

**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.*,¹

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

RE: Dockets 1549 and 1551

**REPLY IN FURTHER SUPPORT OF MOTION OF MONERIS SOLUTIONS, INC. AND
BMO HARRIS BANK N.A. FOR AN ORDER (1) ENFORCING (A) THE ORDER
APPROVING THAT CERTAIN SETTLEMENT REGARDING RECONCILIATION OF
AMOUNTS RELATED TO THE ROLLING RESERVE FUND, (B) THE ORDER
CONFIRMING THE JOINT PLAN OF LIQUIDATION OF CD LIQUIDATION CO.,
LLC, CD LIQUIDATION CO. PLUS, LLC, AND CYNERGY DATA HOLDINGS, INC.
AND (C) COMPLIANCE WITH THE JOINT PLAN OF LIQUIDATION OF DEBTORS
AND (2) ENJOINING MARCELO PALADINI**

¹ The Debtors are the following entities (with the last four digits of their federal tax identification numbers in parentheses): CD Liquidation Co., LLC f/k/a Cynergy Data, LLC (8677); Cynergy Data Holdings, Inc. (8208); CD Liquidation Co. Plus, LLC f/k/a Cynergy Prosperity Plus, LLC (4265). The mailing address for the Debtors is 30-30 47th Avenue, 9th Floor, Long Island City, New York 11101.



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11 U.S.C. § 105(a)20

11 U.S.C. § 1123(b)18

Fed. R. Bankr. P. 700115

PRELIMINARY STATEMENT

As Paladini did in the Martillo Action,² he disregards this Court's prior orders and challenges this Court's jurisdiction over a core proceeding in order to personally gain from claims belonging to the Debtors that he seeks to advance in another court. This Court has jurisdiction to enforce its prior orders and compel compliance with injunctions provided for in a confirmed plan.

By making jurisdictional arguments and not pointedly addressing the derivative claim issue, Paladini attempts to mislead this Court. As this Court observed with respect to the pleadings by the Liquidation Trustee and John Martillo in the Martillo Action, Moneris does not ask this Court to assert jurisdiction over the New York Action or to compel Paladini to litigate his alleged claims against Moneris in this Court instead of in New York. Rather, Moneris asks this Court to enjoin Paladini from continuing to prosecute the New York Action because the claims he seeks to assert against Moneris are derivative and belong to the Debtors' estates. *See* Order Granting Liquidation Trustee's and Intervenor's Motion for Preliminary Injunction and Denying Defendant's Motion to Dismiss [D.I. 1425], Adv. Pro No. 11-51643 KG (Nov. 2, 2011), *published at In re CD Liquidation Co., LLC*, 462 B.R. 124 (Bankr. D. Del. Nov. 2, 2011) (the "Martillo Order"). The only material distinction from the Martillo Action is that the Debtors and Paladini have released the claims Paladini seeks to pursue and this Court has enjoined all such claims in its prior orders in these chapter 11 cases.

Paladini sidesteps the central issue that his claims are derivative, and instead, repeatedly alleges that they are "personal" in the misguided belief that saying it enough times will make it true. By application of Delaware law, Moneris appropriately concentrates on the injuries

² Capitalized terms not defined herein have the meanings ascribed to them in Moneris's Motion.

Paladini alleges because that is what distinguishes a derivative claim from a direct one. Moneris had a contractual relationship with the Debtors, not with Paladini, and the Debtors suffered the principal alleged harms – bankruptcy and the sale of its assets. If Moneris’s conduct during the course of the relationship harmed the Debtors (which Moneris disputes), then it harmed their creditors and stockholders at large, not Paladini personally. Claims to vindicate such harm are, by definition, derivative. The Court has enjoined such claims.

Even if Paladini’s claims were considered direct claims, Paladini was already enjoined from asserting those claims, and Paladini did not preserve them through a carve-out to the Settlement Order’s injunction provision. Paladini erroneously argues that Moneris neglected to furnish the Court with the carve-out language. (Obj. at 10.) To the contrary, at page 9 of the Motion, Moneris states that “Paladini preserved claims and defenses belonging to himself individually ‘indirectly related to the reserves, but [that] do not affect the entitlement to, calculation of, ownership, control or distribution of the reserves.’” (Mot. at 9, ¶ 24, *quoting* Settlement Order [D.I. 935], ¶ 11.) The basis of Paladini’s claims is that Moneris inappropriately set off and claimed entitlement to the reserves, which led to Cynergy’s bankruptcy. His claims, therefore, would “affect the entitlement to, calculation of, ownership, control or distribution of the reserves” and fall outside the carve-out. Furthermore, in the DIP Financing Order [D.I. 281], Paladini released Moneris from all claims, leaving no claims against Moneris to be carved-out in the injunction provisions of the Settlement Order.

This Court should exercise its jurisdiction to enforce its prior orders, compel compliance with the Plan injunctions and releases and enjoin Paladini from prosecuting the New York Action.

ARGUMENT

1. As an initial matter, Paladini argues that this Court is not the proper forum to determine whether his claims are derivative, suggesting instead that the Southern District of New York should do so. (Obj. at 19 n.5.)

2. Paladini neglects to inform this Court that, on September 19, 2012, the Southern District of New York entered a Stipulation and Order Staying the Action Pending a Decision of the Bankruptcy Court (Exhibit 5). The Stipulation and Order provides that the New York Action “is stayed upon consent of all parties . . . pending a written decision of the Bankruptcy Court disposing of the Motion to Enforce.” (*Id.* ¶ 2.) Paladini agreed, and the Southern District of New York accepted, that this Court should decide the Motion before the New York Action proceeds further.

