

United States Bankruptcy Court  
District of Delaware

**APPEAL TRANSMITTAL SHEET**

Case Number: 09-13038-KG

☒ BK ☐ AP

If AP, related BK case number: \_\_\_\_\_

Title of Order Appealed: Order Enforcing Compliance with the Plan, the Settlement Order and the Confirmation OrderDocket Number: 1570Date Entered: Dec 28, 2012

Item Transmitted:

<input checked="" type="radio"/> Notice of Appeal	Docket Number: <u>1571</u>	Date Entered: <u>Jan 11, 2013</u>
<input type="radio"/> Amended Notice of Appeal	Docket Number: _____	Date Entered: _____
<input type="radio"/> Cross Appeal	Docket Number: _____	Date Entered: _____
<input type="radio"/> Motion for Leave to Appeal	Docket Number: _____	Date Entered: _____
<input checked="" type="radio"/> Record on Appeal	Docket Number: <u>1576</u>	Date Entered: <u>Feb 22, 2013</u>

\*Appellant/Cross Appellant:

CD Liquidation Co., LLC fka Cynergy Data, LLC, et al.

Counsel for Appellant:

Eric SutttyElliott Greenleaf1105 Market Street, Suite 1700Wilmington, DE 19801

Appellee/Cross Appellee:

Moneris Solutions, Inc.

Counsel for Appellee:

Howard CohenDrinker Biddle & Reath LLP1100 N. Market Street, Suite 1000Wilmington, DE 19801*\*if additional room is needed, please attach a separate sheet.*

Filing Fee Paid?

☒ YES ☐ NO

IFP Motion Filed by Applicant?

☐ YES ☒ NO

Have Additional Appeals of the Same Order been Filed?

☐ YES ☒ NOIf so, has District Court assigned a Civil Action Number? ☐ YES ☒ NO Civil Action # \_\_\_\_\_

Additional Notes: \_\_\_\_\_

Date: Feb 22, 2013By: Sherry J. Stiles

Deputy Clerk

Bankruptcy Court Appeal(BAP) Number: 13-4

For Use By U.S. Bankruptcy Court

1/15/2013



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

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

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**NOTICE OF APPEAL**

Marcelo Paladini, by and through his counsel, Elliott Greenleaf and Aschettino Struhs LLP, appeals under 28 U.S.C. §158(a) from the Order Granting the Motion of Moneris Solutions, Inc. and BMO Harris Bank N.A. and (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 (Dkt. #1549) entered in the above bankruptcy case on December 28, 2012.

The names of all parties to the order appealed from and the names, addresses, and telephone numbers of their respective attorney are as follows:

<b>Moneris Solutions and BMO Harris Bank N.A.</b>	Joseph Argentina, Jr. Howard Cohen Drinker Biddle & Reath LLP 1100 N. Market Street, Suite 1000 Wilmington, DE 19801 Telephone: (302) 467-4200 Facsimile: (302) 467-4201
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Dated: January 11, 2013

**ELLIOTT GREENLEAF**

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*Attorneys for Marcelo Paladini*

**CERTIFICATE OF SERVICE**

I, Eric Suttty, hereby certify that I caused a copy of the *Notice of Appeal of Marcelo Paladin* to be served via CM/ECF on all parties who have entered notice of appearance in this matter pursuant to Fed. R. Bankr. P. 2002 and upon the following parties in the matter indicated:

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

In re	)	Chapter 11
	)	
CD LIQUIDATION CO., LLC, f/k/a	)	Case No. 09-13038(KG)
CYNERGY DATA, LLC, et al.,	)	(Jointly Administered)
	)	
<u>Debtors.</u>	)	<b>Re Dkt No. 1549</b>

**ORDER**

The Court has carefully considered the Motion of Moneris Solutions, Inc., and BMO Harris Bank, N.A. for entry of an order to (1) enforce (A) this Court’s Order Approving, that Certain Settlement Regarding the Reconciliation of Amounts Related to the Rolling Reserve Fund [the “Settlement Order”], (B) the Order Confirming the Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC, and Cynergy Data Holdings, Inc. [the “Confirmation Order”], and (C) Compliance with the Joint Plan of Liquidation of Debtors [the “Plan”], and (2) Enjoining Marcelo Paladini (D.I. 1549).

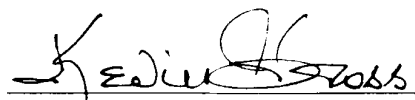
For the reasons stated in the accompanying Memorandum Opinion (the “Opinion”) of even date, IT IS HEREBY ORDERED that:

1. This Court upholds and enforces compliance with the Plan, the Settlement Order (D.I. 935) and the Confirmation Order (D.I. 1202).
2. Marcelo Paladini is permanently enjoined from prosecuting the action pending in the United States District Court for the Southern District of New York captioned *Paladini v. BMO Harris Bank, N.A.*, et ano., No. 12-cv-5178.

3. The terms and conditions of this order shall be immediately effective and enforceable upon its entry.

4. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this order.

Dated: December 28, 2012

  
KEVIN GROSS, U.S.B.J.

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

In re	)	Chapter 11
	)	
CD LIQUIDATION CO., LLC, f/k/a	)	Case No. 09-13038(KG)
CYNERGY DATA, LLC, et al.,	)	(Jointly Administered)
	)	
Debtors.	)	<b>Re Dkt No. 1549</b>

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**MEMORANDUM OPINION<sup>1</sup> GRANTING THE MOTION OF MONERIS  
SOLUTIONS, INC. AND BMO HARRIS BANK N.A. AND (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**

The Court has carefully considered the Motion of 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”) for entry of an order to (1) enforce (A) this Court’s Order Approving, Pursuant to Section 105(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019, the Settlement Between and Among the Debtors, Harris N.A., Moneris Solutions, Inc., Term B Parties and Second Lien Parties, Term A Parties, Cynergy Holdings, LLC and Cynergy Data LLC, Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund and for Certain Related Relief (the “Settlement Order”)

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<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any of the following findings of fact are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

[D.I. 935], (B) this Court's Order Confirming Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC, and Cynergy Data Holdings, Inc. (the "Confirmation Order") [D.I. 1202] and (c) the Joint Plan of Liquidation of Debtors (the "Plan") [D.I. 1190] and (2) enjoin Marcelo Paladini ("Paladini") (the "Motion") (D.I. 1549) filed in these cases and the opposition of Paladini; and this Court having considered the record of the proceedings in the Chapter 11 cases and the information placed before it, and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that these are core proceedings pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409, and due and sufficient notice of the Motion having been given, the Court finds and concludes as set forth below.

### **FINDINGS OF FACT**

1. CD Liquidation Trust is successor-in-interest to the bankruptcy estates of Cynergy Data Holdings, Inc., CD Liquidation Co. Plus, LLC (f/k/a Cynergy Prosperity Plus, LLC), CD Liquidation Co., LLC (f/k/a Cynergy Data LLC) ("Cynergy Data" and collectively, "Cynergy" or the "Debtors") created pursuant to the Plan. Cynergy provided credit and debit card payment processing services for merchants, enabling merchants to receive payments when customers paid by credit card.

2. Paladini was, at the commencement of the Debtors' chapter 11 cases, the Chief Executive Officer and ultimate majority shareholder of the Debtors. Cynergy Data Holdings,



Inc. was the parent of Cynergy Data LLC and Cynergy Prosperity Plus, LLC was the subsidiary of Cynergy Data LLC.

