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And Specially Appearing for Executive Sounding Board Associates

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: COLOREP, INC., a California corporation, *et al.*, Debtors and Debtors-in-Possession. Tax I.D. Nos. 94-3055026 (Colorep, Inc.) and 54-1200596 (Transprint USA, Inc.)	Case No. 13-27689 Chapter 11 (Jointly Administered) **OPPOSITION OF AIRDYE SOLUTIONS, LLC, MESEROLE, LLC, FULLER SMITH CAPITAL MANAGEMENT, AND EXECUTIVE SOUNDING BOARD ASSOCIATES TO MOTION OF SYNERGY PARTNERS USA, LLC AND MICHAEL COHEN FOR AN ORDER (I) ALLOWING ADMINISTRATIVE CLAIMS; AND (II) COMPELLING PURCHASERS TO PAY ADMINISTRATIVE CLAIMS OR IN THE ALTERNATIVE REQUIRING ESBA TO DISGORGE FEES FOR PAYMENT; AND RESPONSE TO**

CAPTION CONTINUED ON NEXT PAGE

OPPOSITION TO ALLOWANCE OFFEES TO ESBA AND RESPONSE TO OPPOSITION TO DISMISSAL OF CASES

Date: May 29, 2014
Time: 10:00 a.m.
Location: Courtroom 1375
255 E. Temple Street
Los Angeles, CA 90012

Synergy Partners USA, LLC ("Synergy") and Michael Cohen ("Cohen") are alleged creditors of the Debtors' estates who have filed not one, but now two, sets of baseless papers. Their requests are supported by a combination of false outrage, selective construction of key orders of this Court, and an interpretation of the Bankruptcy Code that is at best ill-informed. ("Synergy's and Cohen's claims … maintain a higher priority status than the Chapter 11 professionals" Allowance Motion, p. 3 line 15).[1] Despite the volume of pleadings and declarations they have filed, first in support of a "Contempt Motion" (promptly withdrawn after its targets were forced to respond), and now in connection with their "Allowance Motion," an expanded shakedown of those same targets plus the Court-appointed Chief Restructuring Officer of the Debtors, Synergy and Cohen fail to carry their burden. There is no reason they should be paid $26,542.89 in claims they have not proven up. There is no reason to delay or disturb allowance and payment of professionals in the cases because of their last-ditch play.

AirDye Solutions, LLC ("AirDye") , Meserole, LLC ("Meserole"), Fuller Smith Capital Management, LLC ("Fuller Smith"), and with any other entity that Synergy and Cohen may construe may be "Purchasers" (collectively "Purchaser Respondents"), together with Executive Sounding Board associates ('ESBA"), oppose (i) the allowance of any administrative expense claim in favor of Synergy and Cohen, (ii) the imposition of any liability on Purchaser Respondents for any claim alleged to be due to Synergy and Cohen, (iii) the disgorgement of any professional fees that have been paid or will be paid to ESBA with funds expressly negotiated and

[1] This is one example of many: "If Debtors' available funds are insufficient to pay all claims in a given category, the claims in that category are paid pro rata 11 U.S.C. § 726(a)&(b). Section 507(a) subdivides the first category, for priority claims, into nine levels … Like the categories set forth in section 726, all priority claims … must be paid before any claims at a lower level are entitled to any distribution." Allowance Motion, p. 7, lines 23 – 28.

budgeted for that purpose, and (iv) delay of dismissal of these cases.

Willful last-minute bad faith conduct should not be rewarded. Synergy, Cohen and their counsel are in contempt of the Court's Sale Order by making demands on Purchaser Respondents who are specifically and expressly protected from spurious claims like those asserted here. AirDye, Meserole, Fuller Smith and ESBA respectfully request that the Court deny all relief sought by Synergy and Cohen and require that Synergy, Cohen and their counsel be required to pay the costs, fees and expenses of Purchaser Respondents and ESBA for filing this Opposition and the Purchaser Respondents' Response to the earlier Contempt Motion.