I. PALADINI’S FACTUAL ALLEGATIONS UNDERScore THAT HIS CLAIMS ARE DERIVATIVE

A. Paladini’s Allegations Repeatedly Admit That Moneris Did Business With Cynergy, Not Paladini

3. Under well-settled Delaware law – which Paladini’s Objection does not address – a claim is derivative when (1) the company suffered the alleged harm and (2) the company would receive the benefit of the recovery or other remedy. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). In applying this test, the fundamental question is “[l]ooking at the body of the complaint and considering *the nature of the wrong alleged and the relief requested*, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?” *Id.* (emphasis added). The emphasized phrase is important because Paladini criticizes the Defendants for focusing on “the operative particularized injuries and not on the claims themselves.” (Obj. at 25.) According to the Delaware Supreme Court, Moneris

appropriately concentrates on the injuries Paladini alleges because that is what distinguishes a derivative claim from a direct one.

4. Paladini argues that this Court must accept his allegations as true for purposes of this motion. (Obj. at 21 n.6.) Moneris disputes many of the allegations and does not agree that this Court must accept them as true because this not a motion to dismiss for failure to state a claim under FRCP 12(b)(6).³

5. Even on such a motion, the Court need not accept Paladini's unsupported conclusions, unwarranted inferences and legal conclusions couched as factual allegations. *See Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995) ("General, conclusory allegations need not be credited, however, when they are belied by more specific allegations of the complaint.") In particular, the Court should not accept Paladini's conclusory allegations that he suffered individualized harm from Moneris's conduct and that he preserved his claims against Moneris through a carve-out in the Settlement Order's injunction provision.

6. Nevertheless, the Court can accept the truth of Paladini's factual allegations for purposes of this Motion and reach the conclusion, as a matter of law, that the claims are derivative and therefore released and enjoined. Paladini's repeated concessions throughout the Amended Complaint that Moneris did business with Cynergy, the Debtor corporation, not Paladini, the individual, undermine his assertion that he suffered "personal" injuries.

³ In an apparent effort to find any case concerning a "motion to enforce," Paladini cites *Bohlen v. United States*, 623 F. Supp. 595 (C.D. Ill. 1985), for the proposition that this Court is required to accept the allegations of Paladini's Amended Complaint as true. (Obj. at 21 n.6.) In *Bohlen*, the Illinois District Court denied plaintiff's motion to enforce a settlement agreement with the U.S. government because, even accepting as true that an Assistant United States Attorney agreed to the settlement with plaintiff's counsel, he did not have authority to do so. That decision has no application to this motion to enforce the Bankruptcy Court's prior orders.

7. The headings of Paladini’s Amended Complaint alone tell the true story:
 - **Cynergy’s** Business (Compl. § I)⁴
 - Harris’s Relationship with **Cynergy** as Sponsor Bank (*id.* § II)
 - Harris’s Agent Moneris Provides Accounting Services to **Cynergy** (*id.* § III)
 - **Cynergy’s** Forced Asset Sale (*id.* § V)
 - Harris’s Claim That **Cynergy** Breached the BIN Agreement Were Knowingly False (*id.* § VI)
 - **Cynergy** Files for Bankruptcy (*id.* § VII)
8. Likewise, Paladini’s factual allegations repeatedly acknowledge Moneris’s

contractual relationship with Cynergy, not Paladini, *viz.*:

- Moneris “separately contracted with **Cynergy** to ensure that **Cynergy’s** accounts were reconciled on a daily basis” (Compl. ¶ 5)
- Moneris “failed to monitor the daily transactions in **Cynergy’s** operating account and provided incorrect information to **Cynergy**” (*id.* ¶ 6)
- “[A]fter the inception of their contracts with **Cynergy** . . . the Defendants claim to have first become aware that their failures had resulted in substantial shortfalls in **Cynergy’s** merchant reserves and corresponding misinformation to **Cynergy**” (*id.* ¶ 7)
- “Ultimately, the Defendants put a gun to **Cynergy’s** head: [Moneris] threatened to suspend **Cynergy’s** funding and thus put **Cynergy** out of business unless acceded to [Moneris’s] unjustified demands” (*id.* ¶ 8)
- “It was in this context that [Moneris] coerced **Cynergy** and Paladini to sign the Forbearance Agreement” (*id.* ¶ 10)

9. It goes without saying that Moneris disputes these allegations and would have vigorously defended against them had Cynergy or the Debtors’ estates asserted such claims

⁴ A copy of Paladini’s Amended Complaint is annexed to the Motion as Exhibit 2.

against Moneris. Instead, with this Court’s approval of the Settlement Term Sheet, (Mot., Ex. 4), the Debtors released Moneris from such claims and this Court enjoined the Debtors and others pursuant to the Settlement Order [D.I. 935], the Plan [D.I. 1190], and the Confirmation Order [D.I. 1202].

B. Paladini Does Not Allege Facts Showing That He Suffered An Individualized Harm

10. Paladini’s draws the unwarranted conclusion that Moneris’s conduct, all of which he admits was directed at Cynergy, harmed him individually in a manner not experienced by Cynergy or its other shareholders. Paladini ignores the controlling Delaware authority that demonstrates Paladini’s claims are derivative because he cannot prove them without showing that Cynergy (and, likewise, all of Cynergy’s shareholders) were harmed in the same way. *See Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (“In order to state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large”); *Tooley*, 45 A.2d at 1036. In other words, Paladini’s alleged injuries *derive* from the harm allegedly suffered by Cynergy and all of its constituents.⁵

11. Paladini instead relies on incongruous decisions from the Second and Eleventh Circuits affirming the unremarkable proposition that a bankruptcy trustee can only assert claims on behalf of debtors. *Hirsch*, 72 F.3d at 1093 (“Thus, the trustee stands in the shoes of the debtors and can only maintain those actions that the debtors could have brought prior to the bankruptcy proceedings”); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 985 (11th Cir. 1990) (“[S]ection 704 of the Bankruptcy Code requires the trustee to collect and reduce to money the *property of the estate* for which such trustee serves”) (emphasis in original; internal quotations