3. On July 2, 2012, Paladini commenced an action in the United States District Court for the Southern District of New York, *Paladini v. BMO Harris Bank, N.A., et ano.*, No. 12-cv-5178 (the “New York Action”).

**The Forbearance Agreement**

4. Moneris, at the request of various parties including Cynergy Data and its lenders, entered into a Forbearance Agreement, dated as of July 24, 2009, regarding Debtors’ Financing Arrangements and the Harris Documents (the “Forbearance Agreement,”). Moneris agreed to forbear from exercising its rights to setoff and recoup the approximately \$21 million of missing merchant reserve funds subject to certain terms and conditions.

5. In the Forbearance Agreement, the Debtors and Paladini, as Guarantor, acknowledged that CynergyData was obligated to pay the unfunded merchant Rolling Reserves into the Harris Reserve Account and that Events of Default occurred under the Harris Documents, including the BIN Agreement and Merchant Agreements.

The Debtors and Paladini further acknowledged that Defaults Have Occurred Under the Loan Documents and the Harris Documents. (New York Action Complaint, Ex. F, p. 16) (“Compl.”).

The Debtors and Paladini, moreover, expressly acknowledged that they did not execute the Forbearance Agreement under any duress. (Compl. Ex. F ¶ 47.)

6. On September 1, 2009, each of the Debtors filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code (as amended, the “Bankruptcy Code”).

**The Settlement Order**

7. On September 13, 2010, this Court entered the Settlement Order [D.I. 935]. The Settlement Order approved the terms and conditions of a Settlement Term Sheet, as modified, supplemented and amended by the Settlement Order (the “Settlement Term Sheet”), by and among the Debtors, Harris and Moneris Solutions, and others (collectively, the “Settling Parties”).

8. Pursuant to the Settlement Term Sheet, the Debtors and other Settling Parties released any and all claims against Moneris arising before the date of the Settlement Order except for specified claims relating to future distribution of escrowed funds.

9. The Settlement Order expressly incorporates the Settlement Term Sheet by reference and provides that the Settlement Term Sheet is expressly incorporated into the Plan. (Settlement Order ¶ 21; Plan, Article XII § R.)

10. The Debtors, pursuant to the Settlement Term Sheet and Settlement Order, released any and all claims against Moneris “related in any way to the Settlement Term Sheet, Settlement Escrowed Funds, BIN Sponsor Agreement or the Debtors.” Among other things, the Settlement Order provides that:

Each of the Debtors on behalf of themselves and their estates created in the Bankruptcy Cases pursuant to section 541 of the Bankruptcy Code, the Term A Parties, the Term B Parties, and Garrison Opportunities, do thereby and under the Settlement

Term Sheet waive and release any and all claims (to be interpreted in the broadest manner possible), obligations, suits, judgments damages, rights, causes of action, liabilities, defenses, counterclaims or offsets and/or allegations whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, against Moneris related in any way to the Settlement Term Sheet, Settlement Escrowed Funds, BIN Sponsor Agreement or the Debtors, except with respect to: (i) claims as set forth in this Settlement Term Sheet, (ii) claims for breach under the Settlement Term Sheet and (iii) claims for disgorgement by Moneris under the Stipulation and the Settlement Term Sheet . . . .

(Settlement Order ¶ 12.)

11. This Court enjoined actions for claims against Moneris released under the Settlement Term Sheet, Settlement Order or otherwise related to reserves as follows:

Except as expressly permitted by the Settlement Term Sheet, all parties in interest in the Bankruptcy Cases hereby are forever barred, estopped and permanently enjoined from: (a) commencing or continuing in any manner any action or other proceeding, asserting, prosecuting or otherwise pursuing any claims, rights or causes of action, (b) enforcing, attaching collecting or recovering in any manner any judgment, award, decree of order, (c) creating perfection or enforcing any lien or encumbrance or (d) asserting a setoff, right of subrogation or recoupment of any kind, against a Settling Party; (I) released under this Order, or the Settlement Term Sheet or (ii) related to reserves identified in the Bankruptcy Cases as part of the Settlement Escrowed Funds . . . .

(*Id.* ¶ 11.) Moneris is defined to include Harris. 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.” (*Id.* at

¶ 11.) This preservation only applies to direct claims, if any, of Paladini against Moneris, not derivative claims.

12. The Settlement Order and the releases granted by the Debtors in favor of Moneris are binding on the Liquidation Trustee pursuant to the Settlement Order as follows:

This Order is binding upon the Debtors, all creditors of the Debtors, and any trustees that may be appointed in these chapter 11 cases or any trustees appointed in any subsequent proceedings under chapter 7 of the Bankruptcy Code relating to the Debtors, and all other parties-in-interest.

(*Id.* ¶ 22.)

13. The Court retained “jurisdiction to the full extent permitted by law to determine any disputes concerning or relating to the Settlement.” (*Id.* ¶ 24.)

#### **The Plan And Confirmation Order**

14. The Court confirmed the Plan [D.I. 1190] pursuant to the Confirmation Order, dated December 21, 2010. [D.I. 1202.]

15. The Liquidation Trustee, Charles M. Moore, was appointed pursuant to the Plan. He exercises the exclusive right to assert causes of action on the Debtors’ behalf. (Plan at pp.8, 18.) The Plan incorporates the releases set forth in the Settlement Term Sheet and Settlement Order of any claims by the Debtors against Moneris and the permanent injunction provided therein. (Plan, Article XII §R.) The Plan specifies that all injunctions or stays contained in the Settlement Order, Plan or Confirmation Order, remain in full force and effect in accordance with their terms.(Plan, Article XII §O.) The Confirmation Order

provides that prior orders entered in the Chapter 11 Cases, all documents and agreements executed by the Debtors as authorized and directed thereunder are binding upon the Liquidation Trustee. (Confirmation Order ¶ 16.)

16. The Court retained exclusive jurisdiction over all claims brought on the Debtors' behalf. (Plan, Article XI.) The Court additionally retained jurisdiction to enforce all orders, and specifically all injunctions and releases, entered in connection with the bankruptcy. (*Id.*; Confirmation Order ¶ 17.)

**Paladini's Lawsuit Against Moneris In New York**

17. In the New York Action, Paladini alleges that Moneris's actions led to the Debtors' bankruptcy filings by threatening to suspend their funding unless they acceded to Moneris' demand to fund the \$21 million Rolling Reserve. Paladini additionally alleges Moneris' negligence and "malpractice" in improperly performing the daily reconciliation of transfers between Cynergy Data and Moneris and failing to maintain the Rolling Reserves in a Harris Account contributed to the Debtors' bankruptcy. (Compl. ¶¶ 212-230.) Paladini further alleges that Moneris disrupted a potential sale of the Debtors by exchanging information with the potential purchaser and by failing itself to bid. (*Id.* ¶¶ 87-94.)

18. Paladini claims that, as a result of the Debtors' bankruptcy, he suffered personal harm in several respects: first, the Debtors' bankruptcy destroyed the value of his shares; second, the bankruptcy and his role as the Debtors' guarantor caused him to be named a defendant in four creditor lawsuits; third, the sale of the Debtors for less than its

indebtedness exposed Paladini to liability as the Debtors' guarantor; and fourth, an "assumption in the public" that Paladini was responsible for mishandling \$21 million of the Debtors' funds caused harm to his professional reputation. (*Id.* ¶¶ 11-13.)