I. NONE OF THE FINANCING ORDERS, THE SALE ORDER, OR THE APA GIVE SYNERGY OR COHEN PAYMENT RIGHTS FROM PURCHASER RESPONDENTS

Meserole was the debtor in possession lender to the Debtors under the Court's interim and final Financing Orders entered July 18, 2013 [Docket No. 56] and August 16, 2013 [Docket No. 134], respectively (collectively "Financing Orders"), and was the original "DIP Agent" under the Financing Orders. Fuller Smith succeeded Meserole as DIP Agent under the Financing Orders and, with Meserole, was the Purchaser under the Asset Purchase Agreement ("APA") approved by the Sale Order dated October 4, 2013 [Docket No. 219]. AirDye is the "Purchaser Assignee" under the Sale Order of October 4, 2013 [Docket No. 219] and the Asset Purchase Agreement approved by the Sale Order. The undersigned has at all times acted as counsel for AirDye, Meserole and Fuller Smith in the specific capacities set out above, and are specially appearing here on behalf of ESBA with the consent of the Purchaser Respondents and the Debtors.

Synergy and Cohen filed their Contempt Motion, and now their Allowance Motion and disgorgement request, purportedly in reliance on the Sale Order and APA. However, they appear to have read either the Sale Order or the APA. Synergy and Cohen are not entitled to against AirDye because AirDye assumed no liability for their claims and because it is in full compliance with the Sale Order and APA. Synergy and Cohen are not entitled to relief against Meserole and/or Fuller Smith because neither assumed liabilities in connection with the Sale Order and APA and have fully discharged their duties under the Sale Order, APA and Financing Orders.

This Opposition is supported by the Financing Orders, the Sale Order, and APA, and the

Declaration of Robert D. Katz in Support of Opposition to Motion of Synergy Partners USA and Michael Cohen for an Order: (1) Allowing Administrative Expense Claims, etc. ("Katz Dec."). Mr. Katz is the Managing Director of ESBA, and served as the duly appointed and acting Chief Restructuring Officer of the Debtors *nunc pro tunc* to July 10, 2013 under the Debtors' application to employ ESBA as CRO filed July 30, 2013 [Docket No. 80], and the Court's authorizing order dated November 11, 2013 [Docket No. 245]. One of the reasons that ESBA was retained by the Debtors and appointed as CRO was that, as of the petition date, management of the Debtors was in shambles. Mark Fox, who had served as a temporary CEO of the Debtors prior to their filing and who presided over a two month unfunded shutdown of the Debtors' pre-petition operation, was not acceptable to either the Board of Directors of Debtors or the DIP Lenders as a CEO and CRO of the Debtors in Possession. Mr. Fox was not responsive to the Board of Directors or the Debtors, was not experienced in serving as the CRO in a Debtor in Possession in Chapter 11, did not manage the Debtors' business within the budgetary constraints negotiated with the Debtors' lenders, and was riddled with conflicts of interest, including the unresolved issue of his compensation and his use of subcontractors

ESBA was engaged by the Debtors with the consent of the DIP Lenders. ESBA kept Mr. Fox on for a transitional period during which he had no management or operating authority. ESBA was the only authorized representative of the Debtors and was solely responsible for authorizing expenses, managing cash, and negotiating with the DIP Lenders. ESBA terminated Mr. Fox's consulting role at the Debtors early in the case. After the Debtors' cases were filed, but prior to closing of the sale under the Sale Order and APA, Mr. Fox was killed in an auto accident. ESBA has concluded after review of the Debtors' records and files, including Mr. Fox's pre-petition compensation agreement with Colorep and Transprint, that any claim that Synergy may claim it is owed is a claim against Mr. Fox or his estate. Katz Dec. ¶ 8.