⁵ As with the Martillo Action, “[t]his is not a case involving the *Gentile* exception of unique harm to minority shareholders” because Paladini admittedly was Cynergy’s majority and largest shareholder. *See In re CD Liquidation Co., LLC*, 462 B.R. at 133, citing *Gentile v. Rosette*, 906 A.2d 91 (Del. 2006).

omitted). Conversely, those decisions held that investors in a bankrupt corporation, not the trustee, are entitled to pursue claims that the bankrupt corporation defrauded them through a Ponzi scheme. *Hirsch*, 72 F. 3d at 1093-94; *E.F. Hutton*, 901 F.2d at 980-81, 985. In *E.F. Hutton*, moreover, the bankruptcy trustee “conceded that he [wa]s asserting the claims of GIC customer creditors rather than the entity GIC, for which he represent[ed]” and the Court “emphasize[d] that our holding is restricted to the specific facts in this case.” *E.F. Hutton*, 901 F.2d at 985. In *E.F. Hutton*, the creditors were customers who contracted with the debtor. Here, Paladini did not contract with Moneris. The agreements and accounts at issue were in the name of and consummated by Cynergy, not Paladini. Simply put, Paladini was not in privity with Moneris.

12. In *Hirsch*, the claims also included, as here, allegations of professional malpractice that harmed the debtors. Unlike here, and decisively so, the bankrupt corporation allegedly conspired with its third-party professionals to defraud its investors. *Id.* at 1094. Under such circumstances, as Paladini admits, “when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors.” (Obj. at 19, quoting *Hirsch*, 72 F.3d at 1085.) Yet, Paladini does not allege that Cynergy, the entity for which he was the CEO and a majority shareholder, joined with Moneris to defraud or otherwise harm him. Therefore, the *Hirsch* decision does not support Paladini’s argument that he is entitled to pursue a claim of malpractice for services that Paladini admits were provided to Cynergy.

C. Paladini's Claims Are Derivative Because Of The Harm Alleged, Not The Label Placed On The Causes Of Action

13. Paladini erroneously portrays Moneris as arguing that his "claims" are identical to those he brought against Martillo. (Obj. at 24.) To the contrary, Moneris differentiates the alleged "injury" or "harm," on the one hand, from Paladini's "claims" or "causes of action," (Mot. at 14-19), and readily acknowledges that the causes of action are different from those he asserted against Martillo.

14. What is the same, and what matters in assessing whether Paladini's causes of action are derivative, is the nature of the harm alleged and the relief sought. *Tooley*, 845 A.2d at 1036; *Feldman*, 951 A.2d at 733.

15. In addition to the allegations of the Amended Complaint that establish the derivative nature of Paladini's claims, Paladini's Objection contains the following admission fatal to his position: "Paladini's damages arise as a result of his position as majority shareholder and guarantor of Cynergy, as well as his status as a signatory to the Forbearance Agreement." (Obj. at 7.)

16. Paladini's alleged damages, by his own admission, are derivative of the harm allegedly suffered by Cynergy as (a) the recipient of Moneris's services, (b) the borrower of loans from other lenders guaranteed by Paladini, and (c) the beneficiary of the Forbearance Agreement to which Paladini signed as guarantor.

1. Paladini Cannot Prove Harm To Himself As Cynergy's Majority Shareholder Without Proving Harm To Cynergy

17. Paladini's alleged damages resulting from his position as the Debtors' majority shareholder is a "classic derivative harm" because "it flows from a harm to the corporation." (Mot. at 15-16, ¶¶ 44-47); *In re CD Liquidation Co., LLC*, 462 B.R. at 132.

18. Each of Paladini's causes of action (except for economic duress)⁶ alleges that Moneris breached a duty or obligation to **Cynergy**,⁷ which **Cynergy** relied upon in obtaining loans⁸ and which caused **Cynergy** to file for bankruptcy and sell its assets for reduced value, which, in turn, devalued Paladini's shares in the company. In each instance, the harm Paladini claims he has suffered is secondary to the harm allegedly suffered by Cynergy.

19. Paladini is attempting to recover for himself, personally, damages to compensate for the value that **Cynergy** allegedly lost when its sale to another credit card processing company, EVO, fell through, **Cynergy** filed for bankruptcy, and sold its assets pursuant to an order of this Court for less than what Paladini believes they were worth.

20. Therefore, the causes of action to redress such harm are derivative as this Court concluded in the Martillo Action.

2. Paladini Cannot Seek For Himself Damages From Moneris Through Claims The Debtors And Their Lenders Released

21. Each of Paladini's causes of action (except for economic duress) alleges that Moneris breached a duty or obligation to **Cynergy**, which caused **Cynergy** to file for bankruptcy and sell its assets for reduced value, which, in turn, subjected Paladini to lawsuits by Cynergy's lenders and the Liquidation Trustee.

⁶ Discussed *infra* at ¶¶ 27-28.

⁷ The BIN Agreement expressly contradicts Paladini's allegations that defendants owed Cynergy or Paladini a duty of care and that defendants had special relationship of trust and confidence with Cynergy and Paladini because it provides that "[Harris] and [Cynergy] will be deemed to be independent contractors and will not be considered to be agent, servant, joint venture or partner of the other. (Compl., Ex. A § 9.8.)

⁸ Paladini's Objection illogically and incorrectly states that "he" relied upon information from Moneris "in obtaining new loans." (Obj. at 21.) In fact the loans were obtained by Cynergy, not Paladini, in August 2008, three months prior to the date upon which Moneris entered into the BIN Agreement with Cynergy.

22. Paladini cannot pursue such claims against Moneris because (a) they are derivative and (b) they, in effect, allege that Moneris is liable for claims that the Debtors and their lenders explicitly released.