19. Paladini alleges causes of action against Moneris for economic duress, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, tortious interference with business relations, general malpractice and negligence. (*Id.* ¶ 1.)

### **THE COURT'S JURISDICTION**

The Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157 and 1334. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This Court has jurisdiction to enforce its orders and it retained jurisdiction over claims belonging to the Debtors. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009) ("[t]he Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders . . . and it explicitly retained jurisdiction to enforce its injunctions"); *see also In re FormTech Indus., LLC*, 439 B.R. 352, 357 (Bankr. D. Del. 2010) ("Enforcement and interpretation of orders issued in core proceedings are also considered core proceedings within the bankruptcy court's jurisdiction").

### **CONCLUSIONS OF LAW**

#### **Paladini's Claims are Derivative**

A. 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). The fundamental question is “has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?” *Id.* Paladini cannot demonstrate an independent harm to himself. His claims are derivative. *See, e.g., 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”).

### **Sale and Loss in Value**

B. Paladini alleges that Moneris’ actions caused the Debtors’ sale for \$40 million less than the amounts they owed to their lenders and as a result, “Paladini’s equity interest – valued at over \$200MM just months before – was completely destroyed.”(Compl. ¶¶ 159-160.) Paladini explains that this harm is “particularized to him because . . . a portion of the equity of Cynergy belonged to Paladini, personally, as majority shareholder.”(Compl. ¶ 188.)

C. The companies at issue here were all organized under the laws of Delaware and, therefore, the Court is applying Delaware law. *In re Sunrise Secs. Litig.*, 916 F.2d 874, 881-82 (3d Cir. 1990).

D. Loss in share value – is a “classic derivative harm” because “[i]t flows from a harm to the corporation.” *In re CD Liquidation Co., LLC*, 462 B.R. 124, 132; (Bankr. D. Del. Nov. 2, 2011) *see also Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478 at \*5 (Del. Ch. May 31, 2011) (“The Complaint identifies no harm that the [share] buybacks might have caused to the individual shareholders . . . under *Tooley*, this is a purely derivative

claim”).

E. The Cynergy sale affected the value of Paladini’s shares no more or less than the value of other stockholders’ shares and the claims of Cynergy’s creditors. Any harm to Paladini arising out of his status as a shareholder is therefore derivative of harm to the Debtors.

**Economic Duress**

F. The economic duress claim, for which Paladini seeks monetary damages, (Compl. ¶ 183), does not state a cause of action as a matter of law because economic duress is not a cause of action, but rather a theory of recovery for rescission of a contract. *See Bank Leumi Trust Co. v. D’Evori Int’l, Inc.*, 558 N.Y.S.2d 909, 914 (1st Dep’t 1990) (“[W]e do not believe that the doctrine of economic duress, which is traditionally used as a defense to an action, has any place in a cause of action seeking money damages”).

**Exposure To Lawsuits By Cynergy’s Creditors**

G. Paladini alleges that Moneris’ conduct led to the Debtors’ bankruptcy and sale for less than the amount of its indebtedness leading to Paladini being named as a defendant in four lawsuits.

H. This claim is derivative. Paladini cannot prevail without showing an injury to the company, namely, filing for bankruptcy protection and being sold for less than the amount of its indebtedness. *Tooley* applies.



**Paladini's Guaranty**

I. Paladini claims the Cynergy sale exposed him to substantial liability by virtue of his personal guaranty of Cynergy's debts. (Compl. ¶ 165.) Paladini also alleges that by requiring that approximately \$21MM of the sale proceeds be allocated to the Rolling Reserves, Moneris exposed him to further liability on his guaranty. (Compl. ¶ 166.)

J. Paladini's exposure by guaranty claim is derivative of the Debtors' principal obligations and defaults. Paladini does not allege that Moneris breached any agreement with him, but that Moneris' conduct "disrupted the Cynergy asset sale and resulted in a sale for approximately \$40 MM less than the amount owed to the Cynergy Lenders." (Compl. ¶ 187.)

K. Paladini's obligations under the guaranty were not triggered until the Debtors, as principal obligors, defaulted. Paladini does not have an independent cause of action against Moneris. He would first have to prove injury to the Debtors to prevail. Therefore the claims are derivative. *In re CD Liquidation Co., LLC*, 462 B.R. at 133, citing, e.g., *Amusement Indus., Inc. v. Stern*, 2011 WL 2976199, at \*6 (S.D.N.Y. July 26, 2011).

**The Alleged Harm To Paladini's Professional Reputation**

L. Paladini alleges that Moneris' conduct injured his professional reputation by causing a prospective buyer to withdraw its bid to acquire the Debtors which lowered the sale price. (Compl. ¶ 210.)

M. The primary harm of the tortious interference claim is harm to the Debtors, not Paladini, and the claim is Debtors' to assert.

**THE DERIVATIVE CLAIMS ARE ENJOINED**

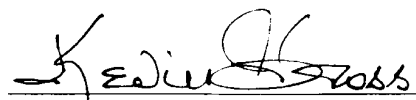
N. Paladini's claims, in the New York Action are derivative and belong to the Debtors. *In re CD Liquidation Co., LLC*, 462 B.R. at 130; *see also In re RNI Wind Down Corp.*, 348 B.R. 286, 292 (Bankr. D. Del. 2006).

O. The Debtors, and by succession the Liquidation Trustee, released all such claims against Moneris pursuant to the Settlement Term Sheet, the Settlement Order, the Plan and the Confirmation Order.

P. The Court enjoined the prosecution of all such released claims pursuant to the Settlement Order, the Plan and the Confirmation Order and will uphold and enforce the injunctions and releases in confirmation plans. *See In re SemCrude L.P.*, 2011 WL 1981713, at \*8 (Bankr. 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's*, 2012 WL 502764, at \*4-\*5 (enforcing the releases in bankruptcy plan against plaintiffs in securities class action litigation).

Accordingly, this Court will issue an Order upholding and enforcing its prior orders releasing and enjoining the claims Paladini asserts against Moneris in the New York Action and, therefore, enjoining Paladini from prosecuting the New York Action.

Dated: December 28, 2012

  
KEVIN GROSS, U.S.B.J.

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

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

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**APPELLANT'S DESIGNATION OF RECORD ON APPEAL**

Marcelo Paladini, by and through his counsel, Elliott Greenleaf and Aschettino Struhs LLP, pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, respectfully (i) designates the following items as the record on appeal from the Order Granting the Motion of Moneris Solutions, Inc. and BMO Harris Bank N.A. and (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 (Dkt. #1549) entered in the bankruptcy case number 09-13038, filed in the Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on December 28, 2012; and (ii) presents the following Statement of Issues on Appeal:

**I. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL<sup>1</sup>**

<b>Item No.:</b>	<b>Docket/Document No.:</b>	<b>Docket Date:</b>	<b>Description</b>
1.	1549	08/31/2012	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
2.	1551	10/10/2012	Objection by Marcelo Paladini to Motion by Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and for Related Relief
3.	1554	10/24/2012	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 Solutions, Inc. and BMO
4.	1560	11/20/2012	Marcelo Paladini's 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 filed by Marcelo Paladini
5.	1562	11/21/2012	Objection of Moneris Solutions, Inc. and BMO Harris Bank N.A. to Marcelo Paladini's Motion for Leave to File a Sur-Reply

<sup>1</sup> All items designated herein by the Appellant include all exhibits, declarations, transcripts, excerpts, attachments or other papers included within each docket entry for such item.

