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15 Attorneys for AirDye Solutions, LLC, Meserole, LLC and  
16 Fuller Smith Capital Management, in the capacities  
17 described below

18 **UNITED STATES BANKRUPTCY COURT**  
19 **CENTRAL DISTRICT OF CALIFORNIA**  
20 **LOS ANGELES DIVISION**

21 In re:  
22 **COLOREP, INC.**, a California corporation, *et*  
23 *al.*,  
24 Debtors and Debtors-in-  
25 Possession.  
26 Tax I.D. Nos. 94-3055026 (Colorep, Inc.) and  
27 54-1200596 (Transprint USA, Inc.)

Case No. 13-27689

Chapter 11

(Jointly Administered)

**RESPONSE TO MOTION OF  
SYNERGY PARTNERS USA, LLC AND  
MICHAEL COHEN FOR AN ORDER  
OF CONTEMPT AGAINST  
MESEROLE, LLC AND/OR FULLER  
SMITH CAPITAL MANAGEMENT**

Date: May 15, 2014

Time: 10:00 a.m.

Location: Courtroom 1375  
255 E. Temple Street  
Los Angeles, CA 90012

1 Alleged claimants Synergy Partners USA, LLC (“Synergy”) and Michael Cohen  
2 (“Cohen”) have filed a scattershot “Motion ... for an Order of Contempt Against Meserole, LLC  
3 and/or Fuller Smith Capital Management (“Contempt Motion”). Despite the volume of  
4 declarations filed in support, the Contempt Motion has no basis in fact or law. Indeed, Synergy,  
5 Cohen and their counsel are in contempt of the Court’s Sale Order by seeking to shake down  
6 payments to which they are not entitled from parties who have no exposure to them. AirDye  
7 Solutions, LLC (“AirDye”), Meserole, LLC (“Meserole”) and Fuller Smith Capital Management,  
8 LLC (“Fuller Smith” and collectively “Respondents”) respond to the Contempt Motion and  
9 request that the Court enter its order: (i) Denying to Synergy and Cohen all relief sought in the  
10 Contempt Motion; and (ii) Requiring that Synergy, Cohen and their counsel be required to pay  
11 Respondents’ costs, fees and expenses for filing this Response. Pursuant to Local Bankruptcy  
12 Rule 9013-1(f), any Reply to this Response must be filed not later than 7 days prior to the  
13 Hearing.

14 Meserole was the debtor in possession lender to the Debtors under the Court’s interim and  
15 final Financing Orders entered July 18, 2013 [Docket No. 56] and August 16, 2013 [Docket No.  
16 134], respectively (collectively “Financing Orders”), and was the original “DIP Agent” under the  
17 Financing Orders. Fuller Smith succeeded Meserole as DIP Agent under the Financing Orders  
18 and, with Meserole, was the Purchaser under the Asset Purchase Agreement (“APA”) approved  
19 by the Sale Order dated October 4, 2013 [Docket No. 219]. AirDye is the “Purchaser Assignee”  
20 under the Sale Order of October 4, 2013 [Docket No. 219] and the Asset Purchase Agreement  
21 approved by the Sale Order. The undersigned has acted as counsel for AirDye, Meserole and  
22 Fuller Smith in the specific capacities set out above.

23 Synergy and Cohen filed their contempt motion purportedly in reliance on the Sale Order  
24 and APA. However, they appear have done so without having read either. Synergy and Cohen  
25 are not entitled to against AirDye because AirDye assumed no liability for their claims and  
26 because it is in full compliance with the Sale Order and APA. Synergy and Cohen are not entitled  
27 to relief against Meserole and/or Fuller Smith because neither assumed liabilities in connection  
28 with the Sale Order and APA and have fully discharged their duties under the Sale Order, APA

1 and Financing Orders.

2 This Response is supported by the Financing Orders, the Sale Order, and APA, and the  
3 Declaration of Robert Katz in Support of Response to Motion of Synergy Partners USA, LLC and  
4 Michael Cohen for an Order of Contempt, etc. (“Katz Dec.”). Mr. Katz is the Managing Director  
5 of Executive Sounding Board Associates, Inc. (“ESBA”), and served as the duly appointed and  
6 acting Chief Restructuring Officer of the Debtors *nunc pro tunc* to July 10, 2013 under the  
7 Debtor’s application to employ ESBA as CRO filed July 30, 2013 [Docket No. 80], and the  
8 Court’s authorizing order dated November 11, 2013 [Docket No. 245]. One of the reasons that  
9 ESBA was retained by the Debtors and appointed as CRO was that, as of the petition date,  
10 management of the Debtors was in shambles. Mark Fox, who had served as a temporary CEO of  
11 the Debtors prior to their filing and who presided over a two month unfunded shutdown of the  
12 Debtors’ pre-petition operation, was not acceptable to either the Board of Directors of the Debtors  
13 or the DIP Lenders in the case as a CEO and CRO of the Debtors as Debtors in Possession. Mr.  
14 Fox was not responsive to the Board of Directors or the Debtors, was not experienced in serving  
15 as the CRO in a Debtor in Possession in Chapter 11, did not manage the Debtors’ business within  
16 the budgetary constraints negotiated, and was riddled with conflicts of interest, including the  
17 unresolved issue of his compensation.