23. Paladini's claims to redress harm he allegedly suffered from certain lawsuits are derivative because Paladini was sued in his capacity as Cynergy's guarantor. (Obj. at 22.)⁹ In the absence of Cynergy's default on its loans, Paladini would not have been exposed to liability to Cynergy's lenders through his guaranty. Paladini is attempting to recover from Moneris compensation for the debts Cynergy owed, and Paladini guaranteed, to Cynergy's lenders and the costs of defending against the enforcement of such debts. (Obj. at 22-23.) Therefore, under *Tooley*, the causes of action to redress alleged harm caused by the lender lawsuits are derivative and this Court reached the same conclusion in the Martillo Action.

24. Specifically, this Court concluded in the Martillo Action that claims by Paladini based on a guaranty of the Debtors' financing are derivative:

Paladini is asserting a claim for "harm" caused to him as a shareholder-guarantor by [Martillo]'s wrongdoing which purportedly caused the corporation to enter bankruptcy, thereby triggering his guaranty. Courts which have considered such a claim have concluded that any such harm is derivative in nature.

(Mot. at 18, ¶ 54) (citations omitted).

25. Furthermore, the crux of Paladini's allegation is that Moneris ultimately is liable to Cynergy's lenders for the company's defaults under their loans. Those lenders, however, explicitly released Moneris from any liability. (Mot., Ex. 4, Settlement Term Sheet, at 9; Settlement Order ¶ 12.) Paladini cannot pursue such claims any more than Cynergy's lenders

⁹ All lawsuits commenced by the lenders and Debtors against Paladini have since been dismissed. (Obj. at 23 n.7.)

could do so directly against Moneris and he certainly is not entitled to benefit personally from such claims.

26. For the same reason, Paladini's claims to redress harm he allegedly suffered as a result of the Liquidation Trustee's lawsuit plainly are precluded by this Court's prior orders, whether derivative or not. In effect, Paladini alleges that Moneris ultimately is liable for claims brought against Paladini by the Liquidation Trustee for the benefit of the Debtors. The Liquidation Trustee and the Debtors, however, released Moneris from all such claims and liability. Paladini cannot revive them for his personal benefit.

27. Paladini's economic duress claim, even if compensable (which Moneris disputes), is derivative because Paladini admits that he signed the Forbearance Agreement in his capacity as Cynergy's guarantor and he contends that "[u]ltimately it was both the existence and the terms of the Forbearance Agreement that bankrupted Cynergy, resulting in the termination of Paladini's employment and personal exposure under the various guarantees and credit facilities Paladini had executed." (Obj. at 6.)¹⁰

28. As is typical in a distressed situation, upon Moneris's exercise of its legal remedies of set-off and recoupment, Cynergy requested that Moneris inter into a forbearance agreement to forbear from further set-off. Putting aside the absurdity of the allegation that a *forbearance* agreement which is requested by a borrower to give the borrower a breathing spell, "bankrupted" Cynergy, Paladini's allegation is that Moneris forced Cynergy, the borrower, to enter into the Forbearance Agreement and that Cynergy was harmed as a result. The alleged

¹⁰ Paladini states in his Objection that the Forbearance Agreement "vitiat[e] certain subordination agreements," the effect of which allegedly exposed Paladini to additional personal liability. (Obj. at 6, 21.) Those subordination agreements are never identified and the Amended Complaint contains no such allegations. (Compl. ¶¶ 177-183.) The Court, therefore, should disregard Paladini's arguments concerning subordination agreements.

harm to Paladini was secondary: he signed the Forbearance Agreement as a guarantor because Cynergy signed as a borrower and any exposure he faced necessarily followed from Cynergy's defaults. Indeed, Paladini contends that his execution of the Forbearance Agreement subjected to him to "liability" and "a barrage of lawsuits" that, as discussed above, cannot serve as the basis here for liability against Moneris.

3. Paladini Does Not Allege A Cause of Action To Redress Reputational Harm

29. Paladini complains of a parade of horrors brought upon his reputation allegedly due to the defendants' "course of conduct in spreading false rumors and concocting breaches that did not exist," which purportedly caused Cynergy's former CFO, Gustavo Ceballos, to leave the United States, "fueling rumors that Cynergy's leaders had somehow siphoned funds for their personal use." (Obj. at 22-23.) Although initially employed by Comvest, the purchaser of Cynergy's assets, Paladini alleges he was "unceremoniously discharged," and, due to his damaged reputation, he will be unable to obtain a position in the electronic payments industry again. (*Id.*)

30. As Moneris explained in its opening papers, Paladini only alleges reputational harm in connection with his cause of action for tortious interference with business relations. (Mot. at 18, ¶¶ 55-57.) That cause of action is derivative because Paladini seeks to redress harm that Moneris allegedly caused Cynergy to suffer by interfering with its prospective sale to a third-party, EVO. (*Id.*) Any sale of the assets benefits the company and all its creditors and stockholders, as does a sale of stock. The Debtors fully released Moneris which release would include any such claims.

31. Otherwise, Paladini does not allege a cause of action against Moneris for "spreading rumors," "concocting breaches," or causing Comvest, a third-party, to terminate his

employment. Paladini cannot rely on such alleged injuries untethered to any cause of action against Moneris to circumvent this Court's orders enjoining claims released against Moneris.

D. The Settlement Order Does Not Preserve Paladini's Claims

32. Despite Paladini's argument to the contrary, (Obj. at 10), Moneris acknowledged in its Motion that the Settlement Order's injunction provision allows Paladini to preserve a narrow set of personal claims "indirectly related to [Cynergy's] reserves" but that "do not affect the entitlement to, calculation of, ownership, control, or distribution of the reserves." (Mot. at 9, ¶ 24.)

33. Paladini's argument that the carve-out preserves the claims he asserts against Moneris in the New York Action relies on the false premise that those claims are direct, not derivative. (Obj. 10-11) ("Paladini may bring personal claims against the Harris Defendants.") Should the Court conclude that Paladini's claims are derivative, then they are not "personal" to Paladini and they are enjoined pursuant to the Settlement Order.

