

1 Daren R. Brinkman (CA Bar No. 158698)
2 David H. Oken (CA Bar No. 175219)
3 BRINKMAN PORTILLO RONK, APC
4 4333 Park Terrace Dr., Suite 205
5 Westlake Village, CA 91361
6 Telephone: (818) 597-2992
7 Facsimile: (818) 597-2998

8 Counsel for *Synergy Partners USA, LLC*
9 *And Michael Cohen*

10 **UNITED STATES BANKRUPTCY COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **LOS ANGELES DIVISION**

13 In re:

14 COLOREP, INC.
15 A California corporation, et al.,

16 Debtors,

17 Tax I.D. Nos. 94-3055026 (Colorep, Inc.) and
18 54-1200496 (Transprint USA, Inc.)

Case No. 2:13-bk-27689-JWB

Chapter 11

(Jointly Administered)

**LIMITED OBJECTION TO THE SECOND
AND FINAL APPLICATION OF EXECUTIVE
SOUNDING BOARD ASSOCIATES, LLC AS
CHIEF RESTRUCTURING OFFICERS TO
THE DEBTORS FOR COMPENSATION AND
ALLOWANCE OF PROFESSIONAL FEES
AND EXPENSES DURING THE PERIOD
FROM JULY 10, 2013 THROUGH MAY 21,
2014**

Date: May 29, 2014
Time: 10:00 a.m.
Judge: Hon. Julia W. Brand
Crt. Rm.: 1375

1 Synergy Partners USA, LLC ("Synergy") and Michael Cohen ("Cohen") file this limited
2 objection ("Objection")¹ to the *Second and Final Application of Executive Sounding Board*
3 *Associates, LLC as Chief Restructuring Officers to the Debtors for Compensation and Allowance of*
4 *Professional Fees and Expenses During the Period from July 10, 2013 through May 21, 2014*
5 ("ESBA Fee Application") [Docket 314] and respectfully submit as follows:

6 ESBA's Fee Application seeks approval of \$496,839.16 in fees and costs and ESBA has already been
7 paid \$377,271.00. [Docket No. 314]. Synergy and Cohen have administrative claims in the amounts of
8 \$18,000 and \$8,542.89 respectively but their claims have not been paid.

9 As the holders of outstanding administrative claims, Synergy and Cohen are entitled to payment. In
10 order for Synergy and Cohen to receive their proper pro rata share of administrative payments, ESBA, as a
11 Chapter 11 professional, should have its fees disgorged or, at a minimum, not be paid anything further until
12 Synergy's and Cohen's claims are paid.

13
14 **A. Synergy's and Cohen's Claims Are Administrative Claims Incurred by Debtors**
15 **in the Ordinary Course of Operations**

16 A debtor-in-possession authorized to operate the debtor's business may incur unsecured debt
17 in the ordinary course of business that will be allowable as an administrative expense. 11 U.S.C.
18 §364(a). Such unsecured debt may be incurred without notice or court approval. *Id.* The purpose of
19 allowing such post-petition debt is to encourage businesses, such as Synergy and Cohen, to continue
20 to furnish goods and services to provide for the ordinary business needs of the debtor in possession.

21 Businesses, such as Synergy's and Cohen's, who provide benefits on credit to bankruptcy
22 estates, such as Debtors', are given administrative claim status entitling such creditors to

23
24

¹ Contemporaneously with this Objection, Synergy and Cohen are filing a separate motion for an order: (1) allowing the
25 administrative expense claims of Synergy (\$18,000) and Cohen (\$8,542.89); and (2) compelling Meserole, LLC and/or
26 Fuller Smith Capital Management ("Purchasers") to pay Synergy and Cohen; or, in the alternative, requiring Executive
27 Sounding Board Associates, LLC ("ESBA"), to disgorge its professional fees to Debtors and requiring Debtors to
28 immediately pay Synergy and Cohen (the "Motion for Administrative Claims"). Synergy and Cohen are also filing an ex
parte motion to have the Motion for Administrative Claims heard on shortened (the "Ex Parte Motion") notice in
conjunction with the hearings on the Dismissal Motion and the final fee application of ESBA.

1 administrative expense priority under 11 U.S.C §§ 364, 503. *In re Blumer*, 95 B.R. 143, 175 (9th
2 Cir. 1988); *See also Handy Andy Home Improvement Centers, Inc.*, 196 B.R. 87, 95 (Bankr.N.D.Ill.
3 1996).

4 In the Ninth Circuit, the test of whether an expense was in the “ordinary course” is as
5 follows:

6 “The “vertical dimension” or “creditor's expectation” test examines the
7 transaction from the viewpoint of a hypothetical creditor and focuses on the
8 creditor's “reasonable expectations of what transactions the debtor-in-
9 possession is likely to enter in the course of its business.” *Dant & Russell*, 853
10 F.2d at 705 (quoting *In re James A. Phillips, Inc.*, 29 B.R. 391, 394
11 (S.D.N.Y.1983). In utilizing this vertical dimension test, courts look to the
12 nature of the debtor's pre-petition business as compared to its post-petition
13 business, *Dant & Russell*, 853 F.2d at 705. The “horizontal dimension” test
14 applies an industry wide perspective and involves a comparison of this
15 debtor's business to other like businesses and a determination of whether the
16 “transaction is of a type that other similar businesses would engage in as
17 ordinary business.” *Id.* at 704.” *Id.* at 147, 148.