6.	1564	11/26/2012	Order Approving Marcelo Paladini's Motion for Leave to File a Sur-Reply in Further Support of Its Objection to Motion by Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and for Related Relief
7.	1567	12/04/2012	Transcript Regarding Hearing Held 11/26/2012 Re: Omnibus Hearing
8.	1569	12/28/2012	MEMORANDUM OPINION
9.	1570	12/28/2012	ORDER
10.	1571	1/11/2013	Notice of Appeal (BAP-13-4) of Marcelo Paladini

## II. STATEMENT OF ISSUES ON APPEAL

The Appellant, by and through his undersigned counsel, designates the issue on appeal to include the following:

1. Whether the Bankruptcy Court erred in granting the 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?
2. Whether the Bankruptcy Court erred in determine that the release of claims under the Settlement Between and Among the Debtors, Harris N.A., Moneris Solutions, Inc., Term B Parties and Second Lien Parties, Term A Parties, Cynergy Holdings, LLC and Cynergy Data LLC, Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund and for Certain Related Relief was unfettered and without limitations despite the clear carve out language in the Agreement?
3. Whether the Bankruptcy Court erred in failing to enforce the carve-out language contained in the Settlement Between and Among the Debtors, Harris N.A., Moneris Solutions, Inc., Term B Parties and Second Lien Parties, Term A Parties, Cynergy Holdings, LLC and Cynergy Data LLC, Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund and for Certain Related Relief, the 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, and the Order Confirming Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC, and Cynergy Data Holdings, Inc., expressly and/or implicitly excluding the release of third party claims?

4. Whether the Bankruptcy Court erred in failing to allow the United States District Court for the Southern District of New York to consider the merits of the action captioned *Paladini v. BMO Harris Bank, N.A. and Moneris Solutions, Inc.*, No. 12-cv-5178, and in ruling on the viability of third party claims by Appellant against Appellees?
5. Whether the Bankruptcy Court applied the incorrect standard in following *Tooley* with respect to the subject third party claims between Appellant and Appellees?
6. Whether the Bankruptcy Court erred in failing to consider the full litany of harms and injuries asserted by Appellant in the Amended Complaint in the action captioned *Paladini v. BMO Harris Bank, N.A. and Moneris Solutions, Inc.*, No. 12-cv-5178?
7. Whether the Bankruptcy Court erred by failing to address Paladini's argument that the Bankruptcy Court lacked jurisdiction over the proceeding because Paladini's claims against the Harris Defendants were specifically carved out from the Order Approving, Pursuant to Section 105(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019, the Settlement Between and Among the Debtors, Harris N.A., Moneris Solutions, Inc., Term B Parties and Second Lien Parties, Term A Parties, Cynergy Holdings, LLC and Cynergy Data LLC, Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund and for Certain Related Relief?
8. Whether the Bankruptcy Court erred by failing to address Paladini's argument that the Bankruptcy Court lacked subject matter jurisdiction over the proceeding because this was a dispute between non-debtors?
9. Whether the Bankruptcy Court erred by failing to address Paladini's argument that the Bankruptcy Court lacked subject matter jurisdiction over the proceeding because this was a non-core proceeding unrelated to the Debtors' bankruptcy?
10. Whether the Bankruptcy Court erred by failing to address Paladini's argument that the Bankruptcy Court lacked jurisdiction over the proceeding because the Harris Defendants' Motion violated Bankruptcy Rule 7001?
11. Whether the Bankruptcy Court erred by failing to address Paladini's argument that the allegations in the Complaint are in no way similar to those brought in the Martillo Action?

12. Whether the Bankruptcy Court erred in concluding that Paladini's claims were derivative, and not personal?

Dated: January 25, 2013

**ELLIOTT GREENLEAF**

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*Attorneys for Marcelo Paladini*

**CERTIFICATE OF SERVICE**

I, Eric M. Suttty, hereby certify that on the 25<sup>th</sup> day of January, 2013, I caused a copy of the **Appellant's Designation of Record on Appeal** to be served via CM/ECF on all parties who have entered notice of appearance in this matter pursuant to Fed. R. Bankr. P. 2002 and upon the following parties in the manner indicated:

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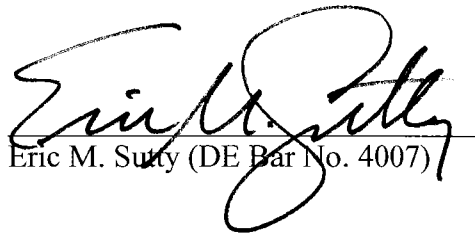
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Eric M. Suttty (DE Bar No. 4007)



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

In re:  CD LIQUIDATION CO., LLC, f/k/a CYNERGY DATA, LLC, <i>et al.</i> ,  Debtors.	X : : : : : : : : X	Chapter 11  Case No. 09-13038 (KG)  Jointly Administered
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**APPELLEES MONERIS SOLUTIONS, INC.’S AND BMO HARRIS BANK N.A.’S  
DESIGNATION OF ADDITIONAL ITEMS FOR RECORD ON APPEAL AND  
COUNTER-STATEMENT OF ISSUES**

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 their counsel, Torys LLP, pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure and Rule 8006-1 of the Local Rules for the United States Bankruptcy Court for the District of Delaware, respectfully (i) designates the following additional items for the record on appeal from the Order (D.I. 1570) Granting the Motion of Moneris Solutions, Inc. and BMO Harris Bank N.A. and (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 entered in the bankruptcy case number 09-13038, filed in the Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”) on December 28, 2012; and (ii) presents the following Counter-Statement of Issues on Appeal:

**I. APPELLEES' DESIGNATION OF ADDITIONAL ITEMS  
FOR THE RECORD ON APPEAL**

<b>Item No.:</b>	<b>Docket/ Document No.:</b>	<b>Docket Date:</b>	<b>Description</b>
11.	207	10/06/2009	Declaration of Gregory C. Cohen in Support of Objection by Moneris Solutions Inc. to the Proposed Assumption and Assignment of Assumed Contracts and Proposed Cure Amounts
12.	281	10/16/2009	Final Order (I) Authorizing Use of Cash Collateral, (II) Authorizing Postpetition Financing, (III) Granting Senior Priming Liens and Superiority Claims, and (IV) Granting Adequate Protection to the Prepetition Secured Parties
13.	863, Ex. A	8/10/2010	Settlement Term Sheet Summary of Proposed Terms and Conditions June 2, 2010
14.	935	9/13/2010	Order Approving, Pursuant to Section 105(A) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019, the Settlement Between and Among the Debtors, Harris N.A., Moneris Solutions, Inc., Term B Parties and Second Lien Parties, Term A Parties, Cynergy Holdings, LLC and Cynergy Data, LLC Regarding Reconciliation of Amounts Related to the Rolling Reserve Funds and For Certain Related Relief (the " <u>Settlement Order</u> ")
15.	961	9/22/2010	Transcript Regarding Hearing Held September 13, 2010
16.	1178	12/14/2010	Limited Objection of Marcelo Paladini to Confirmation of the Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC, and Cynergy Data Holdings, Inc.
17.	1190	12/17/2010	Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC and Cynergy Data Holdings, Inc. (the " <u>Plan</u> ")
18.	1193	12/20/2010	Reply in Support of Limited Objection of Marcelo Paladini to Confirmation of the Plan
19.	1202	12/21/2010	Order Confirming Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation Co. Plus, LLC and Cynergy Data Holdings, Inc. (the " <u>Confirmation Order</u> ")