34. Even if not derivative, the claims Paladini asserts against Moneris in the New York Action are nonetheless released and enjoined by the Settlement Order because they would "affect the entitlement to, calculation of, ownership, control, or distribution of the reserves."

35. The gravamen of the New York Action is that Moneris falsely accused Cynergy of mishandling the Rolling Reserves and breaching its obligations under the BIN Agreement, which in turn, forced Cynergy to execute the Forbearance Agreement and ultimately file for bankruptcy. (Compl. ¶¶ 73, 110, 132-158). According to Paladini, the "Rolling Reserves were not due and payable" to Moneris (*id.* ¶ 123), Moneris "was not entitled to these funds" out of the asset sale proceeds, (*id.* ¶ 157) and the "Defendants' requirement that approximately \$21MM of the sale proceeds be allocated to the Rolling Reserves exposed Paladini to further liability under his guaranty." (*Id.* ¶ 166.) A settlement on the entitlement to and distribution of the Rolling

Reserves was approved by this Court. Paladini cannot collaterally attack that settlement by bringing the New York Action for his personal gain.

36. In short, the premise of Paladini's lawsuit is that Moneris is not entitled to the Rolling Reserves. Because he did not preserve the right to pursue any claim based on that premise, direct or derivative, the claims he asserts in the New York Action are released and enjoined.

37. In fact, Paladini could not preserve such claims in the Settlement Order because he had already released Moneris from all claims in this Court's final order approving debtor-in-possession financing. *See* Final Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Postpetition Financing, (III) Granting Senior Priming Liens and Superpriority Claims, and (IV) Granting Adequate Protection to the Prepetition Secured Parties [D.I. 281] ("DIP Financing Order"). Specifically, Paladini, a Credit Party (as defined in the DIP Financing Order), "waived, discharged and released any and all rights to challenge any of the Prepetition Harris Indebtedness¹¹ and the security for those obligations, and to assert any offsets, defenses, claims, objections, challenges, causes of action and/or choses of action against Harris and/or any of its respective affiliates, parents, subsidiaries, agents, attorneys, advisors, professionals, officers, directors and employees." (*Id.* ¶ E.(9) at pp. 20-21.) Having released Moneris from *all* claims through the date of the DIP Financing Order, he had no claims left to preserve against Moneris through the Settlement Order's carve-out.

¹¹ The "Prepetition Harris Indebtedness" is defined to include all of the Debtors' obligations to Moneris under the BIN Agreement and other agreements between Cynergy and Moneris.

II. THE BANKRUPTCY COURT HAS JURISDICTION ON THE MOTION TO ENFORCE ITS ORDERS

A. Moneris Properly Sought Relief By Motion Rather Than By An Adversary Proceeding

38. Paladini mischaracterizes the relief sought in the Motion. Moneris is not asking this Court to decide for the first time whether an injunction should be ordered. Moneris is seeking to have this Court enforce its prior injunctive orders and compel Paladini to comply with its prior orders. Paladini has run afoul of the previously issued releases and injunctions in the DIP Financing Order, the Settlement Order, the Plan and the Confirmation Order. He is also skirting around the injunction issued in the Martillo Order in contravention of the principles set forth therein.

39. Paladini misstates the applicable rule of the Federal Rules of Bankruptcy Procedure to allege that the relief sought in the Motion requires the commencement of an adversary proceeding. If he had stated the entirety of Rule 7001(7) of the Bankruptcy Rules as cited in the Motion, he would not have left out the exception to the Rule which is on point here. Specifically Rule 7001(7) of the Bankruptcy Rules provides that an adversary proceeding is “a proceeding to obtain an injunction or other equitable relief, *except* when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief” (emphasis added).

40. The legislative notes on Rule 7001 explain that:

This rule is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief that is provided for in a plan under circumstances in which substantive law permits the relief.

Committee Notes on Rules—1999 Amendment.

41. Moneris seeks to have Paladini comply with the injunctive relief provided for under the confirmed Plan. As per the cases to which Moneris cited in the Motion, it is proper to proceed by motion to uphold the injunctions and releases in confirmation plans rather than by

adversary proceeding. *See In re SemCrude L.P.*, No. 09-11525 BLS, 2011 WL 1981713, at *8 (Bank. D. Del. Oct. 7, 2011) (granting motion to enforce confirmation order enjoining state court suit brought by debtor's limited partners against debtor's former CEO and debtor's auditor); *In re Charter Commc'ns*, 2012 WL 502764, at *4-*5 (Bankr. S.D.N.Y. Feb. 8, 2012) (enforcing the releases in bankruptcy plan against plaintiffs in securities class action litigation).

42. None of the cases cited by Paladini in the Objection at page 17 address injunctions under a plan, nor are any of them applicable. The first case held that bankruptcy courts do not have the power to reinstate the automatic stay once it has been lifted, in that case to allow a foreclosure sale, but noted that the debtor could file a complaint for injunctive relief to enjoin the foreclosing party. *Stacy Fuel & Sales, Inc. v. Ira Phillips, Inc. (In re Stacy)*, 167 B.R. 243, 248 (N.D. Ala. 1994). Here, Moneris is not seeking to lift an automatic stay, and is not seeking injunctive relief outside of a plan. Rather, Moneris is seeking enforcement of an already existing injunction provided for in a confirmed plan. The second case is similarly inapplicable because it involved the request for a stay of a district court decision pending appeal and the apparent request by the debtor for an injunction from the district court to prohibit a chapter 7 trustee from selling assets of the estate. *In re Innovative Commc'n*, 2008 WL 4755763 (D.V.I. Oct. 27, 2008). Again, Moneris isn't requesting the Court to determine if the standards for an injunction are met; rather Moneris is seeking enforcement of an already existing injunction under a chapter 11 plan and confirmation order. Finally, the third case cited by Paladini does not involve injunctive relief at all. There the Seventh Circuit held that an action by creditors seeking turnover of a debtor's pension fund must be brought through an adversary proceeding rather than by motion. *In re Perkins*, 902 F.2d 1254 (7th Cir. 1990). These cases are simply inapplicable to the Motion.

