reports for November 2008--October 2009 that were used to calculate funds in the EP Reserve. *See* Trustee Supp Rog Responses ¶¶ 3-7. The Trustee also stated that VIMAS reports provided from the New Cynergy Data Accounting Department were used in all calculations. *See* Trustee Supp Rog Responses ¶¶ 5, 6.

In December 2011 (within the short period allowed for fact discovery) the Tribul Parties served Subpoenas and a Notice of Deposition (the "Notice") on the Purchaser pursuant to Federal Rule of Civil Procedure 30(b)(6) and on individual employees who worked for Old Cynergy and currently work for New Cynergy – Derek Daniels, Claudine Epps, Andres Ordonez and Marcelo Paladini. *See* Subpoena (directed to New Cynergy), Notice of Rule 30 (b)(6) Deposition of Cynergy Regarding Tribul Parties and Notice of Depositions (collectively annexed hereto as Exhibit C). Pursuant to the Rule 30(b)(6) subpoena and notice, the Tribul Parties further requested that the Purchaser produce employees, officers or representatives duly knowledgeable to testify concerning, among other things, the calculation of the alleged losses on the Classic Closeouts merchant account, the content and accuracy of the completed Suspended Funds report that was produced by New Cynergy at the request of the Tribul Parties in or about September 2011, and all transactions regarding the Classic Closeouts account (including all residuals earned by Cynergy from Classic Closeouts, as well as gross revenues, net revenues, gross profits and net profits received and retained by Cynergy as a result of the merchant accounts boarded to Cynergy by or through the Tribul Parties; calculations of Plaintiffs financial obligation to the Estate, including Suspended funds, EP Reserves and other accounts held on behalf of Plaintiffs at any time prior to Bankruptcy petition date). *See* Exh. C., Notice at ¶ 2. Those representatives have not been produced.

The Trustee has also failed to produce all responsive documents from his own files. At his deposition, the Liquidation Trustee testified that he was working as the "Restructuring Agent" for the Debtors in May and June 2009 and made presentations to the financial institutions regarding the Tribul/Chanin dispute at their weekly meetings. *See* Transcript of Deposition of Charles Moore, December 21, 2011 (hereinafter, "Moore Tr.", a copy of which is annexed hereto as Exhibit D), at p. 142: lines 8-11. The Trustee's computers, however, were never searched for discovery in connection with this case, a blatant violation of the Trustee's discovery obligations. *See* Moore Tr. 105:16-20. *See also* Transcript of Deposition of Jesse York, dated, December 19, 2011 (hereinafter "York Tr.", a copy of which is annexed hereto as Exhibit E), at p. 52: lines 16-20. The Trustee also withheld from his production over 1,400 documents on grounds of attorney work product attorney client privilege. *See* Privilege Log.[2] At the depositions of the Trustee and his associate, Jesse York, the Tribul Parties established that a number of these purportedly privileged documents – copies of which should have been located in the depository, in the Purchaser's files and in the Trustee's own files -- were not actually privileged (and therefore, wrongfully withheld). *See* Moore Tr. pp.83-87, York Tr. pp. 122-124. In addition, the detailed Juris Reports showing the Trustee's billing records that the Trustee only produced after the Court stated its belief that such records appeared relevant during a teleconference on January 18, 2012, were produced with key information missing. A copy of the Juris Reports is being filed under seal as Exhibit F.

On January 10, 2012, during the deposition of Derek Daniels' deposition (the in-house Accountant for Debtors and the Accounting Manager for New Cynergy today), the Tribul Parties learned that New Cynergy had assigned Mr. Daniels to assist the Trustee and to produce

[2] A copy of the privilege log has not been attached to this pretrial order as it is 1,428 pages in length.

independent reports, based on "raw data" given to him from New Cynergy's IT department for the Trustee's benefit. Consequently, the reports that the Trustee relied upon for its calculation of residuals withheld from the Tribul Parties were compiled from numbers or "raw data" given to Mr. Daniels – not VIMAS generated reports. Daniels Tr. 81:20-25, 82:1-2. The Tribul Parties have not been provided that raw data.