A. "Assumed Liabilities" Are Defined: They Do Not Include Synergy or Cohen.

Synergy and Cohen are wrong in asserting that "it is uncontroverted that Purchasers are obligated to pay Debtors' Post-Petition accounts payable." Allowance Motion, p. 4, lines 16-17. Purchaser Respondents, having in good faith negotiated the APA and Sale Order to narrowly

define ongoing liability for Debtor-payables. Meserole and Fuller Smith, as Purchaser, and AirDye, as Purchaser Assignee, assumed ***only*** the limited post-petition obligations that fell within the heavily negotiated definition of "Assumed Liabilities" in the APA, which in turn is incorporated into the Sale Order. (Sale Order, p. 6, lines 19 – 25). The relevant section of the APA describes Assumed Liabilities as follows:

> (a)(i) all accruals, operating costs and expenses and accounts payable of a Debtor incurred in the ordinary course of business arising after the Petition Date and before Closing **in accordance with the Budget** (without giving effect to the Variance (as defined in the Budget)) that remain as of the Closing Date. (APA p. 11, § 2.3(a)(i) emphasis added)

In other words, if the DIP Lenders had agreed in an approved DIP Budget to fund specified post-petition operating expenses but had not yet provided a DIP loan advance to cover that commitment, the Purchaser would assume that committed liability. Purchasers' exposure was not limitless in respect of ordinary course post-petition operating expenses. The Assumed Liabilities exposure was expressly tied to unfunded commitments by the DIP Lenders under the DIP Budget. Synergy and Cohen were never budgeted by Debtors, were never agreed to in an approved DIP Budget, and were not included in Assumed Liabilities. Katz Dec. ¶ 12.

The Sale Order picks up the circumscribed scope of Assumed Liabilities by describing them as "certain" operating expenses, and "certain" administrative expenses, including "certain" professional fees, all as fully set forth in the Final APA: Sale Order, p. 6, lines 19 – 25.

The Sale Order expressly goes on to protect the Purchaser from post-closing risk by finding that the Purchaser is a good faith purchaser for purposes of section 363(m) and that:

> (g) the negotiation and execution of the final purchase agreement ("Final APA" …) and any other agreements or instruments related thereto were at arms' length and in good faith. Sale Order p 7. Lines 16 – 28; p. 8, lines 1 – 2.

The definition of Assumed Liabilities was heavily negotiated at arms-length by the Debtors, on the one hand, and Meserole, Fuller Smith and AirDye, on the other. Likewise, each and every iteration of the "Budget" approved under the Financing Orders was heavily negotiated

at arms-length by the Debtors, on the one hand, and Meserole and Fuller Smith on the other. **At no time** did the Debtors negotiate an approved "Budget" under the Financing Orders that included payments to Synergy and Cohen. Katz Dec. ¶ 12. **At no time** did the Debtors negotiate a definition of "Assumed Liabilities" under the Sale Order and APA that included payments to Synergy and Cohen. Despite efforts in the Allowance Motion to wish it otherwise, the specific scope of "Assumed Liabilities" does not include the Synergy and Cohen claims. 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:[2]

First, the negotiated post-petition payables either contained in an approved DIP Budget but not yet funded (APA § 2.3(a)(i), quoted in Allowance Motion at p. 4, lines 10 – 13); or

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

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

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

B. The Sale Order Protects Purchaser Respondents from Synergy's and Cohen's

[2] 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.

Alleged Claims.

Synergy and Cohen allege that the Sale Order and APA provide the basis for their claims and the Allowance Motion. Just the opposite is true. Not only are the Purchasers and Purchaser Assignee protected by a good faith finding from any risk on appeal, but the Sale Order protects Purchaser Respondents from liability for Excluded Liabilities, including the meritless and fabricated claims asserted in the Allowance Motion. The APA provides that:

> Except as specifically set forth in Section 2.3, Purchaser shall not assume or be liable for any Claims, Liens, Encumbrances, Interests, Liabilities or other obligations of a Seller of any kind or nature whatsoever, whether presently in existence or arising hereafter (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).