43. In fact, this Court provided a road map for the relief sought by the Motion at the hearing on the Liquidation Trustee's and Martillo's complaint for a preliminary injunction when it observed that the Liquidation Trustee "could have moved to enforce the injunctive relief in the plan "rather than initiating an adversary proceeding." (9/27/2011 Tr. at 67:7-11 [D.I. 1418].)

B. Paladini's Claims Are Derivative And Therefore The Court Has Jurisdiction

44. Contrary to Paladini's assertion, the Motion does not seek the adjudication of noncore state law issues between nondebtor third parties. It does invoke this Court's authority to enforce its prior orders over which this Court had jurisdiction and authority to issue and has retained jurisdiction.

45. Analogous to this Court's holding in the Martillo Order, this Court has subject matter jurisdiction over the motion to enforce its prior orders and over the claims that Paladini asserted against Moneris in the New York Action. *See In re CD Liquidation Co., LLC*, 462 B.R. at 135 ("It is clear that this Court may enjoin Paladini from prosecuting the New York Action. This Court unquestionably has subject matter jurisdiction over the claims that Paladini seeks to prosecute against Martillo.").

46. Paladini's assertion that the Court lacks subject matter jurisdiction because this is a dispute between non-debtor parties is a red herring. The Court must first determine if the claims are direct or derivative. Paladini's claims against Moneris are indirect and derivative claims which could only have been asserted by the Debtors and the Liquidation Trustee. *See PHP Liquidating, LLC v. Robbins (In re PHP Healthcare Corp.)*, 2005 WL 488785, *2-*3 (3d Cir. 2005) ("an individual creditor of a debtor may not assert a general claim belonging to all creditors"). Because the claims are derivative, they arise under and in the Debtors' chapter 11 cases. Accordingly, this Court has jurisdiction to enforce its orders over the claims in the New York Action. As set forth in the Martillo Order:

Paladini's challenge to the Complaint as being beyond this Court's subject matter jurisdiction under Section 1334(b) of Title 28 of the United States Code (the "Judicial Code") is wrong. The Complaint seeks to enjoin Paladini from prosecuting causes of action that belong to the Liquidation Trustee. As such, the Complaint arises under and in a case under Chapter 11 of the Bankruptcy Code and is related to such a case. The Court clearly has the authority and the jurisdiction to enforce its orders, here the Confirmation Order. *In re Continental Airlines, Inc.*, 279 F.3d 226, 230-31 (3d Cir. 2002).

In re CD Liquidation Co., LLC, 462 B.R. at 135-36.

47. The New York Action is not an unrelated action between non-debtor third parties. The causes of action properly belong, to the extent not released, to the Liquidation Trustee. The Liquidation Trustee has the exclusive power to assert actions for general harms under chapter 5 of the Bankruptcy Code. (Plan [D.I. 1190], pp. 2, 7, 9, 17, 19 & 22 (Liquidation Trustee shall dispose of all "Liquidation Trust Assets" which include "Causes of Action" (but exclude Settlement Escrowed Funds) and "Recovery Actions," which include "all causes of action under chapter 5 of the Bankruptcy Code; Liquidation Trust Agreement will provide for the prosecution of Causes of Action assigned to the Liquidation Trust.")) The Plan preserved the right of the Liquidation Trustee to enforce claims which were not otherwise released in the Plan or Settlement Order. (Plan, Article V § E ("Except as provided in the Sale Order, the Settlement Order, the Plan, or in any contract, instrument, release or other agreement entered into or delivered in connection with the Plan including the Liquidation Trust Agreement, in accordance with Section 1123(b) of the Bankruptcy Code, the Liquidation Trustee will retain and may enforce any claims, demands, rights and Causes of Action that any Estate may hold against any person or Entity to the extent not released under the Sale Order, the Settlement Order, Article XII.H or otherwise."))

48. Further, the Liquidation Trustee has the authority and responsibility to "effect all actions and execute all agreements, instruments and other documents necessary to implement the Plan, including, without limitation, the Settlement Order, Settlement Term Sheet and Settlement

Escrow Account.” (Plan, Article V § A.3.) The Debtors and then by succession, the Liquidation Trustee, has the authority, not Paladini, to assert causes of action against parties and implement the injunctions and releases set forth in the applicable orders and agreements.

49. Even if the Court were to apply the test for “related to” jurisdiction, the New York Action could conceivably have an effect on the estate. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Paladini’s usurpation of general claims which belong to the estate has a conceivable effect on the administration of the estate. Any recovery by Paladini, a shareholder, would violate the priority schemes of the Bankruptcy Code and the distributions set forth in the Plan (shareholders did not receive a distribution). The fact that the estate has released Moneris from any such liability would mean that further prosecution would be a breach of the Settlement Term Sheet and in contravention of the Plan. This Court retained jurisdiction over causes of action for breach of the Settlement Term Sheet. (Mot., Ex. 4, Settlement Term Sheet, p. 14 (“Challenges: Any action relating to the Settlement Term Sheet shall be brought in the Bankruptcy Court unless and until the bankruptcy cases are closed by order of the Bankruptcy Court, after which such action may be brought in the federal or state courts of New York . . .”). The Plan specifically allowed for Moneris to enforce compliance with the Settlement Order. (Plan, Article XII § G (“This Permanent Injunction shall not, however, apply to limit, abridge or otherwise affect (a) the rights of the parties to the Settlement Term Sheet or as provided in the Settlement Order, including, without limitation, the rights of Moneris Solutions, Inc. and Harris N.A., and any and all other parties to enforce the terms of the Settlement Term Sheet or *compel compliance with the Settlement Order*; . . .”) (emphasis added).)