Mr. Daniels was apparently given the task by New Cynergy to prepare reports for the Trustee. *Id.* The Tribul Parties were never provided with the actual VIMAS reports showing the residuals paid on the Classic Closeouts account or the calculations of the "raw data" - just an abridged version that Cynergy's own Accounting Manager could not describe. *Id.* The Court should note that Mr. Daniels testified that such raw reports would take less than one day to locate and produce. *See* Daniels Tr. 209:1-17. Such reports were promptly requested from both the Trustee and New Cynergy, as a followup to the original discovery requests, to which this data is clearly responsive. Neither the Trustee nor New Cynergy has complied with this request nor have the Tribul Parties been told when or if such information would be produced.[3]

On or about January 15, 2012, the Tribul Parties reiterated their request for outstanding document demands made during the depositions of Jesse York and Charles Moore. These items included all the documents which were improperly withheld on the grounds of privilege, including the financial reports that are essential to calculate the actual gain or loss on the Classic Closeouts account. To date, the Trustee and the Purchaser have failed to comply with these

[3] Mrs. Claudine Epps, the Purchaser's Manager of the Collections Department (within the accounting department, who performed the same duties for the Debtors during the Pre-Petition period in question) also met with counsel for the Trustee and provided "assistance" to the Trustee. Yet, when questioned by the Tribul Parties' counsel at deposition, Mrs. Epps could not recall the actual costs charged to Cynergy by the banks for ACH transactions, the fees that the Trustee claims are appropriately passed along to the Tribul Parties under the Classic Closeouts Indemnity Agreement. Epps Tr. 101:11-13. The cooperation and assistance by the Cynergy employees confirms that the Trustee knew of and availed himself of the right to data, information and access to Cynergy employees under the APA.

requests. To date, the Tribul Parites have yet to receive, among other things, documents and testimony necessary to authenticate the financial documents that will show that the maximum loss suffered by Cynergy on the Classic Closeouts account was actually less than $400,000, not the $1.8 million that the Trustee seeks to offset against the Tribul Parties' claims.

That conclusion is supported by a "Suspended Funds report" that Megan Lozano of Cynergy provided to the Tribul Parties' accounting department in September 2011 (in response to a request for the comprehensive Suspended Funds report that would show all fees and charges, debits and credits, and thus the maximum amount of losses) on the Classic Closeouts merchant account. Claudine Epps testified that such a document would be the most accurate accounting of the total maximum loss on the Classic Closeouts merchant account, but would not authenticate the document itself. The Tribul Parties have yet to receive the documents and cooperation from the Purchaser that would authenticate the document, and the Trustee has now refused to stipulate to the authenticity of the that document. This is a document that was produced to the Trustee by the Tribul Parties with their document production in November.

Another example is that, the Tribul Parties have yet to receive, among other things, the copies of financial reports that are essential to calculate the actual net loss (or gain) on the Classic Closeouts account. The Tribul Parties believe these reports will show that the income received by Cynergy on the Classic Closeouts account, which the Tribul Parties believe will show that there was a Net Gain, not a Net Loss, to Cynergy on that account (and thus no right to any setoffs). The Court will recall that the Tribul Parties have maintained that the Classic Closeouts account has been used as a pre-textual justification for Cynergy to withhold more than $7 million of Residuals due to the Tribul Parties' and to seize other funds that rightfully belong to the Tribul Parties.

Applicable Authority

Pursuant to the Federal Rules of Civil Procedure, each party must provide the identities of the individuals that the party may use to support its claims or defenses and a copy, or a description by category, of all documents and tangible things that the party may use to support its claims or defenses. *See* Fed. R. Civ. P. 26(a)(1). Further, the rules provide remedies which a court may employ when a party fails to comply with, or meaningfully participate in discovery. Fed. R. Civ. P. 37(b)(2)(A)(ii);*Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995). Rule 37(b)(2)(A) of the states, in relevant part:

> "If a party or party's officer, director, or managing agent-or witness designated under Rule 30(b)(6) or 31(a)(4)-fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: .... (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence ..."

Fed.R.Civ.P. 37(b)(2)(A) (ii).

There is ample precedent in the Third Circuit where Courts have precluded a delinquent party from submitting withheld evidence that was not produced in response to a Court Order. *See, e.g., Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (preclusion of any evidence of damages); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 823 (3d Cir. 1982) (preclusion would be an appropriate sanction for dilatory and incomplete compliance with a pretrial discovery order); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 104–07 (D. N.J. 2006) (precluding the use of the information contained in documents produced for the first time by Defendants with their Motion for Summary Judgment and as designated trial exhibits); *Chalick v. Cooper Hospital/University Medical Center*, 192 F.R.D. 145, 152 (D. N.J. 2000) (holding that

defendants were precluded from asserting the defense of notice for failure to respond to discovery requests).

There are four factors to consider when evaluating whether a failure to disclose or supplement warrants exclusion of evidence: "(1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure the prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or willfulness in failing to comply with a court order or discovery obligation." *See Eli Lilly & Co. v. Actavis Elizabeth, LLC,* No. 07–3770, 2010 WL 1849913, at * 15 (D. N.J. May 7, 2010) (citing *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 148 (3d Cir. 2000)). The Trustee's acts constitute the type of "flagrant disregard of a court order by the proponent of the evidence" that warrants a preclusion order. *Konstantopoulous v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997).