Item No.:	Docket/ Document No.:	Docket Date:	Description
20.	1227	12/21/2010	Transcript Regarding Hearing Held December 21, 2010
21.	1418	9/27/2011	Transcript Regarding Hearing Held September 27, 2011
22.	1424	11/2/2011	Memorandum Opinion
23.	1425	11/2/2011	Order Granting Liquidation Trustee's and Intervenor's Motion for Preliminary Injunction and Denying Defendant's Motion to Dismiss
24.	1536	4/17/2012	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
25.	1546	5/31/2012	Stipulation for Dismissal of Appeal
26.	86 Adv. Proc. No. 10- 53190	5/24/2012	Notice of Dismissal of Adversary Proceeding
27.	1567	12/04/2012	Transcript Regarding Hearing Held November 26, 2012 with Errata Sheet

## II. APPELLEES' COUNTER-STATEMENT OF ISSUES ON APPEAL

Appellees state that the appeal presents the following issues:

1. Whether the Bankruptcy Court's findings of fact in its December 28, 2012, Memorandum Opinion were clearly erroneous.
2. Whether the Bankruptcy Court correctly concluded in its December 28, 2012, Memorandum Opinion that appellants' claims in the action captioned *Paladini v. BMO Harris Bank, N.A., et ano.*, No. 12-cv-5178 (S.D.N.Y.), are derivative claims belonging to the Debtors.
3. Whether the Bankruptcy Court abused its discretion by permanently enjoining appellant from prosecuting such derivative claims, which the Bankruptcy Court had previously enjoined in the Settlement Order (D.I. 935), the Plan (D.I. 1190), and the Confirmation Order (D.I. 1202).

Dated: February 8, 2013  
Wilmington, Delaware

**DRINKER BIDDLE & REATH LLP**

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*Attorneys for Moneris Solutions, Inc., in its  
capacity and as agent for BMO Harris Bank N.A.*

# ITEM 27

**Errata Sheet of Moneris Solutions, Inc. and BMO Harris Bank**

<b><u>PAGE</u></b>	<b><u>LINE</u></b>	
5	12	<b>CHANGE:</b> Add “to” before “enforce.”
6	5	<b>CHANGE:</b> Add “,” after “We”
6	12	<b>CHANGE:</b> “termination” to “determination”
6	13	<b>CHANGE:</b> “barely” to “fairly”
7	4	<b>CHANGE:</b> “adjoin” to “enjoin”
7	11	<b>CHANGE:</b> Add “,” after “previewed”
7	12	<b>CHANGE:</b> Add “,” after “familiar”
7	22	<b>CHANGE:</b> Add “,” after “pending”
7	23	<b>CHANGE:</b> Add “,” after “understand”
8	7	<b>CHANGE:</b> Add “I will” before “try”
8	9	<b>CHANGE:</b> “bin” to “BIN”
8	10	<b>CHANGE:</b> Add “,” after “Debtors”
8	10	<b>CHANGE:</b> Add “,” after “prepetition”
8	11	<b>CHANGE:</b> “visa” to “Visa”
8	11	<b>CHANGE:</b> “mastercard” to “Mastercard”
8	12	<b>CHANGE:</b> “bin” to “BIN”
8	15	<b>CHANGE:</b> Add “,” after “Data”
8	17	<b>CHANGE:</b> Add “,” after “to”
8	17	<b>CHANGE:</b> Add “,” after “distribution”
8	17	<b>CHANGE:</b> Add “,” after “of”
8	19	<b>CHANGE:</b> “suppose” to “supposed”
8	19	<b>CHANGE:</b> “of” to “have”
8	20	<b>CHANGE:</b> “have” to “had”
8	21	<b>CHANGE:</b> “in” to “of”
9	3	<b>CHANGE:</b> Add “,” after “agreements”
9	13	<b>CHANGE:</b> “say” to “se”
9	14	<b>CHANGE:</b> Add “,” after “on”
9	14	<b>CHANGE:</b> Add “,” after “he”

- 2 -

<u>PAGE</u>	<u>LINE</u>	
9	15	<b>CHANGE:</b> Add “,” after “counsel”
9	15	<b>CHANGE:</b> “has” to “had”
9	17	<b>CHANGE:</b> Add “,” after “language”
9	18	<b>CHANGE:</b> Add “,” after “claims”
9	19	<b>CHANGE:</b> Add “,” after “reason”
9	19	<b>CHANGE:</b> Add “,” after “now”
9	24	<b>CHANGE:</b> “date” to “dated as”
10	2	<b>CHANGE:</b> “bin” to “BIN”
10	11	<b>CHANGE:</b> “and” to “in”
10	17	<b>CHANGE:</b> Delete “they are”
10	22	<b>CHANGE:</b> Add “,” after “because”
10	23	<b>CHANGE:</b> Add “,” after “earlier”
10	25	<b>CHANGE:</b> Add “,” after “law”
11	1	<b>CHANGE:</b> “in its [indiscernible],” to “v. Donaldson, Lufkin & Jenrette”
11	2	<b>CHANGE:</b> Add “,” after “Debtors”
11	2	<b>CHANGE:</b> Add “,” after “Paladini”
11	22	<b>CHANGE:</b> “bin” to “BIN”
11	22	<b>CHANGE:</b> Add “a” before “different”
12	22	<b>CHANGE:</b> Delete “that that”
13	3	<b>CHANGE:</b> “proceeded” to “preceded”
13	22	<b>CHANGE:</b> “and” to “in”
13	24	<b>CHANGE:</b> Add “,” after “harm”
14	22	<b>CHANGE:</b> “by the” to “with a”
15	1	<b>CHANGE:</b> Add “,” after “emphasizes”
15	7	<b>CHANGE:</b> Add “,” after “good”
15	19	<b>CHANGE:</b> Delete “,” after “services”
15	20	<b>CHANGE:</b> Add “,” after “Cynergy”
15	20	<b>CHANGE:</b> Add “,” after “213”

- 3 -

<u>PAGE</u>	<u>LINE</u>		
15	21	CHANGE:	Delete "that"
15	23	CHANGE:	"pled" to "led"
16	16	CHANGE:	Delete "what to"
16	21	CHANGE:	Add "he" before "only"
17	17	CHANGE:	Add "and" before "direct"
18	3	CHANGE:	Delete "or," before "and"
18	3	CHANGE:	Delete "how" after "and"
18	5	CHANGE:	Add "," after "allocation"
18	5	CHANGE:	Add "," after "to"
18	7	CHANGE:	Add "," after "allocation"
18	7	CHANGE:	Add "," after "calculation"
18	8	CHANGE:	Add "," after "control"
18	10	CHANGE:	"and" to "in"
18	16	CHANGE:	Delete "itself" after "it"
18	16	CHANGE:	"reached" to "breached"
18	20	CHANGE:	Delete "just on"
19	3	CHANGE:	"sur-replies" to "sur-reply"
19	5	CHANGE:	Add "to" before "arguments"
19	14	CHANGE:	Add "," after "ownership"
19	20	CHANGE:	Delete first instance of "what we point out"
19	22	CHANGE:	Add "," after "2009"
20	2	CHANGE:	"order," to "order."
20	2	CHANGE:	"in" to "In"
20	12	CHANGE:	"They" to "We"
20	14	CHANGE:	Add "," after "derivative"
21	6	CHANGE:	"reply" to "sur-reply"
21	22	CHANGE:	"Court" to "core"
21	22	CHANGE:	"Court" to "core"
22	1	CHANGE:	"Court" to "core"