50. Paladini has unsuccessfully tried before to usurp the powers of the Debtor and the Liquidating Trustee by commencing the Martillo Action and by pleadings filed within the plan

confirmation process. This Court preliminarily enjoined him from continuing the Martillo Action. His objections to releases under the Plan in connection with his desire to preserve standing to personally bring claims against creditors was overruled by this Court at the Confirmation Hearing.¹² The Court, however, made clear at the confirmation hearing that the injunction under the Plan did not limit personal claims from being pursued. (12/21/2010 Tr. at 64 [D.I. 1227].) Paladini has not brought personal claims in the New York Action. He is once again attempting to litigate rights of the Debtors/ Liquidation Trustee for his own personal gain despite this Court's orders to the contrary.

51. Thus, this Court has authority and jurisdiction to enforce the DIP Financing Order, the Settlement Order, the Plan and the Confirmation Order.

C. The Court Has Jurisdiction To Issue Injunctions In The Enforcement Of Its Prior Orders

52. Moreover, pursuant to the equitable powers of the Court under Section 105(a) of the Bankruptcy Code and the power to issue injunctions under the "All Writs Act" of Section 1651(a) of the Judicial Code, the Court may grant the relief requested in the Motion to preserve and protect the DIP Financing Order, the Confirmation Order and the Settlement Order and the Court's exclusive jurisdiction over the matters enumerated in the Plan. *See In re CD Liquidation Co., LLC*, 462 B.R. at 136 (holding the Court "may grant the relief requested in the Complaint in order to preserve and protect the Confirmation Order and this Court's exclusive jurisdiction over the matters enumerated in the Plan"); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099-

¹² This Court stated: "As far as the section 502(a) argument is concerned, I do think that it is clear that where we have a liquidating trustee, as we do in this case, with full authority to pursue any litigation or challenge claims, that it is appropriate and necessary that that fiduciary have the unfettered opportunity to pursue that litigation, or not pursue the litigation in its judgment, and if a party believes that its judgment is improper for any reason, that is something that Mr. Paladini or others may bring to the Court's attention. And if the Court agrees, then they would be given provided standing to pursue those claims. But under the circumstances, I do think that it would be inappropriate to grant standing at this time under section 502(a)." (12/21/2010 Tr. at 52-53 [D.I. 1227].)

1102 (11th Cir. 2004) (discussing federal courts' power to issue injunction under All Writs Act and noting traditional factors supporting injunctive relief need not be shown).

53. This Court's exclusive jurisdiction to hear and determine the derivative claims and the motion was expressly reserved under the Plan. (Plan, Article XI.) The Plan expressly stated that this Court retained "exclusive jurisdiction over all matters arising out of, and related to", the Debtors' chapter 11 cases and the Plan. This included, but was not limited to, jurisdiction to:

(5) [e]nter and *enforce such orders* as may be necessary or appropriate to execute, implement, or consummate *the provisions of the Plan* and all contracts, instruments, *releases* and other agreements or documents created in connection with the *Plan*, the Liquidation Trust Agreement, the Disclosure Statement or the *Confirmation Order* (emphasis added);

(6) [h]ear and determine disputes arising in connection with the interpretation, implementation, consummation or *enforcement of the Plan*, including disputes arising under agreements, documents or instruments executed in connection with the Plan (emphasis added);

(8) [*i*]ssue *injunctions*, enter and implement other orders, or take such other actions as may be necessary or appropriate *to restrain interference by any Entity* with implementation, consummation or *enforcement of the Plan or the Confirmation Order* (emphasis added);

(10) [h]ear and determine any matters arising in connection with or relating to the *Plan*, the Disclosure Statement, the Liquidation Trust Agreement or the *Confirmation Order* (emphasis added);

(11) [*e*]nforce *all orders, judgments, injunctions, releases*, exculpations, indemnifications and rulings *entered in connection with the Chapter 11 Cases*; and

(15) [h]ear and determine such other matters as may be provided *in the Confirmation Order* or as may be authorized under, or not inconsistent with, provision of the Bankruptcy Code (emphasis added).

54. The Plan specifically provides "[a]ll injunctions or stays contained in the Settlement Order, Plan or Confirmation Order shall remain in full force and effect in accordance with their terms." (Plan, Article XII § O (Terms of Injunction or Stay).) It further incorporates

the injunctions from the Settlement Order as follows: “The Settlement Term Sheet is incorporated by reference in this Plan as if set forth herein in full. The Settlement Order remains binding and in full force and effect.” (Plan, Article XII § R. (Incorporation of Settlement Order).)

55. Similarly, in the Confirmation Order, this Court expressly preserved jurisdiction over the Plan and retained jurisdiction to enjoin violations of the Plan. (Confirmation Order ¶ 17.)

56. Paladini’s challenge to the Court’s jurisdiction to hear the motion as being a non-core proceeding unrelated to the Debtor’s bankruptcy cases is completely misguided. None of the cases Paladini cites address the distinction between derivative and direct claims or a collateral attack on prior orders of the court.

57. Paladini’s assertions that none of the Debtors are named in the New York Action nor is the Liquidation Trustee involved is equally incongruous. (Obj. at 13.) It is no surprise that those entities are not parties. First, Paladini has settled with the Liquidation Trustee in the Debtors’ estates. *See* Order Granting the Motion of the Liquidating Trustee for an Order Approving and Authorizing Compromise of Controversies By and Among the Liquidating Trustee, XL Specialty Insurance Company and Marcelo Paladini (settling fee dispute with defense insurer for Paladini) [D.I. 1533]; Stipulation for Dismissal of Appeal, *Charles M. Moore, in his capacity as Liquidation Trustee v. Marcelo Paladini*, [D.I. 1546]; Adv. Pro. 10-53190-KG, Bankr. D. Del., Notice of Dismissal of Adversary Proceeding [D.I. 86].) Second, Paladini has been enjoined from bringing claims against Martillo that belonged to the estate. *See In re CD Liquidation Co., LLC*, 462 B.R. at 137. Third, pursuant to the Settlement Term Sheet, the

Settlement Order, the Plan, and the Confirmation Order, the Debtors, and therefore the Liquidation Trustee, have settled with and released Moneris.