18 ESBA was retained by the Debtors with the consent of the DIP Lenders, ESBA retained  
19 Mr. Fox for a transitional period during which he had no management or operating authority, and  
20 ESBA terminated Mr. Fox’s consulting role at the Debtors early in the case. After the Debtors’  
21 cases were filed, but prior to closing of the sale under the Sale Order and APA, Mr. Fox was  
22 killed in an auto accident. ESBA is informed that either or both of Synergy and Cohen were  
23 personal acquaintances of Mr. Fox. Katz Dec. ¶ \_\_\_\_.

24 **I. “Assumed Liabilities” Are Defined: They Do Not Include Synergy or Cohen.**

25 Synergy and Cohen are wrong in asserting that “it is uncontroverted that Purchasers are  
26 obligated to pay Debtors’ Post-Petition accounts payable.” Contempt Motion, p. 5, lines 16-17.  
27 Meserole and Fuller Smith, as Purchaser, and AirDye, as Purchaser Assignee, assumed *only* the  
28 limited post-petition obligations that fell within the heavily negotiated definition of “Assumed

1 Liabilities” in the APA, which in turn is incorporated into the Sale Order. (Sale Order, p. 6, lines  
2 19 – 25). The Sale Order described the circumscribed scope of Assumed Liabilities as follows:

3 The Assumed Liabilities under the Final APA include, without  
4 limitation, (i) certain accrued but unpaid operating expenses and  
5 payables incurred by the Debtors after the Petition Date and before  
6 the Closing Date in the ordinary course of business ... (iv) certain  
7 other administrative expenses, including certain professional fees,  
8 all as more fully set forth in the Final AP, including those expenses  
9 and obligations listed on Schedule 2.3(f) to the Final APA. Sale  
10 Order, p. 6, lines 19 – 25.

11 The Assumed Liabilities are not limitless, they are specifically defined in the APA, in  
12 respect of which the Sale Order expressly provides:

13 Purchaser is purchaser is purchasing the acquired Assets in good  
14 faith and is a good faith buyer within the meaning of section  
15 363(m) ... in that, inter alia: ... (g) the negotiation and execution of  
16 the final purchase agreement (“Final APA” ...) and any other  
17 agreements or instruments related thereto were at arms’ length and  
18 in good faith. Sale Order p 7. Lines 16 – 28; p. 8, lines 1 – 2.

19 The definition of Assumed Liabilities was heavily negotiated at arms-length by the  
20 Debtors, on the one hand, and Meserole, Fuller Smith and AirDye, on the other. Likewise, each  
21 and every iteration of the “Budget” approved under the Financing Orders was heavily negotiated  
22 at arms-length by the Debtors, on the one hand, and Meserole and Fuller Smith on the other. **At**  
23 **no time** did the Debtors negotiate an approved “Budget” under the Financing Orders that  
24 included payments to Synergy and Cohen. Katz Dec. p. \_\_, lines \_\_. **At no time** did the Debtors  
25 negotiate a definition of “Assumed Liabilities” under the Sale Order and APA that included  
26 payments to Synergy and Cohen. Despite efforts in the Contempt Motion to wish it otherwise,  
27 the specific scope of “Assumed Liabilities” does not include the Synergy and Cohen claims.  
28 Instead, the Sale Order and APA reflect the result of heavy, detailed and lengthy negotiations and  
specify a small amount of Assumed Liabilities in the following two relevant categories for which  
the Purchaser and Purchaser Assignee would be responsible:<sup>1</sup>

<sup>1</sup> The other categories of “Assumed Liabilities” are common sense and not relevant here: Cure amounts under Assumed Contracts; Future performance under Assumed Contracts; Post-Closing operating expenses, and the like.

1           **First**, the negotiated post-petition payables either contained in an approved DIP Budget  
2 but not yet funded (APA § 2.3(a)(i), quoted in Contempt Motion at p. 5, lines 10 – 13); or

3           **Second**, the negotiated post-petition payables set out in Schedule 2.3(f) of the APA and  
4 the agreed upon schedule attached to Schedule 2.3(f).(APA § 2.3(f), not quoted in Contempt  
5 Motion but attached, in relevant part, as **Exhibit A** to this Response.

6           The language in the Sale Order that Synergy and Cohen rely on does in fact provide that  
7 “[t]he Purchaser shall pay the Assumed Liabilities,” however the Assumed Liabilities are only  
8 those specific liabilities actually assumed by the Meserole and Fuller Smith, as Purchaser, and  
9 AirDye, as Purchaser Assignee.