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<u>PAGE</u>	<u>LINE</u>	
22	4	CHANGE: "VII" to "(7)"
22	16	CHANGE: Add "," after "well"
22	17	CHANGE: "Court" to "core"
22	20	CHANGE: "Court" to "core"
22	24	CHANGE: "belong" to "belonging"
23	5	CHANGE: "Court" to "core"
23	7	CHANGE: "Court" to "core"
24	23	CHANGE: "Grebsky [ <i>phonetic</i> ]" to "Drebsky"
26	13	CHANGE: "when we fight," to "in reply,"
27	2	CHANGE: "efficiencies" to "deficiencies"
27	7	CHANGE: Delete "to"
28	3	CHANGE: "non-Court" to "non-core"
29	5	CHANGE: "ingenious" to "disingenuous"
30	5	CHANGE: Add "of" before "good"
31	15	CHANGE: "bin" to "BIN"
31	21	CHANGE: "bin" to "BIN"
32	4	CHANGE: "bin" to "BIN"
32	13	CHANGE: Add "," after "all"
32	13	CHANGE: "its" to "it's"
32	13	CHANGE: "allege" to "alleged"
33	4	CHANGE: "NDA's," to "NDAs,"
34	12	CHANGE: "bin" to "BIN"
34	12	CHANGE: "mastercard/visa" to "Mastercard/Visa"
34	18	CHANGE: Delete "Bob" after "contrary,"
35	9	CHANGE: "tern" to "term"
35	19	CHANGE: Add "," after "helped"
36	14	CHANGE: "bin" to "BIN"
37	14	CHANGE: "somthing" to "something"
38	12	CHANGE: "peri" to "pariah"

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<u>PAGE</u>	<u>LINE</u>	
38	19	<b>CHANGE:</b> “Convest [ <i>phonetic</i> ]” to “ComVest”
39	16	<b>CHANGE:</b> “disseminial” to “the seminal”
39	21	<b>CHANGE:</b> “them” to “then”
44	5	<b>CHANGE:</b> Add “,” after “language”
44	6	<b>CHANGE:</b> Add “of,” after “enforcement”
44	10	<b>CHANGE:</b> “and” to “in”
44	11	<b>CHANGE:</b> “barred as stopped” to “barred, estopped”
44	11	<b>CHANGE:</b> “enjoining” to “enjoined”
44	16	<b>CHANGE:</b> “principle” to “principal”
44	16	<b>CHANGE:</b> Delete “you say” after “because”
44	21	<b>CHANGE:</b> “and” to “in”
44	25	<b>CHANGE:</b> Delete “at which there” after “provision”
45	11	<b>CHANGE:</b> Add “,” after “to”
45	12	<b>CHANGE:</b> Add “,” after “of”
45	20	<b>CHANGE:</b> “accepted” to “excepted”
45	23	<b>CHANGE:</b> “plans” to “plan’s”
46	5	<b>CHANGE:</b> Before the word “effect” change “in” to “and”
46	7	<b>CHANGE:</b> “plans” to “plan’s”
46	11	<b>CHANGE:</b> “orders” to “order’s”
47	19	<b>CHANGE:</b> Add “,” after “(6)”
48	9	<b>CHANGE:</b> Add “,” after “believe”
48	10	<b>CHANGE:</b> Add “,” after “argument”
48	15	<b>CHANGE:</b> “vie” to “vis”
48	18	<b>CHANGE:</b> Before the word “prior” add “,” after “agreement”
48	18	<b>CHANGE:</b> Before the word “already” add “,” after “agreement”
48	19	<b>CHANGE:</b> “reserved” to “reserve”
49	5	<b>CHANGE:</b> Add “,” after “events”
49	5	<b>CHANGE:</b> Add “,” after “here”
50	3	<b>CHANGE:</b> “coma” to “comma”

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<u>PAGE</u>	<u>LINE</u>	
54	21	<b>CHANGE:</b> Remove extra space after “plans”
54	21	<b>CHANGE:</b> “plans” to “plan’s”
54	25	<b>CHANGE:</b> “plans” to “plan’s”
55	7	<b>CHANGE:</b> Delete “,” after “otherwise”
55	15	<b>CHANGE:</b> “plans” to “plan’s”
55	17	<b>CHANGE:</b> “a” to “the”
55	17	<b>CHANGE:</b> “orders” to “order’s”
55	18	<b>CHANGE:</b> Add “,” after “out”
55	23	<b>CHANGE:</b> Add “,” after “directly”
55	23	<b>CHANGE:</b> Add “,” after “do”
55	24	<b>CHANGE:</b> Add “,” after “allocation”
		<b>CHANGE:</b>
		<b>CHANGE:</b>
		<b>CHANGE:</b>
		<b>CHANGE:</b>
		<b>CHANGE:</b>
		<b>CHANGE:</b>
		<b>CHANGE:</b>

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: ) Case No. 09-13038 (KG)  
 ) Chapter 11  
CD LIQUIDATION CO., LLC. )  
 et al. ) Courtroom No. 3  
 Debtors. ) 824 Market Street  
 ) Wilmington, Delaware 19801  
 )  
 )  
 ) November 26, 2012  
 ) 01:00 P.M.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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transcript produced by transcription service.

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3

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For Marcelo Paladini, by Mr. Aschettino	24, 50

1 THE COURT: Good afternoon, everyone. Thank you, and  
2 please be seated. It is good to see you all after the  
3 holiday

4 MR. WARD: Good afternoon, Your Honor.

5 THE COURT: Good afternoon, Mr. Ward, how are you  
6 sir?

7 MR. WARD: I am doing well, how about yourself?

8 THE COURT: Very well, thanks.

9 MR. WARD: All right, for the record, Chris Ward,  
10 Polsinelli Shughart on behalf of the Trustee.

11 THE COURT: Yes.

12 MR. WARD: Your Honor, there is one matter on the  
13 agenda today. The Trustee is not a party to that matter so I  
14 do not want to cast any aspersions of which side I sit on,  
15 but I am going to sit where there is more room, and I will  
16 turn the podium over to the movants, Your Honor.

17 THE COURT: Thank you. Mr. Cohen.

18 MR. COHEN: Good afternoon, Your Honor.

19 THE COURT: Good afternoon. How are you, sir?

20 MR. COHEN: Good. Did you have a nice Thanksgiving,  
21 Your Honor?

22 THE COURT: Very, very nice, thank you, and I hope  
23 you did too.

24 MR. COHEN: Busy with the twins.

25 THE COURT: They are here?

1 MR. COHEN: They are four weeks old.

2 THE COURT: Oh congratulations, how wonderful.

3 MR. COHEN: So, Your Honor, Howard Cohen, Drinker  
4 Biddle & Reath on behalf of Moneris Solutions and Harris  
5 Bank. With me today is Chris Caparelli and Alison Bauer from  
6 the Torys Firm.