Under controlling law, the Trustee had the obligation to retrieve the responsive information, data and documents and to produce them to the Tribul Parties. *In re: Global Power Equipment Group Inc.*, 418 B.R. 833, 841 (Bankr. D. Del. 2009) ("Federal Rule of Civil Procedure 34 states that a party may request the production of documents and other items that are within the 'responding party's possession, custody, or control'). The Third Circuit and other courts have held that documents are in the "control" of the responding party if the party has "the legal right or ability to obtain the documents from another source upon demand." *Mercy Cath. Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004).

Analysis

A. Preclude the Trustee From Objecting to the Authenticity of Any Documents, Data, or Testimony when Tribul Parties Introduce Them Because the Tribul Parties Have Been

Prejudiced By Not Having Full Access To Data and Individuals Which The Trustee Uses to Prove its Claims And Are Not In A Position To Meaningfully Cure That Prejudice.

The Trustee has not produced relevant, responsive documents from the files of the Purchaser that would have authenticated the documents upon which the Tribul Parties intend to rely upon and utilize at trial. The Trustee also failed to timely request the assistance of the Purchaser's personnel to authenticate such relevant documents, despite his right to do so under the APA (and having done so for documents that support the Trustee). Therefore, the Trustee must be precluded from objecting to the authenticity of any data, documents, or testimony, which the Tribul Parties introduce. The Trustee must be precluded from objecting to the authenticity of any data or testimony when Tribul Parties present such information because the Trustee has denied the Tribul Parties opportunity to properly authenticate data and documents despite the Trustee exercising control over the data, documents, and witnesses.

The Third Circuit considers four factors when evaluating whether a failure to disclose or supplement warrants exclusion of evidence:

> (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure the prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or willfulness in failing to comply with a court order or discovery obligation.

Eli Lilly & Co. v. Actavis Elizabeth, LLC, No. 07–3770, 2010 WL 1849913, at * 15 (D. N.J. May 7, 2010) (citing *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 148 (3d Cir. 2000)). As the following discussion illustrates, these factors are presently satisfied.

Not only has the Liquidation Trustee refused to produce documents for authentication, the Trustee has not produced witnesses to authenticate documents. An incurable prejudice will exist at trial if the Trustee can object to the authenticity of VIMAS reports and other documents that should have been authenticated by employees of the Purchaser and be able to rely upon other

such documents himself. Granting this order preventing the Trustee from objecting to the authenticity of data and documents like the Suspended Funds Report would cure the prejudice created by the Trustees failure to comply with its discovery requirements.

To prove that Cynergy improperly levied charged and offsets against the residuals owed to Tribul Parties, the Tribul Parties must rely upon the Trustee's selective disclosure of the relevant documents and calculations in its control. The Trustee's denial of access to these materials -- including the actual calculation of losses on Residuals paid on the Classic Closeouts account, and the residuals that would have been paid to the Tribul Parties (and into the Tribul Parties' EP Reserve accounts) on the "missing merchants" that were moved out of the Tribul Parties portfolio during the summer of 2009 (and then back into their accounts after the APA was consummated), substantially prejudices the Tribul Parties. Instead of making these documents and data available for authentication, the Trustee has wrongly asserted that he did not have control or access to this information. Accordingly, the Trustee should be precluded from objecting to authenticity of data and documents that the Tribul Parties will introduce at Trial.

Specifically, the Tribul Parties wish to introduce the Suspended Funds Report on the Classic Closeouts Account. Mrs. Epps, the Manager of Collections for New Cynergy, herself testified that the Suspended Funds report was the form that would include all of the reconciled fees and charges, and was more accurate than the reports created for and relied upon by the Trustee regarding the Classic Closeouts fees and charges. *See* Epps Tr. 145:10-24. Therefore, with no other recourse to cure the prejudice created by the Trustee's intransigence, precluding the Trustee from objecting to its authenticity is the only way to cure the prejudice.

Since the Tribul Parties are wholly reliant upon the Trustee to provide data and documentation relating to the authenticity of data and reports created by Cynergy's VIMAS

system, it is not in any position to meaningfully cure the prejudice created by the Trustee. To cure this prejudice, The Trustee must be precluded from objecting to the Tribul Parties' authentication of such documents and data.

