

**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.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

**Hearing Date: November 26, 2012 at 1:00 pm (E.T.)**

**Re: Docket Nos. 1549, 1551, 1554, 1560**

**OBJECTION OF MONERIS SOLUTIONS, INC. AND BMO HARRIS BANK N.A. TO  
MARCELO PALADINI'S MOTION FOR LEAVE TO FILE A SUR-REPLY**

Moneris Solutions, Inc. ("Moneris Solutions") for itself and in its capacity as agent for BMO Harris Bank N.A. ("Harris") (together with Moneris Solutions, "Moneris"), by and through its undersigned counsel, hereby objects to Marcelo Paladini's ("Paladini") *Motion for Leave to File a Sur-Reply in Further Support of His Objection to Motion By Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and For Related Relief* [D.I. 1560] (the "Sur-Reply Motion"). In support of this objection, Moneris respectfully states as follows:

By his Sur-Reply Motion, Paladini belatedly and improperly attempts to expand upon his already filed *Objection by Marcelo Paladini to Motion by Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and for Related Relief* (the "Objection") [D.I. 1551]. He does so under the guise that Moneris raised new arguments in its *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*

<sup>1</sup> 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.



*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* (the “Reply”) [D.I. 1554]. To the contrary, because the Reply responds to the arguments Paladini raised in his Objection, a Sur-Reply is inappropriate and the Court respectfully should deny the Sur-Reply Motion.

### **PROCEDURAL BACKGROUND**

1. Moneris filed and served the Reply on October 24, 2012, for a hearing originally scheduled for Tuesday, October 30, 2012. Two days later, on October 26, 2012, the Trustee filed with this Court its *Notice of Agenda of Matters Scheduled for Hearing Filed by Charles M. Moore, in his capacity as the Liquidation Trustee of the CD Liquidation Trust* (the “Original Agenda”) [D.I. 1556]. As of the time of filing of the Original Agenda, Paladini did not file any motion for leave to file a sur-reply. Later on Friday, October 26, 2012, the parties agreed to adjourn the October 30 hearing due to the threat of Hurricane Sandy hitting the East Coast. Accordingly, on October 26, 2012, the Trustee filed an *Amended Notice of Agenda of Matters Scheduled for Hearing*, noticing that the matter had been adjourned until November 14, 2012, at 2:00 p.m. (the “Second Agenda”) [D.I. 1557].

2. On November 8, 2012, Paladini requested a further adjournment of two weeks until after Thanksgiving due to complications arising from Hurricane Sandy and an additional storm that hit the New York area. Paladini did not ask Moneris whether it would oppose a motion for leave to file a sur-reply and he did not otherwise raise any concerns with Moneris’s Reply. Moneris extended the courtesy of the adjournment and, on November 9, 2012, the Trustee filed its third *Notice of Agenda of Matters Scheduled for Hearing*, noticing that the matter had been adjourned until November 26, 2012, at 1:00 p.m. (the “Third Agenda”) [D.I. 1558].

3. On November 20, 2012, eight business days after the agreement to adjourn for the second time and on the same date that the Agenda was due to be filed, Paladini filed the Sur-Reply Motion and attached to it Paladini's proposed *Sur-Reply in Further Support of His Objection to Motion By Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and For Related Relief* [Exhibit B to D.I. 1560] (the "Proposed Sur-Reply").

4. Subsequently, the Trustee filed its fourth agenda, the *Notice of Agenda of Matters Scheduled for Hearing on November 26, 2012 at 1:00 p.m. (Eastern Time)* (the "Fourth Agenda") [D.I. 1561]. The Trustee listed the Sur-Reply Motion on the Fourth Agenda.

### **ARGUMENT**

5. Paladini's Sur-Reply Motion fails to meet the requirements for granting leave to file the Proposed Sur-Reply. The Sur-Reply Motion was improperly filed weeks after the Reply was filed. It is unnecessary where no new arguments were raised in the Reply. The Sur-Reply Motion is a veiled attempt for Paladini to get a second bite at the apple after failing to address the derivative issues raised by Moneris in the Motion.