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

As such, Meserole, Fuller Smith and AirDye are entitled to the full protection of the Court under the Sale Order, which runs completely in favor of the Purchaser Respondents and against the positions taken in the Allowance Motion. Synergy and Cohen are in contempt of the Court's orders, not Purchaser Respondents. Among the Sale Order's protective provisions are:

> [A]ll persons and entities holding Liens, Claims or interests in all or any portion of the Acquired Assets sold by the Debtors arising under out of , in connection with, or in any way relating to the Debtors, the Acquired Assets, the operation of the Debtors' business prior to the Closing Date of the transfer of the Acquired

> Assets sold by the Debtors to the Purchaser, hereby are forever barred estopped and permanently enjoined from asserting against the Purchaser or its successors or assigns, their property or the acquired Assets, such persons' or entities' Liens or Claims against the debtors or in and to the Acquired Assets sold by the Debtors to the Purchaser. Sale Order, p. 14, ¶ 9, lines 18 through 24.

And

> Except for the Assumed Liabilities … the Purchaser shall not have any liability or other obligation of the Debtors arising under or 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, lines1 through 23.

And

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

This is not a close case. Synergy and Cohen have no right to payment, let alone contempt or a right to compel disgorgement from ESBA or any other administrative expense professional that Synergy and Cohen have not singled out. Purchaser Respondents' have no exposure for liabilities they did not assume, and have recourse against parties who are expressly barred by the Sale Order from asserting claims against them.

II. SYNERGY'S AND COHEN'S MISCONTRUE BANKRUPTCY CODE SECTION 503

Section 503 provides a basis for administrative expense priority only to "actual, necessary costs and expenses of preserving the estate." Section 503 does not elevate claims of volunteers, or shift liability to the bankruptcy estate for claims against third parties.

A. SYNERGY AND COHEN HOLD DO NOT HOLD 503(a) CLAIMS

The evidentiary showing that Synergy and Cohen make through their several declarations is, essentially, that their alleged administrative expense claims should be allowed because they say so. After all, they reason, "Moving Parties relied upon the fact they had no reason to believe they were not included in the list of assumed liabilities." Allowance Motion p. 8, lines 21-23.

Just to put this in perspective, Synergy and Cohen are saying that they provided services in the last two weeks of July, 2013, in reliance on their "lack of a reason to believe that their claims would be not be assumed" on October 7, 2013 by Purchasers who were not identified until much later in the case. The sale procedure order was entered on August 12, 2013 [Docket No. 109] and the Purchaser was identified at a hearing on October 3, 2013. Synergy and Cohen were not relying on a good faith belief their services would be compensated by assumption. At best, the declarations say that they were relying on their relationship with Mark Fox, who was deceased before the sale procedure was even approved.

Synergy and Cohen had every reason to understand they would not be paid by these Debtors. Let alone by Purchaser Respondents or ESBA. Neither Synergy or Cohen has produced any post-petition engagement agreement or terms of compensation with the Debtors, or even any pre-petition agreement with Colorep or Transprint that would give any idea of how and why they should be paid what they say is owed. They have proven no compensation schedules, no headhunter bounty rates, no hourly pay rates, no expense reimbursement terms, and no other commercially reasonable terms that would have to have been presented to ESBA, approved by ESBA, and negotiated by ESBA with the DIP Lenders for inclusion in an approved DIP Budget.

Thomas Varian says he is "an unsecured and unpaid creditor" who had done work pre-petition for Mark Fox, and that he made a post-petition referral based on Mr. Fox's request. Varian Dec. p. 2, lines 20 – 23. The only documentation attached to Mr. Varian's declaration is an alleged post-petition invoice dated three weeks after the cases were filed, with no detail, no supporting fee schedule or agreement and a single line saying: "Placement Fee $18,000." ESBA did not authorize employment of a headhunter, and has good reason to believe that any compensation due to Synergy, or to its representative or agent Justin Tamborello, was to be paid by Mark Fox. Not by the Debtors. Katz Dec. ¶ 14. No experienced Chapter 11 professional or fiduciary would authorize payment of an $18,000 invoice on these facts, especially when they were faced with daily demands for cash that had to be negotiated with the Debtors' DIP Lenders.