B. Preclude the Trustee from Presenting Data from New or Old Cynergy and Any Testimony from Any New Cynergy Employees because the Liquidation Trustee Failed to Produce Such Information and Persons Despite Having Power and Control Pursuant to Section 7.8(b)(ii) of the Asset Purchase Agreement.

Under controlling law, the Trustee had the obligation to retrieve the responsive information, data and documents and to produce them to the Tribul Parties. *In re: Global Power Equipment Group Inc.*, 418 B.R. 833, 841 (Bankr. D. Del. 2009) ("Federal Rule of Civil Procedure 34 states that a party may request the production of documents and other items that are within the 'responding party's possession, custody, or control'). The Third Circuit and other courts have held that documents are in the "control" of the responding party if the party has "the legal right or ability to obtain the documents from another source upon demand." *Mercy Cath. Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004).

The Trustee has the legal right to demand documents from Cynergy and the Purchaser pursuant to APA Section 7.8(b)(ii). Yet, the Trustee has consistently argued that it does not have the power or control to provide information from the Purchaser. In direct contradiction to the Trustee's assertions, the Trustee has repeatedly used Section 7.8(b)(ii) of the APA to facilitate its preparation for this case. Specifically, New Cynergy assigned Mr. Derek Daniels to assist the Trustee and to produce independent reports, based on "raw data" given to him from New Cynergy's IT department for the Trustee's benefit. Consequently, the reports that the Trustee relied upon for its calculation of residuals withheld from the Tribul Parties were compiled from numbers or "raw data" given to Mr. Daniels. Daniels Tr. 81:20-25, 82:1-2. As this Court ruled in

the January 18, 2012 Telephone Status Conference, this "raw data" is within the control and possession of the Trustee. However, the Trustee has denied the Tribul Parties access to such data.

The Liquidation Trustee and New Cynergy have the sole and exclusive access to and control of data on the Cynergy VIMAS system. The Liquidation Trustee has wrongly argued, however, that he is powerless to produce such information from VIMAS. Despite those assertions, when requested, New Cynergy has granted the Trustee full assistance and access to information and data on VIMAS to help defend against the Tribul Parties' assertions. The Trustee has repeatedly relied upon New Cynergy to provide it information in preparation for this litigation. However, it has consistently represented to this Court and the Tribul Parties that it is powerless to comply with the Court's Orders and the Tribul Parties numerous discovery demands.

For example, the Trustee seeks to enter into evidence spreadsheets with data that purport to represent the full accounting of the net loss or gain on the Classic Closeouts account and the fees and charges that contributed to the alleged net loss. However, these reports are materially inaccurate. As noted in Mr. Daniels' deposition, the reports did not detail how much money Cynergy made in residuals on the Classic Closeouts account from the time that it became the ISO until the time that it was suspended. *See* Daniels Tr. 206:18-25, 201:1-19. Consequently, there is a possibility that the amount of money that Debtor earned as the ISO on the Classic Closeouts Account exceeded the amount they lost because of chargebacks and other fees. *Id.*[4] Thus, the

[4] The data relied upon the Trustee as his only proof of the alleged set-offs which he asserts (including the alleged fees and charges and losses on the Classic Closeouts account) has itself not been properly authenticated. Mr. Daniels testified that he relied upon data given to him by the IT Department at New Cynergy in doing calculations that he then provided to the Trustee. Daniels Tr. p. 81, l. 20- p. 82, l. 2. Thus, the Trustee has not authenticated that data (nor provided that data to the Tribul Parties to

continued denial of access by the Trustee and New Cynergy to the relevant data denies the Tribul Parties the ability to cure the prejudice and present additional rebuttal evidence as to the accounting on Classic Closeouts merchant account. Moreover, the Tribul Parties have never been provided the backup data supporting the reports used by Trustee, reports that were created for use in this litigation by the Trustee and the Purchaser.[5] Mrs. Epps, the Manager of Collections for New Cynergy, herself testified that the Suspended Funds report was the form that would include all of the reconciled fees and charges, and was more accurate than the reports created for and relied upon by the Trustee regarding the Classic Closeouts fees and charges. *See* Epps Tr. 145:10-24

The Trustee's use of Section 7.8(b)(ii) of the APA to access information and personnel of New Cynergy in preparation of this adversary proceeding, demonstrates that he has "control" over data and individuals of the Purchaser. As a result, any discovery requests made by the Tribul Parties for data and persons should have been complied with by the Trustee. Yet, to date, there are countless documents, data, and people that the Trustee has not produced in compliance with requests, demands, and Court orders.