#### **A. Paladini's Sur-Reply Motion Is Untimely And Improperly Filed**

6. Paladini did not seek shortened notice to file the Sur-Reply Motion although he had ample time to do so. Further, in contravention of the practice of filing pleadings the day prior to the hearing agenda deadline, Paladini waited to the day the Fourth Agenda was due to file his Sur-Reply Motion.

7. Paladini seeks relief under Rules 1001-1(c) and 9006-1(d) of the Local Rules for the United States Bankruptcy Court District of Delaware (the "Local Rules"). Local Rule 9006-1 governs the time for service and filing of Motions and Objections. Subsection (d) of Local Rule 9006-1 provides that "Reply papers by the movant, or any party that has joined the movant, may be filed and, if filed, shall be served so as to be received by 4:00 p.m. prevailing Eastern

Time the day prior to the deadline for filing the agenda.” Del. Bankr. L.R. 9006-1(d). Local Rule 9006-1 does not provide for or expressly prohibit the filing of a sur-reply. Paladini, however, had ample time to file the Sur-Reply Motion prior to the filing of the Original Agenda and well before the deadline for filing the Fourth Agenda.

8. Second, Paladini attached the Proposed Sur-Reply to his motion without waiting for the Court’s permission to file it. *See Kondrath v. Arum*, 881 F. Supp. 925, 927 n.2 (D. Del. 1995) (“After the defendants filed their reply brief, the plaintiffs filed a motion for leave to file a sur-reply brief, and the sur-reply itself . . . . Since approval was neither sought nor granted before the plaintiffs filed their sur-reply brief, that filing was improper.”)

**B. The Reply Raises No New Arguments Warranting a Sur-Reply**

9. Paladini argues that an issue is waived unless a party raises it in its opening brief and alleges that Moneris raised two new arguments in the Reply. Sur-Reply Motion ¶ 3. Moneris, however, did not raise any new arguments in the Reply and, therefore, the Sur-Reply Motion should be denied. *Southco, Inc. v. Penn Eng’g & Mfg. Corp.*, 768 F. Supp. 2d 715, 721 (D. Del. 2011) (“Because Southco did not raise new arguments in its Reply Brief, the Court concludes that the filing of PEM’s Sur-Reply Brief is unnecessary.”)

10. Paladini erroneously contends that Moneris raised for the first time in the Reply that (i) Paladini’s claims in the New York Action are not preserved by a carve-out of the Settlement Order’s injunction provisions, and (ii) the DIP Financing Order incorporates a release of claims against Moneris by Paladini.

11. In its opening motion papers, Moneris argues that Paladini’s claims are derivative. Accordingly, Paladini’s claims belong to the Debtors, which released Moneris from such claims. This Court enjoined those released claims through the Settlement Order, the confirmed Plan and the Confirmation Order.

12. Moneris acknowledges in its opening papers – and reiterates that acknowledgment in the Reply – that the Settlement Order’s injunction provision contains a narrow carve-out by which Paladini preserved certain “personal,” *i.e.*, direct, claims against third parties. (Mot. at 9, ¶ 24, *quoting* Settlement Order [D.I. 935], ¶ 11; Reply at 2.) Because Paladini’s claims in this lawsuit are derivative, not direct, Moneris explains in its opening papers that the carve-out does not apply to preserve such claims. Moreover, Moneris quoted the carve-out in its opening papers, including the exception that does not permit Paladini to assert any claims, as he does in this lawsuit, which would “affect the entitlement to, calculation of, ownership, control or distribution of the reserves.” (Mot. at 9, ¶ 24.) Quite clearly, Moneris did not raise this argument for the first time on Reply.

13. In his Objection, Paladini repeatedly argues nonetheless that his claims are “personal” and, in his view, preserved by the carve-out. Notably, Paladini does not contend that the carve-out preserves the claims if, as Moneris submits, they are derivative. Thus, if the Court accepts Moneris’s position, it need not even consider the carve-out language.