18 Synergy’s and Cohen’s services easily fall within the ordinary course of Debtor’s business.
19 First, both Synergy and Cohen were retained to do work pre- and post-petition. (Declaration of
20 Thomas Varian ¶3; Declaration of Michel Cohen ¶3)². Second, the ongoing publicist and web
21 design activities of Cohen as well as the employee recruitment services of Synergy, which were
22 taken on behalf of the Debtors and later the Debtors-in-possession, were certainly well within
23 Moving Parties’ expectations that such efforts were in the Debtors-in-Possession’s ordinary course
24 of business. (Declaration of Thomas Varian ¶¶3,4; Declaration of Michael Cohen ¶¶3,4) Third,
25 businesses such as Debtors, commonly utilize the services of an employee recruiter firm like
26 Synergy and the web design/publicist services provided by Cohen. Moreover, given Synergy’s and
27 Cohen’s understanding that the employee who was placed by Synergy continues to work for the

28

² For purposes of this Opposition, the Declarations of Thomas Varian, Michael Cohen and David Oken, referred to
herein, refer to their respective declarations filed in support of Synergy’s and Cohen’s Motion for an Order: (1) Allowing
Administrative Expense Claims; and (2) Compelling Purchasers to Pay Administrative Claims, or, in the Alternative,
Requiring ESBA to Disgorge Professional Fees For Payment of Administrative Expense Claims and are incorporated by
reference hereto.

1 newly organized entity that is owned by Purchasers, it is difficult to fathom how they can assert that
2 Synergy's efforts were not ordinary course.

3 Synergy and Cohen also provided a direct benefit to the Debtors' estates. Cohen performed
4 web design and publicist services at the request of the interim CEO of the Debtors, Mark Fox.
5 (Declaration of Michael Cohen ¶4) Synergy recruited Ms. Nikole Batista to fill the position of Head
6 of Design at the request of the interim CEO of the Debtors, Mark Fox. (Declaration of Thomas
7 Varian ¶4) Prior to the sale of the Debtors' assets, Ms. Batista provided the Debtors with the skills
8 required for the position she filled when the Debtor was being run by ESBA. Moreover, Synergy is
9 informed and believes that Ms. Batista was retained as an employee by the Purchasers after the sale
10 closed and, therefore, Ms. Batista continues to provide a benefit to the Purchasers. (Declaration of
11 Thomas Varian ¶4) Accordingly, both ESBA and the Purchasers ratified the necessity of her
12 employment by continuing to retain Ms. Batista. Thus, Synergy's and Cohen's claims fulfill the
13 requirements to be categorized as administrative and ordinary course claims. *Gull Industries, Inc. v.*
14 *John Mitchell, Inc. (In re Hanna)*, 168 B.R. 386, 388 (9th Cir. 1994); *Burlington Northern Railroad*
15 *Co. v. Dant & Russell (In re Dant & Russell)*, 853 F.2d 700, 706 (9th Cir.1988).

16
17 **B. Synergy and Cohen Are Entitled to Equal Treatment and Payment, Pro Rata, With All**
18 **Other Administrative Expenses Under 11 U.S.C. § 503(b)**

19 It is well established that administrative claimants are to be paid pro rata.

20 The rule that all administrative claimants be treated alike on a pro rata basis in the
21 event there are insufficient assets to pay each claimant in full, does not necessarily
22 require the time and amount of distributions to be similar. *In re IML Freight, Inc.*, 52
23 B.R. 124 (Bankr.D.Utah 1985). However, it is clearly the law... that all
24 administrative expenses incurred under 11 U.S.C. § 503(b) are entitled to equal
25 treatment upon the conclusion of a Chapter 11 proceeding.

26 *In re Barron*, 73 B.R. 812, 813-14 (Bankr. S.D. Cal. 1987). If administrative claimants that could
27 have been paid in the ordinary course are not paid at the time that the estate incurs the debt, and if
28 there are insufficient funds to cover all administrative expenses in full, then claims such as

1 Synergy's and Cohen's are paid pro rata with other remaining administrative creditors. *In re Livore*,
2 473 B.R. 864, 868 (Bankr. D.N.J. 2012). Congress expressly intended to treat all administrative
3 claims equally. Regardless of the kind of claimant, all Sec. 503(b) administrative expenses should
4 share on the same pro-rata basis if there is not enough money in the end. *In re Vernon Sand &*
5 *Gravel, Inc.*, 109 B.R. 255, 257 (Bankr. N.D. Ohio 1989); *Specker Motor Sales Co.*, 300 B.R. 659,
6 691 (6th Cir. 2004).