Permitting the Trustee to present inaccurate reporting on the Classic Closeouts account as evidence will not only prejudice the Tribul Parties but will also disrupt the orderly progression of the trial. The Trustee has failed to adhere to the stipulated and Court ordered obligations to supplement the numerous deficiencies in its production of documents that were within its possession and control. Allowing such evidence into the record at trial would circumvent and

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cross-examine any witnesses), and the Trustee should be precluded from introducing or relying upon such data at trial.

[5] The Suspended Funds report provided by the Tribul Parties' account representative, on the other hand, was created and provided in the usual course of business, and thus should be presumed to be complete and accurate.

frustrate the entire scheme of discovery provided by the Federal Rules of Civil Procedure. The Tribul Parties would be unfairly prejudiced if an order of preclusion is not entered since it would not be able to properly evaluate or challenge this evidence or properly cross examine these witnesses.

The Tribul Parties respectfully request an order of preclusion.

(2) Motion In Limine Seeking an Inference that (i) the Suspended Funds Report Produced to the Tribul Parties Which Shows that the Maximum Loss on the Classic Closeouts Merchant Account Is Approximately $390,000 (ii) Cynergy Realized a Net Gain on the Classic Closeouts Merchant Account (Not a Net Loss) And Thus Is Not Entitled to Any Set-Offs and Fees Relating to That Account (iii) the Residuals Due on the Missing Merchants Was At Least $880,000 for April-October 2009, (iv) The Additional Funds that Were Withheld from the Missing Merchants' Accounts, and Which Should Have Been Deposited into the Tribul Parties' Second EP Reserve Account Was at Least $31,000, and (v) The Documents Produced from the Files of the Debtor and the Purchaser And Upon Which the Tribul Parties Wish to Rely Are Authentic and Reliable, and Must Be Interpreted in the Light Most Favorable to the Tribul Parties

In addition to the order of preclusion sought above, the Tribul Parties also seek negative inferences against the Trustee relating to the documents, information and testimony withheld by the Trustee.

Background

The Tribul Parties rely upon the same facts as detailed in their prior motion in limine seeking preclusion.

Applicable Authority

The general rule applied with regards to the evidentiary adverse inference is "that where evidence is in the control of the party and that party failed to produce it, you may draw the inference that, if produced, it would be unfavorable to that party." *Risk v. Burgettstown Borough*, 364 Fed. Appx. 725 (2008 U.S. Dist. Lexis 92895) (WDPA 2008) (in considering whether an

adverse inference is required, the factors are "the degree of fault of the party who altered or destroyed the evidence, the degree of prejudice suffered by the opposing party, and the availability of a lesser sanction that will avoid substantial unfairness to the opposing party's rights and deter future similar conduct"); s*ee also MOSAID Technologies, Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332 (DNJ 2004).

A. Argument

As detailed in the preceding motion, the APA gave the Trustee the control over the VIMAS and other data and documents regarding the Classic Closeouts account that were not turned over to the Tribul Parties in discovery. The Trustee has failed to produce a complete Suspended Funds Report regarding the Classic Closeouts report – which Mrs. Epps testified was the most complete and accurate method of determining the total loss on a merchant account – and has failed to produce the documents or witnesses necessary to authenticate the Suspended Funds report that was provided to the Tribul Parties by the Purchaser's account representative, Megan Lozano, in the usual course of business. The Court should therefore infer that the complete Suspended Funds report obtained by the Tribul Parties through Megan Lozano in September 2011 (and later produced to the Trustee in discovery by the Tribul Parties) is accurate and that the maximum potential loss on the Classic Closeouts Account is $390,425.92. The Trustee has also failed to produce a residual report regarding the amount of residuals actually received by Cynergy as the ISO on the Classic Closeouts account. The Tribul Parties maintain that such a report would show that Cynergy actually profited on the Classic Closeouts account and had a net gain, not a net loss. The Court should draw the negative inference that such data would support the Tribul Parties' contention.

Last, the Tribul Parties request that the Court draw a negative inference regarding the residuals owed to the Tribul Parties on the "missing merchants." The Trustee has not produced the requested data that would show how much more would (or should) have been paid to the Tribul Parties in residuals (and placed into the Tribul Parties' Second EP Reserve Account) on account of the approximately 3,500 merchants that were moved out of the Tribul Parties' portfolios from July to October 2009 and then moved back after the APA on October 26, 2009. The Court should draw the negative inference that such data supports the Tribul Parties' contention that they are owed at least an additional $880,000 in residuals and that at least an additional $31,000 should have been placed in the Tribul Parties' Second EP Reserve Fund and returned to the Tribul Parties on or about October 25, 2009.