Mr. Cohen failed to file a declaration in support of the Allowance Motion, despite the many references to his declaration in the Allowance Motion. In his declaration in support of the

Contempt Motion, Mr. Cohen assets that he is "an unsecured and unpaid creditor" of the Debtors. Like Mr. Varian, Mr. Cohen attaches no engagement agreement from either pre-petition Colorep and Transprint, or the Debtors, and no summary of terms on which he alleges he was engaged to perform services post-petition. Mr. Cohen simply states that Transprint agreed to his work and attaches to his declaration a scope of work that he appears to have constructed for purposes of the Contempt Motion and which cannot be authenticated as having been agreed to by the Debtors. Mr. Cohen also attaches an account activity statement with amounts he claims are due. Again, there is no support provided for the rate or terms of payment, the expense reimbursement agreement between the parties, or any other information that a bankruptcy fiduciary like ESBA would need to evaluate a payment request.

In addition, the activity statement is filled with inexplicable inconsistencies. For example, under the category "Billings Prepetition" he shows all transactions occurring post-petition on July 25, 2013, and yet all the specific expense references shown in the following column are all to pre-petition expenses. It is unclear whether Mr. Cohen is suggesting that if he incurred expenses pre-petition, and then re-billed them post-petition, he is entitled to administrative expense priority under Section 503(b). He is not. Then under the category "Billings Post Petition" Mr. Cohen shows a service fee of $2,500 for the period 7/15/13 – 7/19/13, with an offsetting wire transfer of $2,500 received from the Debtors on 7/20/13. He then shows an expense entry dated 7/25/13 totaling $535.98 with itemization showing expenses from 7/22/13 through 7/26/13, the day **after** the 7/25 posting, followed by another expense entry for 7/25/13 allegedly covering $1,631 in expenses for the period 7/30/13 to 8/1/13, all of which is **after** the 7/25 posting. On 7/26/13 Mr. Cohen shows an incoming wire from the Debtors of $3,500. Why? He had been fully compensated for any post- services he could have arguably been authorized to perform on 7/20, and had expenses for the period ending 7/26/13 of $538.98. All of the remaining expenses posted for 7/25/13 were for later dates and could not have been paid with the $3,500 wire on 7/26/13. Even if all the expenses posted on 7/25/13 had been incurred prior to that date, Mr. Cohen would have received $3,500 for an aggregate of 2,166.99 in accrued and to-be accrued expenses. It is not Purchaser Respondents' or ESBA's burden to prove up the basis of Mr. Cohen's alleged

administrative expense claim or the amount of that claim. It is clear from his own declaration that Mr. Cohen has failed to carry his burden.

Synergy's and Cohen's alleged claims could only have arisen under Mark Fox, who was a pre-petition contact of each of theirs, who had no authority to hire them on a post-petition basis, and whose tenure ended early in August of 2013. There is significant reason for an estate fiduciary such as ESBA **not** to authorize payment of such alleged post-petition expenses when they were attributed to an interim CEO whose employment had been terminated, when there was no support provided as the basis of the alleged post-petition expenses or their amount, when any accounting provided was indecipherable, and when the Debtors had much higher priorities that ESBA had to convince the DIP Lenders to fund.

B. IF SYNERGY AND COHEN HAD CLAIMS, THEY SHOULD HAVE COME FORWARD SOONER.

Synergy and Cohen have waited until the literal last day of the case to make their request. There is no reason that a motion for allowance and payment of administrative expense claims could not have been made by them in July, near the date of their supposed services and in connection with the Interim Order, or in August, in connection with the Final Order, or in September or October, in connection with the sale process and Sale Order. There is no suggestion in the Allowance Motion as to why .