7 If Debtors' available funds are insufficient to pay all claims in a given category, the claims in
8 that category are paid pro rata. 11 U.S.C.A. §726(a) & (b). Section 507(a) subdivides the first
9 category, for priority claims, into nine levels, including administrative expenses, fees and charges.
10 *Id.* Like the categories set forth in section 726, all priority administrative claims, such as Moving
11 Parties' claims, must be paid before any claims at a lower level are entitled to any distribution. *Id.*

12 As administrative claimants, Synergy and Cohen are accorded the first level of priority in a
13 bankruptcy case and are to be paid in full before claims in a lower category. *In re Lazar*,
14 (Bankr.C.D.Cal.1997) 207 B.R. 668, 673. In *Lazar*, the court held that all claims of a given category
15 must be paid before any claims in a lower category are entitled to any distribution. *Id.* at 673.

16
17 **C. ESBA Should be Required to Disgorge Professional Fees in Order for Pro Rata**
18 **Payment to be Made to Synergy and Cohen**

19 Despite the foregoing pro-rata rules, Chapter 11 professionals, such as ESBA are required to
20 disgorge fees when administrative claimants, such as Synergy and Cohen, have not been paid. *In re*
21 *Lochmiller Industries, Inc.* (S.D. Cal. 1995) 178 B.R. 241. The *Lochmiller* court reasoned that
22 because Chapter 11 professionals understand the risks of non-payment that are inherent as a
23 professional in a bankruptcy proceeding, Chapter 11 professionals are the proper entities/persons to
24 disgorge payments when an administrative claimant has not been paid.
25
26
27

1 The ESBA has been paid disproportionately more than the other professionals.³ As a result,
2 ESBA should be required to disgorge an amount sufficient for pro rata payment to Synergy and
3 Cohen *Id.* at 251. 253, 254.

4
5
6 Dated: May 15, 2014

Respectfully Submitted by,

BRINKMAN PORTILLO RONK, APC

By: /s/ David H. Oken

8 Daren R. Brinkman
9 David H. Oken

10 Counsel for *Synergy Partners USA, LLC*
11 and *Michael Cohen*

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26 ³ ESBA's Second and Final Fee Application seeks approval of \$496,839.16 in fees and costs and has already
27 been paid \$377,271.00. [Docket No. 314] Debtor's primary counsel's First and Final Fee Application seeks
approval of \$908,541.46 in fees and costs and has already paid \$508,333.32. [Docket No. 308]

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

4333 Park Terrace Drive, Suite 205, Westlake Village, CA 91361

A true and correct copy of the foregoing document entitled (*specify*): **LIMITED OBJECTION TO THE SECOND AND FINAL APPLICATION OF EXECUTIVE SOUNDING BOARD ASSOCIATES, LLC AS CHIEF RESTRUCTURING OFFICERS TO THE DEBTORS FOR COMPENSATION AND ALLOWANCE OF PROFESSIONAL FEES AND EXPENSES DURING THE PERIOD FROM JULY 10, 2013 THROUGH MAY 21, 2014** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) **May 15, 2014**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On (*date*) **May 15, 2014**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL**

(*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

May 15, 2014
Date

Haley Pinkston
Printed Name

/s/ Haley Pinkston
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

SERVICE LIST

Served by Overnight Delivery:

Hon. Julia W. Brand
United States Bankruptcy Court
Central District of California
Edward R. Roybal Federal Building and Courthouse
255 E. Temple Street, Suite 1382 / Courtroom 1375
Los Angeles, CA 90012

Served by US Mail:

Mesorole, LLC
Ari Hurt
152 West 57th Street, 54th Floor
New York, New York 10019

Fuller Smith Capital Management, LLC.
Attn: Daniel J. Fuller
23 Jefferson Road
Princeton, New Jersey 08540

Served Electronically by Court's Notice of Electronic Filing ("NEF") System:

- **Martin J Brill** mjb@lnbrb.com
- **Daren Brinkman** office@brinkmanlaw.com
- **Melanie Scott Green** Melanie.green@usdoj.gov
- **Patrick B Howell** phowell@whdlaw.com,
dprim@whdlaw.com;tmichalak@whdlaw.com
- **David W. Meadows** david@davidwmeadowslaw.com
- **Stephan W Milo** smilo@wawlaw.com, psilling@wawlaw.com
- **Margreta M Morgulas** mmorgulas@stutman.com
- **Michael S Neumeister** mneumeister@omm.com
- **Penelope Parmes** penelope.parmes@troutmansanders.com
- **Frank T Pepler** frank.pepler@dlapiper.com, linda.vallin@dlapiper.com
- **Danielle A Pham** dpham@gordonsilver.com
- **Jeffrey M. Reisner** jreisner@irell.com
- **Christopher O Rivas** crivas@reedsmith.com
- **Nicola G Suglia** nsuglia@fleischerlaw.com
- **United States Trustee (LA)** ustpregion16.la.ecf@usdoj.gov