In this case, it is clear that (1) this evidence is relevant to issues in this case, (2) the evidence in question was and is within control of the Trustee, and (3) that there has been an actual suppression or withholding of evidence in question by the party against whom the inference is to be draw. Thus, negative inferences against the Trustee are not only appropriate but are necessary to avoid undue prejudice to the Tribul Parties.

TRUSTEE'S MOTIONS IN LIMINE

(1) Motion *in Limine* To Exclude Any Attempt to Elicit Evidence Relevant to, or Otherwise Reference, the Allegations in Tribul Parties' State Court Complaint or Other Allegations Admittedly Not Part of the Tribul Parties' Claims As Set Forth In Their Final Tally.

The Trustee seeks an Order *in Limine* precluding the introduction of testimony and other evidence wholly unrelated to the claims set forth on the Tribul Parties' Final Tally on the basis that such evidence is not relevant. Specifically, the Trustee seeks to preclude any introduction of evidence or other reference whatsoever to allegations set forth in a separate state court complaint filed by Tribul Parties and other allegations incorporated into Tribul Parties' Proofs of Claim,

which claims Tribul Parties have, since filing the Proofs of Claim, repeatedly stated under oath are not part of their claim in these proceedings.

a. Tribul Parties' Admissions Limiting the Scope of These Proceedings

Tribul Parties have repeatedly confirmed under oath that their dispute involves residuals withheld by Debtors and disputed fees, charges and setoffs, and nothing more, as set forth on their Final Tally as stated more fully below. In a Stipulation approved by Order of the Court, the parties jointly set forth that "[t]he Tribul Parties' claims relate to withheld residuals and challenged fees, charges and setoffs that were allegedly either assessed or for which recovery is sought." (Order Approving Stipulation Regarding Discovery and Scheduling ("Stipulation"), Dkt. No. 1447, at p. 1 of Stipulation). The Stipulation provided a comprehensive list of "[t]he categories of claims and challenged setoffs/fees." (*Id.* at p. 2 of Stipulation).

Moreover, the Tribul Parties agreed in the Stipulation that they would supplement their discovery responses "by stating ***all*** categories of their claim." (*Id.* at p. 1) (emphasis added). Tribul Parties thereafter supplemented their discovery responses, expressly confirming once again that they were "detailing ***each*** category" of their claim. (*See* Tribul Parties' First Supplement to Their Objections and Responses to Trustee's First Set of Interrogatories Propounded Upon Tribul Parties (the "Discovery Supplement"), attached as Exhibit B to Trustee's Motion for Partial Summary Judgment, Dkt. No. 1453) (emphasis added); *see also*Transcript of Deposition of Rick Blesofsky ("Blesofsky Dep."), dated December 12, 2011, Dkt. No. 1454, atpp. 185-186 (representing verification of the Discovery Supplement). The Discovery Supplement contained a list of categories comprising Tribul Parties' claims, which consisted of substantially the same categories listed in the Stipulation. (*Id.* at p. 3). The Discovery Supplement contained a so-called Final tally which contains all the categories of their

claims and a total dollar amount (Blesofsky Dep. at pp. 26-27). Tribul Parties concluded their Discovery Supplement, "[i]n sum, Cynergy did not perform its obligations and pay the Tribul Parties the full amount of Residuals that were due and owing the Tribul Parties under the ISO agreements." (*Id.* at p. 21).

Tribul Parties' 30(B)(6) deponents again confirmed that this list of categories set forth in the Discovery Supplement constituted Tribul Parties' entire claim in these proceedings. (*See, e.g.*, Blesofsky Dep. pp. 106-107 (Tribul counsel representing that Mr. Blesofsky and Mr. Chanin were being presented as Tribul Parties' 30(B)(6) deponents). Specifically, Mr. Blesofsky agreed that the categories listed in the Discovery Supplement and the Final Tally "[are] the Tribul Parties' claim in this case"). (*Id.* atpp. 26-27).

b. Tribul Parties' Repeated Allegations Outside the Scope of These Proceedings

Despite Tribul Parties' unequivocal statements before this Court and under oath that the categories set forth in the Stipulation and in their Supplemental Discovery Response comprise their entire claim in these proceedings, counsel for Tribul Parties has repeatedly questioned deponents in these proceedings, including Tribul Parties' own witnesses, regarding matters clearly outside the stated scope of that claim. These extraneous matters include allegations of damage to the Tribul Parties' merchant portfolio, as described on page 2 of Exhibit A to the Proofs of Claim, and tort claims alleged in the state court complaint (the "Complaint"), which Tribul Parties purported to incorporate by reference into their Proofs of Claim on page 3 of Exhibit A to the Proofs of Claim. That Complaint was filed in New York state court in June 2009, was dismissed in October 2009, and has not been refiled. The Complaint includes assertions of such tort claims as defamation, libel, tortious interference with a business relationship, unfair competition and conversion. These matters are clearly outside of the scope

of the claim as described by Tribul Parties in their Final Tally, which they have confirmed is their entire claim in these proceedings.