58. Because Paladini seeks (i) to prosecute personally, (ii) before the United States District Court for the Southern District of New York, (iii) causes of action that were the right of the Liquidation Trustee to assert, (iv) which have been released by the Debtors with such releases approved by prior orders of this Court (v) in violation of the releases and injunctions provided for in the DIP Financing Order, the Settlement Term Sheet, the Settlement Order, the Plan, and the Confirmation Order and (vi) over which this Court retained jurisdiction, Moneris properly brought the Motion before this Court.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening motion papers, Moneris Solutions and Harris respectfully request that the Court (i) grant their motion to enforce the Settlement Term Sheet, the Settlement Order, the Plan and the Confirmation Order, (ii) enforce the existing injunctions and enjoin Marcelo Paladini from continuing the New York Action and (iii) grant such other and further relief as is just.

Dated: October 24, 2012
Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

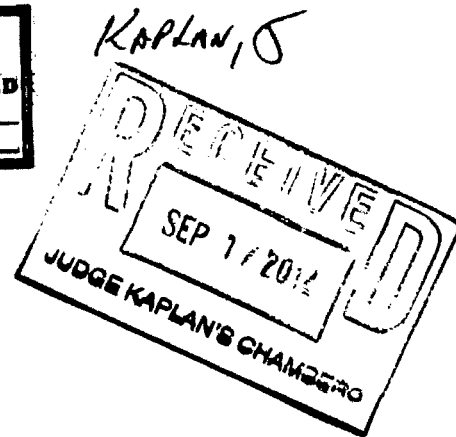
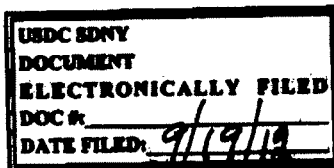
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EXHIBIT 5



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*Attorneys for Defendants
BMO Harris Bank N.A. and
Moneris Solutions, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MARCELO PALADINI

Plaintiff,

v.

BMO HARRIS BANK, N.A. and
MONERIS SOLUTIONS, INC.,

Defendants.

Case No. 12-cv-05178 (LAK)

STIPULATION AND ORDER STAYING THE
ACTION PENDING A DECISION OF THE
BANKRUPTCY COURT

WHEREAS, Plaintiff filed an amended complaint on July 11, 2012;

WHEREAS, Defendants contend that Plaintiff's claims are released and enjoined by a confirmed Joint Plan of Liquidation and related orders (the "Plan") of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") in *In re CD Liquidation Co.*, Case No. 09-13038 (KG);

WHEREAS, Plaintiff contends that Plaintiff's claims were not and could not have been released by the Plan and were instead expressly carved out of the Plan;

WHEREAS, on August 31, 2012, Defendants filed with the Bankruptcy Court a motion to enforce the Bankruptcy Court's prior orders and, pursuant to such orders, to enjoin this action (the "Motion to Enforce");

- 2 -

WHEREAS, Plaintiff contends that the Defendants' Motion to Enforce is improper, that the Bankruptcy Court does not have jurisdiction over Plaintiff's claims in the instant action and that the Defendants are not entitled to injunctive relief; and

WHEREAS, on August 31, 2012, Defendants filed a motion to stay (the "Motion to Stay") this action pending a resolution of the Motion to Enforce.

IT IS HEREBY STIPULATED AND AGREED:

1. The Motion to Stay is withdrawn without prejudice;
2. This action is stayed upon consent of all parties without prejudice to any and all of the parties' rights, which are expressly reserved, pending a written decision of the Bankruptcy Court disposing of the Motion to Enforce;
3. In the event that the Bankruptcy Court's decision does not enjoin some or all of this action:
 - a. Defendants may file and serve a motion to dismiss the Amended Complaint within thirty days of the entry of the Bankruptcy Court's decision;
 - b. Plaintiff will have thirty days thereafter to file and serve an opposition to Defendants' motion to dismiss; and
 - c. Defendants will have fifteen days thereafter to file a reply in further support of the motion to dismiss.

- 3 -

New York, New York
September 14, 2012

ASCETTINO STRUHS LLP


By: 

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September 14, 2012

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By: 

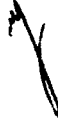
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*Attorneys for Defendants BMO Harris
Bank N.A. and Moneris Solutions, Inc.*

So Ordered:



Lewis A. Caplan
United States District Judge

9/19/12 

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----	X	
In re	:	Chapter 11
	:	
CD LIQUIDATION CO., LLC, f/k/a	:	Case No. 09-13038 (KG)
CYNERGY DATA, LLC, <i>et al.</i> ,	:	
	:	(Jointly Administered)
	:	
Debtors.	:	
-----	X	

CERTIFICATE OF SERVICE

I hereby certify that copies of the MOTION OF MONERIS SOLUTIONS, INC. AND BMO HARRIS BANK N.A. FOR ORDER (1) ENFORCING (A) THE ORDER APPROVING THAT CERTAIN SETTLEMENT REGARDING RECONCILIATION OF AMOUNTS RELATED TO THE ROLLING RESERVE FUND, (B) THE ORDER CONFIRMING THE JOINT PLAN OF LIQUIDATION OF CD LIQUIDATION CO., LLC, CD LIQUIDATION CO. PLUS, LLC, AND CYNERGY DATA HOLDINGS, INC. AND (C) COMPLIANCE WITH THE JOINT PLAN OF LIQUIDATION OF DEBTORS AND (2) ENJOINING MARCELO PALADINI were served today by first class mail to the persons set forth below and all other parties via CM/ECF.

ASCETTINO STRUHS LLP
Stephen A. Aschettino
Nicole Joy Leibman
1500 Broadway, 21st Floor
New York, New York 10036
Attorneys for Plaintiff Marcelo Paladini

Dated: August 31, 2012

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