7 THE COURT: Yes. Welcome. Good to see you again.

8 MR. COHEN: And our client, Fern Glowinsky, chief  
9 legal counsel of Moneris.

10 THE COURT: Welcome. Yes.

11 MR. COHEN: With Your Honor's permission I will cede  
12 the podium to Mr. Caparelli to present the motion enforce.

13 THE COURT: Thank you.

14 MR. COHEN: Thank you.

15 THE COURT: Good afternoon, good to see you.

16 MR. CAPARELLI: Thank you, Your Honor, good  
17 afternoon.

18 THE COURT: Now as I recall in the matter involving,  
19 the last matter involving Mr. Paladini and Mr. Martillo.

20 MR. CAPARELLI: Yes, Your Honor.

21 THE COURT: I think that the New York Court,  
22 actually, asked me to make the determination as to whether or  
23 not the claims were derivative or not.

24 MR. CAPARELLI: I believe that is correct, Your  
25 Honor.



1 THE COURT: You do not have quite that same situation  
2 here do we?

3 MR. CAPARELLI: Not quite, Your Honor.

4 THE COURT: Okay.

5 MR. CAPARELLI: We at the same time that we made the  
6 motion before Your Honor, we made a motion to stay in the  
7 Southern District. The parties, actually, were able to agree  
8 to a stipulated order on that motion.

9 THE COURT: Okay.

10 MR. CAPARELLI: That was entered by the Southern  
11 District, and the text of that stipulated order says that  
12 that action will remain stayed pending a termination by this  
13 Court on that issue. So I think, in effect, it is barely  
14 closely aligned in terms of that.

15 THE COURT: Okay.

16 MR. CAPARELLI: That case will stay put, you know,  
17 pending this Court's resolution of the motion to enforce.

18 THE COURT: So we do not have two Courts, kind of,  
19 jockeying for who is going to decide the issue first?

20 MR. CAPARELLI: No, no we do not.

21 THE COURT: Okay. Thank you.

22 MR. CAPARELLI: So we are here today on the motion of  
23 Moneris Solutions and BMO Harris Bank which we refer,  
24 collectively, to in our papers as Moneris and if that is okay  
25 with the Court I will do so here for ease.

1 THE COURT: Sure.

2 MR. CAPARELLI: The motion to enforce the Court's  
3 prior orders, namely, the plan, the confirmation order and  
4 the related settlement order to adjoin the plaintiff, Mr.  
5 Paladini, from bringing claims against Moneris that were  
6 released and enjoined pursuant to those orders. Now as the  
7 Court will recall from the earlier proceedings in this  
8 bankruptcy, Mr. Paladini is the Debtors' former majority  
9 shareholder and CEO. He was also a guarantor of several  
10 loans to the company.

11 And as Your Honor has already previewed if this  
12 motion sounds familiar that is because this is not the first  
13 time Mr. Paladini has attempted to invoke another Court's  
14 jurisdiction and, in our view, assert for himself claims  
15 belonging to the Debtors. Mr. Paladini had sued his former  
16 partner Mr. Martillo in New York. Mr. Martillo joined the  
17 liquidation Trustee to enjoin Mr. Paladini's suit in that  
18 action because, like here, Mr. Paladini's claims rightfully  
19 belong to the Debtors.

20 The only meaningful distinction between the two  
21 lawsuits is that the Debtors had not released Mr. Martillo  
22 and, therefore, they have a lawsuit currently pending I  
23 understand before this Court. The difference here is that  
24 the Debtors already released Moneris from any such claims,  
25 and all such released claims are enjoined by this Court's

1 prior orders. Observing that Mr. Paladini's conduct in the  
2 Martillo action had bordered on bad faith, this Court  
3 enjoined Mr. Paladini's lawsuit against Mr. Martillo in an  
4 order dated November 2011. For the reasons stated in Your  
5 Honor's decision in that matter, we believe Mr. Paladini's  
6 lawsuit here against Moneris also should be enjoined.

7           A bit of factual background; try to keep it concise.  
8 As the Court may recall, Moneris was the Debtors' sponsor  
9 pursuant to a, so called, bin sponsorship agreement. That  
10 allowed the Debtors' prepetition to process credit card  
11 transactions on the visa and mastercard networks. Notably,  
12 Mr. Paladini was not a party to that bin sponsorship  
13 agreement. The parties to that contract were the companies:  
14 Moneris on the one hand, and the prepetition Debtor, Cynergy  
15 Data on the other.

16           A material issue in the bankruptcy proceedings was  
17 the entitlement to distribution calculation of and allocation  
18 of approximately \$21 million dollars in, so called, rolling  
19 reserves that Cynergy was suppose to of held in Moneris's  
20 accounts, but instead they have been siphoned off to  
21 Cynergy's operating accounts. Following a year in  
22 proceedings in this Court, which included extensive document  
23 and deposition discovery, Your Honor approved the settlement  
24 amongst the Debtors, their lenders and Moneris to place  
25 approximately \$21 million dollars from the sale of the

1 Debtors' assets into escrow for distribution to the Debtors'  
2 merchants pursuant to their contractual rights under the  
3 merchant agreements which were tripartite agreements between  
4 the merchants, Moneris and Cynergy. Mr. Paladini was  
5 represented by counsel to negotiate certain language into the  
6 settlement order that affirmed that settlement term sheet --

7 THE COURT: Now he argues, of course, that he was not  
8 a party to that settlement agreement. But he, clearly, had  
9 notice and participated to some extent in its determination,  
10 is that right?

11 MR. CAPARELLI: Agreed, Your Honor, he was not a  
12 party to the settlement term sheet and, therefore, to the  
13 settlement per say. But he was and, in fact, he, you know,  
14 as we will touch on he argues, in fact, that he through  
15 counsel has specific language inserted into the settlement  
16 order for reasons I will explain. I do not believe that that  
17 language which gives him a narrow carve out to certain  
18 personal claims preserves the claims that he brings here. I  
19 mean, the main reason I can preview right now is because to  
20 the extent that he preserved personal claims because we  
21 believe that the claims here are derivative, they would not  
22 be preserved by that carve out.

23 Your Honor, in connection with the settlement which  
24 the Court approved by the settlement order date of September  
25 13, 2010 the Debtors and their lenders released Moneris from

1 all claims relating to the settlement, any reserves, and the  
2 bin sponsorship agreement. Essentially, everything related  
3 to Moneris's relationship with the Debtors was released.  
4 Moreover, the Court enjoined "all parties and interests to  
5 the bankruptcy cases" which undoubtedly included Mr.  
6 Paladini, a claimant, the majority shareholder and guarantor  
7 of the Debtors from asserting any released claims or any  
8 claims related to the Debtors' reserves. That is paragraphs  
9 11 and 12 in the settlement order.

10 Now despite the releases and injunctions embodied in  
11 the Court's orders which are binding on all parties and  
12 interest, including Mr. Paladini, he now asserts in this  
13 action several claims against Moneris through a lawsuit that  
14 he commenced in the Southern District as we discussed.  
15 Claiming, in effect, that Moneris set in motion a series of  
16 events that, ultimately, concluded in the Debtors filing for  
17 bankruptcy and they are then, allegedly, because of that  
18 bankruptcy caused harm to befall Mr. Paladini, individually,  
19 but in his role as either the shareholder or guarantor of the  
20 Debtors. Moneris respectfully requests that the Court  
21 enforce its prior orders to enjoin Mr. Paladini's lawsuit.