10           The claims asserted by Synergy and Cohen fall in neither category, were not assumed, and  
11 will not be paid. Both Synergy and Cohen have been repeatedly and specifically advised by both  
12 the Debtors and by Purchaser representatives that their alleged post-petition services were not  
13 authorized, that their alleged post-petition claims were not included in any Budget to be paid as  
14 expenses of administration in these cases, and that their alleged post-petition claims were not  
15 assumed by Meserole, Fuller Smith or AirDye as Assumed Liabilities under the APA. Katz Dec.  
16 ¶ \_\_.

17           **II.     The Sale Order Protects Respondents from Synergy’s and Cohen’s Alleged**  
18 **Claims.**

19           Synergy and Cohen allege that the Sale Order and APA provide the basis for their claims  
20 and the Contempt Motion. In fact, just the opposite is true. The Sale Order protects Respondents  
21 from all liability for Excluded Liabilities, which excludes from assumption exactly the meritless  
22 and fabricated claims asserted in the Contempt Motion. The APA provides that:

23                           Except as specifically set forth in Section 2.3, Purchaser shall not  
24 assume or be liable for any Claims, Liens, Encumbrances, Interests,  
25 Liabilities or other obligations of a Seller of any kind or nature  
26 whatsoever, whether presently in existence or arising hereafter  
27 (other than the Assumed Liabilities and the Liabilities or other  
obligations created or incurred by Purchaser following the Closing),  
including, without limitation, the following (collectively the  
“Excluded Liabilities”).” APA, Exhibit A, p. 11, § 2.4(a).

28           Among the Excluded Liabilities listed in Section 2.4(a)(ii) are “any accruals, costs and

1 expenses and accounts payable of a Seller arising after the Petition Date and before Closing in  
2 excess of the Budget.” Exhibit A, p. 11, § 2.4. Here, neither Synergy’s nor Cohen’s alleged post-  
3 petition services were ever authorized by the Debtors, neither Synergy’s nor Cohen’s alleged  
4 post-petition services were ever provided for in a Budget proposed by the Debtors or authorized  
5 by Meserole or Fuller Smith under the Financing Orders; and neither Synergy’s nor Cohen’s  
6 alleged post-petition services were ever assumed by AirDye under Section 2.3(f) and Schedule  
7 2.3(f) of the APA. Synergy’s and Cohen’s alleged claims are exactly the type of Excluded  
8 Liabilities that the APA ensured would not come back to haunt the Purchaser or Purchaser  
9 Assignee.

10 As such, Meserole, Fuller Smith and AirDye are entitled to the full protection of the Court  
11 under the Sale Order, which runs completely in favor of the Respondents and against the position  
12 taken in the Contempt Motion. Synergy and Cohen are in contempt of the Court’s orders, not  
13 Respondents. Among the Sale Order’s protective provisions that shield Respondents are:

14 [A]ll persons and entities holding Liens, Claims or interests in all or  
15 any portion of the Acquired Assets sold by the Debtors arising  
16 under out of , in connection with, or in any way relating to the  
17 Debtors, the Acquired Assets, the operation of the Debtors’  
18 business prior to the Closing Date of the transfer of the Acquired  
19 Assets sold by the Debtors to the Purchaser, hereby are forever  
20 barred estopped and permanently enjoined from asserting against  
21 the Purchaser or its successors or assigns, their property or the  
22 acquired Assets, such persons’ or entities’ Liens or Claims against  
23 the debtors or in and to the Acquired Assets sold by the Debtors to  
24 the Purchaser. Sale Order, p. 14, ¶ 9, lines 18 through 24.

25 And

26 Except for the Assumed Liabilities ... the Purchaser shall not have  
27 any liability or other obligation of the Debtors arising under or  
28 related to any of the Acquired Assets ... The Purchaser shall not be  
liable for any Claims against the Debtors or any of its predecessors  
or affiliates ... whether known or unknown as of the Closing Date,  
now existing or hereafter arising, whether fixed or contingent, with  
respect to the Debtors or any obligations of the Debtors arising  
prior to the Closing Date. Sale Order p. 18, ¶ 23, lines 20 – 23, p.  
19, lines 1 through 23.

1 And

2 The Purchaser shall not assume, other than the assumed Liabilities  
3 and permitted Liens, not be deemed to assume or in any way be  
4 responsible for any Claim, Lien, liability or obligation of the  
5 Debtors and/or their estates. Sale Order, p. 19, ¶ 25, lines 22  
6 through 24.

7 This is not a close case. Synergy and Cohen have no right to payment, let alone contempt.  
8 Respondents' have no exposure for liabilities they did not assume, and have recourse against  
9 parties who are expressly barred by the Sale Order from asserting claims against them.

10 WHEREFORE, Respondents respectfully request that the Court (a) deny the Contempt  
11 Motion filed by Synergy and Cohen; and (b) grant sanctions against Synergy, Cohen and their  
12 counsel for their contempt of the Sale Order in an amount equal to the attorneys' fees incurred by  
13 Respondents in filing this response and, if a hearing is held, appearing at that hearing.

14 \_\_\_\_\_ /s/ Frank T. Pepler

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