c. Brief Argument

Since the filing of the Proofs of Claim in January 2010, Tribul Parties have repeatedly, as detailed above, represented that their claim in these proceedings is limited to exclude the allegations in the state court complaint and allegations regarding damages to the Tribul Parties' merchant portfolio. Any evidence relating to those allegations can have no relevance whatsoever to the pending claims and should be excluded. Rule 402 of the Federal Rules of Evidence provides that evidence that is not relevant is not admissible. Rule 401 defines "relevant evidence" as that "having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

Evidence or comments relating to the various tort allegations and allegations in the state court complaint are outside the scope of the ISO Agreements at issue in these proceedings and can have no probative value with regard to the matters before this Court.# There is no need for a trial within a trial during this litigation, particularly of claims not pending in any court, which could only confuse the issues and cause undue expense and delay. Introduction of this irrelevant evidence would not only unduly complicate and extend the proceedings, it would also unjustly subject witnesses, including non-party witnesses, to questioning that does not relate at all to the pending case, but to some threatened but as yet unfiled (or not re-filed) litigation. Various witnesses effectively would be forced to testify with no notice of claims that may eventually be filed against them and no opportunity to seek counsel with respect to same. Given that this

evidence would have no bearing on the issues to be decided in this case, there is no need to subject the witnesses to such risk.

The Trustee respectfully requests an Order *in Limine* precluding Tribul Parties' witnesses and counsel from introducing testimony or other evidence relating to, or otherwise referring to, the allegations in the state court Complaint and any other allegations other than those set forth in the Tribul Parties' Final Tally.

(2) Motion *in Limine* For An Order Precluding Tribul Parties From Making Statements Disparaging of Cynergy Data and the Liquidation Trustee Relating to Allegations Not Part of These Proceedings.

The Trustee also moves this Court for an Order *in Limine* precluding Tribul Parties' witnesses and counsel from making statements disparaging of Cynergy Data, LLC, the Trustee, or various individuals or entities associated with them, relative to allegations that are admittedly not a part of these proceedings.

As set forth in the Trustee's first Motion *in Limine*, Tribul parties' witnesses and counsel have repeatedly made reference in this litigation to allegations that they have admitted are outside the scope of these proceedings. These references have at times been disparaging and inflammatory, such as references to Cynergy "cheating" and "stealing" from Tribul Parties, shutting Tribul parties out of VIMAS, and engaging in "crooked stuff" and "games," and referring to various potential witnesses in this action as "dirty" and "co-conspirators" and alleging that they are individually liable for actions in connection with the claims that are admittedly not a part of this case. These statements all referred to actions allegedly taken by Cynergy as alleged in the state court Complaint and not the allegations at issue in these proceedings.

Rules 401 and 402 of the Federal Rules of Evidence require the exclusion of irrelevant evidence, and even evidence that is relevant may nonetheless be excluded under Rule 403 if "its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403.

The disparaging statements such as those referenced above would have no probative value even if related to the claims actually at issue in this case. Because they do not, in fact, relate to claims at issue in this case, there can be no argument that they have any probative value in these proceedings whatsoever. Such statements are calculated to evoke passion, rather than reason, in these proceedings, and may even intimidate various witnesses. Such inflammatory statements have no proper place in this litigation and should be excluded by an Order *in Limine*.

B. Any party may, but is not required to, file a trial brief, no less than two (2) business days prior to trial. If filed, two (2) courtesy copies of each such brief shall be delivered to Chambers contemporaneously with its filing. No trial brief shall be more than 25 double-spaced pages in length, without leave of the Court.

XVI. Limitations, Reservations and Other Matters

A. Length of Trial. The probable length of trial is two days.

B. The parties shall meet and confer in good faith regarding the authentication of proposed exhibits and the scheduling of the final pretrial depositions.

C. The principals of the parties shall meet at 6:00 p.m. the evening before the commencement of trial to attempt to resolve the dispute through settlement.

IT IS ORDERED that this Final Pretrial Order shall control the subsequent course of the action unless modified at the trial of the action, or prior thereto, to prevent manifest injustice or for good cause shown. Such modification may be made either on application of counsel for the parties or by the Court.