Synergy's and Cohen's counsel Mr. Oken says he made demand on Meserole and Fuller Smith by letter dated March 13, 2014. Had he examined any part of the docket in the case, counsel could have easily determined that the undersigned represented and continues to represent Meserole and Fuller Smith in the case. Until Mr. Oken filed his declaration in support of the Contempt Motion, the undersigned had never seen this demand. Nor did either Meserole or Fuller Smith receive it. Even had the demand letter been received, these claims would not have been paid by Purchaser Respondents, by authorized to be paid by ESBA. Mr. Oken's ostensible demand in March was a simple pretext to revive and position a dispute that should have been brought much earlier in the case.

C. "ORDINARY COURSE" POST-PETITION PAYABLES HAVE NO

SPECIAL PRIORITY OVER PROFESSIONAL FEES, and THERE IS NO JUSTIFICATION FOR ESBA, ALONE, TO DISGORGE, AND NO JUSTIFICATION FOR RATABLE DISGORGEMENT BY ALL PROFESSIONALS TO PAY $26,542.89 IN UNSUPPORTED CLAIMS.

As Purchaser Respondents and ESBA noted above, Synergy and Cohen base their alleged right to payment on the misunderstanding that their "ordinary course" claims "maintain a higher priority status than the Chapter 11 professionals. Allowance Motion, p. 3, line 14. They give no legal support for this argument because there is no special ordinary course priority. They move on to a suggestion that ESBA disgorge, or that all professionals disgorge, sufficient fees to pay the Synergy and Cohen claims in full. Not only does that turn the concept of ratable distribution inside out, but there is no showing that disgorgement is appropriate in this case to pay claims that have not been proven.

These cases have been ongoing for almost a year. During that time, interim payments have been made to ESBA, to Stutman Treister and Glatt, to special litigation counsel for the Debtors, to special intellectual property counsel to the Debtors, to two sets of tax counsel and advisors for the Debtors, to Hilco services in connection with due diligence in support of the sale. Each and every professional fee has been negotiated by ESBA, the Debtors, the DIP Lenders and the Purchaser Respondents. Most, if not all, of the professionals have made significant fee concessions to provide the best possible outcome for true expense of administration creditors in the cases. As just two examples, the DIP Lenders and Purchasers negotiated significant reductions in fees due to Stutman Treister & Glatt and ESBA, and each of those professionals agreed to take payment over time by Purchasers post-closing. Stutman Treister & Glatt and ESBA were able to make those concessions, and the DIP Lenders and Purchasers agreed to include the related professional fees in the definition of "Assumed Liabilities" because the Debtors' counsel and CRO were confident that they had command of the post-petition expenses of administration that were allowable and that should be paid, if even on a compromised basis. Synergy and Cohen have not made a sufficient showing of either their right to payment or to the amount of their claims to justify further sacrifice or compromise by the professionals who are

prepared to draw these cases to conclusion on May 29, 2014. No professional should be forced to incur additional unfunded fees to address Synergy's and Cohen's complaints when they have made so little effort to protect themselves.

WHEREFORE, Purchaser Respondents and ESBA respectfully request that the Court (a) deny the Allowance Motion filed by Synergy and Cohen; and (b) grant sanctions against Synergy, Cohen and their counsel for their contempt of the Sale Order in an amount equal to the attorneys' fees incurred by Purchaser Respondents and ESBA in filing this response and, if a hearing is held, appearing at that hearing; (c) deny disgorgement from ESBA or any other professional in the case; (d) overrule Synergy's and Cohen's opposition and grant the Debtors' motions to dismiss; and (e) for such other and further relief as the Court determines is just and proper.

Dated: May 23, 2014

/s/ Frank T. Pepler

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