14. Due to the emphasis Paladini placed on the Settlement Order’s carve-out language in his Objection, Moneris responded in the Reply with several arguments why Paladini is wrong *even if* his claims are treated as direct claims. It is those responsive arguments that Paladini erroneously contends Moneris raised for the first time on Reply. The release by Paladini as a “Credit Party” pursuant to the DIP Financing Order provided such an example. (Reply at 14, ¶ 37.) Even if his claims are treated as direct, Paladini has released Moneris for actions arising prior to the DIP Financing Order and he is enjoined by the Settlement Order from asserting any claim that accrued thereafter that challenges Moneris’s entitlement to the Debtors’ reserves.

15. Because the Reply does not raise new arguments, Paladini should not be permitted to file the Proposed Sur-Reply and the Sur-Reply Motion should be denied.

**C. Paladini Inappropriately Filed The Proposed Sur-Reply To Augment His Prior Objection To The Motion**

16. For the reasons discussed above, the Court need not consider the Proposed Sur-Reply because Paladini is not entitled to file it.

17. Moreover, a review of the Proposed Sur-Reply reveals Paladini's ulterior motive to augment his Objection by – ironically – arguing for the first time that his claims are not derivative under Delaware law and that Moneris mischaracterized his arguments in the Objection. (Proposed Sur-Reply at 6, ¶ 10.) Paladini's attempt at a second bite at the apple is not a proper basis to grant leave for a sur-reply. *See Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001) (“The plaintiff in her motion for leave to file a sur-reply fails to address any new matters presented by the defendants’ reply. The plaintiff contends that the defendants have mischaracterized her position.... Because this contention does not involve a new matter but rather an alleged mischaracterization, the court denies the plaintiff’s motion.”)

18. In addition, Paladini attempts through the Proposed Sur-Reply to argue that the Court, at the Plan Confirmation Hearing, preserved the types of claims he asserts in this lawsuit. The discussion at the Plan Confirmation Hearing to which he cites involved Paladini's objection to the Plan's permanent injunction under Article XII.G and releases under Article XII.H. *See Paladini's Limited Objection to Confirmation* [D.I. 1178] and *Paladini's Reply in Support of Objection* [D.I. 1193]. The Court's ruling that the “injunction does not limit personal claims from being pursued,” (Obj. at 5), did not in any way limit the Settlement Order's injunction and releases or the incorporation of them into the Plan. The “injunction” under the Plan at Article XII.G expressly preserves the Settlement Order injunctions. (Plan at Article XII.G [D.I. 1190].)

Similarly, the releases under Article XII.H of the Plan expressly did not alter the rights to releases under paragraph 11 of the Settlement Order. (Plan at Article XII.H [D.I. 1190].) Finally, Article XII.R of the Plan, which incorporated the Settlement Term Sheet and held the Settlement Order to be binding, was not addressed as part of the Confirmation Hearing's ruling to preserve personal claims. (Plan at Article XII.R [D.I. 1190].)

19. Because the Plan's injunctive and release provisions never intended to, and specifically provided that they did not, limit the injunctive and release provisions of the Settlement Order, the Court's ruling at the Confirmation Hearing did not alter the injunctive provisions of the Settlement Order.

20. The remaining portions of the Sur-Reply, paragraphs 10-14, do not address any alleged new arguments. Instead Paladini takes an extra opportunity to refute the cases cited in Moneris's opening motion papers. This is not a proper basis for granting leave to file a sur-reply.

21. Thus, contrary to the stated reasoning, the Proposed Sur-Reply is not a response to new arguments raised by Moneris (because there are none) and does not clarify mischaracterizations by Moneris. Rather, the Proposed Sur-Reply itself mischaracterizes the existing Orders and presents additional arguments that Paladini could have raised in his Objection.

**CONCLUSION**

For the foregoing reasons, Moneris Solutions and Harris respectfully request that the Court deny the Sur-Reply Motion and grant such other and further relief as is just.

Dated: November 21, 2012  
Wilmington, Delaware

**DRINKER BIDDLE & REATH LLP**

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N.A.*



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

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

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the OBJECTION OF MONERIS SOLUTIONS, INC. AND BMO HARRIS BANK N.A. TO MARCELO PALADINI’S MOTION FOR LEAVE TO FILE A SUR-REPLY were served today by electronic mail upon the persons set forth below and all other parties via CM/ECF.

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Dated: November 21, 2012

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