Dated:_____

_____
KEVIN GROSS, U.S.B.J.

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EXHIBIT A

TRIBUL PARTIES' DEPOSITION DESIGNATIONS

Designated Testimony of Claudine Epps

Epps Deposition page 71:9 to 76:22
Epps Deposition page 94:13-16
Epps Deposition page 96:9-21
Epps Deposition pages 100:5 to 106:12
Epps Deposition pages 108:11 to 111:7
Epps Deposition pages 130:6 to 133:15
Epps Deposition pages 142:10 to 143:5
Epps Deposition pages 152:5 to 153:7
Epps Deposition pages 158:22 to 161:5
Epps Deposition pages 163:18 to 164:10
Epps Deposition pages 172:4 to 177:23
Epps Deposition page 209:3-6
Epps Deposition pages 210:5 to 213:13
Epps Deposition pages 215:19 to 216:6

Designated Testimony of Derek Daniels

Daniels Deposition pages 14:16-23
Daniels Deposition pages 15:23-25
Daniels Deposition pages 16-1-8
Daniels Deposition page 17:15-25
Daniels Deposition pages 18:1-5,
Daniel Deposition pages 19:18-24
Daniel Deposition pages 23:21-25
Daniel Deposition pages 24:1-14, 22-25
Daniels Deposition pages 25:1-9
Daniels Deposition pages 26:25
Daniel Deposition pages 27:1-5
Daniels Deposition page 30: 3-17
Daniels Deposition pages 33:7-18
Daniels Deposition page 34:1-10
Daniels Deposition pages 41:4-12
Daniels Deposition page 49:7-16, 19-25
Daniels Deposition pages 50:1-14
Daniels Deposition page 51:16-25
Daniels Deposition pages 52:20-25
Daniels Deposition page 54:4-25
Daniels Deposition pages 55:1-8
Daniels Deposition pages 56:15-18,21-25
Daniels Deposition pages 57:1-7,14-23
Daniels Deposition pages 58:1-25
Daniels Deposition page 69:8-13
Daniels Deposition pages 75:14-25
Daniels Deposition page 76:1-25
Daniels Deposition pages 77:1-9
Daniels Deposition pages 79:5-21
Daniels Deposition page 81:20-25
Daniels Deposition pages 82:1
Daniels Deposition pages 86:8-25
Daniels Deposition pages 87:8-25
Daniels Deposition page 87:5-10
Daniels Deposition pages 88:10-18
Daniels Deposition pages 92:4-25
Daniels Deposition pages 93:1-25
Daniels Deposition pages 94:1-25

Daniels Deposition pages 95:1-25
Daniels Deposition pages 96:11-25
Daniels Deposition pages 97:1-3,13-22
Daniels Deposition pages 104:19
Daniels Deposition pages 105:1-21
Daniels Deposition pages 106:18-25
Daniels Deposition pages 107:1-25
Daniels Deposition pages 108:1-8
Daniels Deposition pages 109:16-25
Daniels Deposition pages 110:1-25
Daniels Deposition pages 111:1-7
Daniels Deposition pages 112:1-25
Daniels Deposition pages 113:1-24
Daniels Deposition pages 114:1-20
Daniels Deposition pages 118:15-25
Daniels Deposition pages 119:14-25
Daniels Deposition pages 120:1-2
Daniels Deposition pages 125:8-13
Daniels Deposition pages 130:21-25
Daniels Deposition pages 134:9-25
Daniels Deposition pages 135:1-25
Daniels Deposition pages 136:1-25
Daniels Deposition pages 141:8-20
Daniels Deposition pages 150:6-25
Daniels Deposition pages 151:1-7
Daniels Deposition pages 159:16-25
Daniels Deposition pages 160:1-25
Daniels Deposition pages 161:1-4
Daniels Deposition pages 163:4-25
Daniels Deposition pages 165:1-25
Daniels Deposition pages 166:1-25
Daniels Deposition pages 167:1-12
Daniels Deposition pages 168:1-25
Daniels Deposition pages 169:7-25
Daniels Deposition pages 170:1-5
Daniels Deposition pages 176:9-25
Daniels Deposition pages 177:1-17
Daniels Deposition pages 179:3-28
Daniels Deposition pages 180:1-10
Daniels Deposition pages 181:8-18

Daniels Deposition pages 183:10-22
Daniels Deposition pages 184:7-18
Daniels Deposition pages 185:24-25
Daniels Deposition pages 186:13-25
Daniels Deposition pages 187:1-3
Daniels Deposition pages 188:1-12
Daniels Deposition pages 189:1-6
Daniels Deposition pages 193:5-25
Daniels Deposition pages 196:19-25
Daniels Deposition pages 197:1-25
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