22 Moneris is entitled to that injunction because as I  
23 said earlier his claims are derivative and, therefore, belong  
24 to the Debtors. The claims are derivative because under  
25 Delaware law as the Supreme Court has articulated in Tooley

1 in its [indiscernible], the Debtors, not Mr. Paladini,  
2 suffered the alleged harm. And the Debtors not Mr. Paladini  
3 would receive the benefit of any recovery if he were able to  
4 prove the facts of his complaint.

5 THE COURT: Let me just interrupt you for one minute,  
6 Mr. Caparelli, just so I am clear.

7 MR. CAPARELLI: Sure.

8 THE COURT: Are we in agreement that Delaware law is  
9 the law that applies here? I seem to recall that Mr.  
10 Paladini questioned this law whether it was Delaware law or  
11 New York law.

12 MR. CAPARELLI: My recollection I did not think --

13 THE COURT: I may be wrong on that.

14 MR. CAPARELLI: -- I didn't think it was at issue  
15 here. I believe the standards are the same under New York  
16 and Delaware.

17 THE COURT: Okay.

18 MR. CAPARELLI: I, you know, understand in the  
19 Martillo action both of those were cited. I believe here in  
20 our papers, we have cited cases under New York law. Just to  
21 be sure, I do believe one Debtor that was not a party to the  
22 bin sponsorship agreement, different Cynergy entity, was a  
23 New York entity. But I do not understand this motion to turn  
24 on any dispute over a conflict of law.

25 THE COURT: Okay. Thank you.

1 MR. CAPARELLI: Now the Delaware Courts say that a  
2 fundamental question of whether a claim is derivative is  
3 this: looking at the body of the complaint and considering  
4 the nature of the wrong alleged, and of the relief requested,  
5 has the plaintiff demonstrated that he can prevail without  
6 showing injury to the Debtors. The answer, Your Honor, is  
7 quite simply no. Time and again, throughout the complaint,  
8 Mr. Paladini makes clear that the harm that allegedly befell  
9 him in his capacity as the majority shareholder and guarantor  
10 of the Debtors arose from the bankruptcy which he says,  
11 allegedly, Moneris caused.

12 Now, of course, Moneris denies a lot of the factual  
13 allegations in his complaint about its alleged conduct  
14 directed towards the company. But what is important for  
15 today's motion is that those allegations make clear that  
16 whatever conduct is alleged was directed at the company  
17 pursuant to its contractual relationship, and to the extent  
18 those facts were to be proven true the harm would be to the  
19 company first, and that any harm that did allegedly befall  
20 Mr. Paladini would be secondary and derivative.

21 THE COURT: Would that include the defamation claim?

22 MR. CAPARELLI: Well, Your Honor, that that he does  
23 not actually, in fact, have a cause of action for defamation.  
24 And I believe the reason why that is the case is because  
25 under whether you are under New York or Delaware those would

1 be time barred. In New York it is a one year time bar, and  
2 in Delaware it is a two year time bar. The events of this as  
3 you will recall proceeded September 2009 --

4 THE COURT: Yes.

5 MR. CAPARELLI: So I believe that is why if he had  
6 intended to bring such a claim, he would not have been able  
7 to do so. What he does do, and I agree this is the one  
8 alleged harm that you will not find in the Martillo action,  
9 is he does allege harm to his reputation. But he, in fact,  
10 shoehorns that into only one cause of action so out of his  
11 six or so causes of action, all of them only allege harms  
12 related to his loss in equity as a shareholder, and to his  
13 exposure to lawsuits as a guarantor.

14 The only cause of action that he asserts this harm to  
15 his professional reputation is in, oddly enough, the tortious  
16 interference with business relations claim. And the facts of  
17 that particular cause of action or the alleged facts are that  
18 Moneris allegedly disrupted a potential sale of Cynergy the  
19 company to a third party EVO which, allegedly, caused  
20 Cynergy's sales price ultimately to be lower; thereby,  
21 triggering Mr. Paladini's guarantees, destroying his equity  
22 and Cynergy, and allegedly damaging his professional  
23 reputation.

24 I submit that while that particular harm to the  
25 extent you could even find that that is a harm that flows for



1 tortious interference, and I submit that you cannot. But,  
2 nevertheless, it is still a derivative harm. But for the  
3 harm that Moneris allegedly caused to Cynergy, again, setting  
4 in motion, allegedly, a chain of events that led to Cynergy's  
5 bankruptcy and sale of assets that are priced lower than,  
6 allegedly, would have been obtained by a sale to EVO; that  
7 alleged harm to his reputation would not have occurred.

8 I do believe that each of the causes of actions do  
9 allege that same harm, that same derivative harm. I do want  
10 to touch, specifically, as well on the economic duress claim  
11 because I think that one is also a little bit different, but,  
12 nevertheless, remains a derivative claim. Mr. Paladini says  
13 that he was allegedly forced to sign the forbearance  
14 agreement. But he admits as a guarantor, that is paragraph  
15 130 of his complaint, and then he says that, again, accepting  
16 his allegation that the forbearance agreement which provided  
17 Cynergy time to set its affairs in order prior to filing the  
18 petition, nevertheless, says that that forbearance agreement  
19 allegedly forced Cynergy into bankruptcy which resulted in  
20 the termination of his employment, and exposure under the  
21 guarantees and credit facilities.

22 So, again, while I take by the grain of salt the  
23 allegation that a forbearance agreement could actually cause  
24 the bankruptcy, in effect, it undermines the extent to which  
25 he can claim that as a direct versus a derivative claim

1 because, ultimately, he himself emphasizes it is at paragraph  
2 158 of the complaint, and on page 6 of the objection, he  
3 emphasizes that it is the forbearance of claim which relates  
4 to his economic duress -- forbearance agreement which relates  
5 to the economic duress, ultimately, results in the harms that  
6 are derivative.

7           He also alleges claims for breach of good for a  
8 breach of the covenant of good faith and fair dealing, as  
9 well as a breach of fiduciary duty. In both of those causes  
10 of actions, he has claimed breaches of duties or covenants  
11 owed to Cynergy the company that, again, even to the extent  
12 that those could be proven true he does not allege any harm  
13 independent of the harm that allegedly would have been caused  
14 to the company by Moneris.

15           We have spoken already of his claim for tortious  
16 interference. He then has two additional claims of separate  
17 causes of action, but related in their factual allegations:  
18 general malpractice and negligence in which he alleges that  
19 Moneris, allegedly, performed accounting services; again, for  
20 Cynergy paragraph 213 in an allegedly deficient or negligent  
21 manner, that depending on the cause of action, which he then  
22 says was the cause of the alleged rolling reserve shortfall.  
23 And, again, then pled and set in motion to Cynergy's  
24 bankruptcy which, again, the harm from these alleged  
25 malpractice and negligent claims to him are the destruction

1 of his equity value, and his exposure to liability as  
2 Cynergy's guarantor.

3           So in sum, Mr. Paladini's alleged harm in each of the  
4 causes of action, no matter what the label on that cause of  
5 action is, derived from the Debtors' bankruptcy. And,  
6 accordingly, his claims to address those alleged harms are  
7 derivative and belong to the Debtors, and they should be  
8 enjoined. The Court reached the same conclusion when Mr.  
9 Paladini attempted to sue Mr. Martillo in New York. Now,  
10 again, Mr. Paladini argues that the two actions are apples  
11 and oranges because he says that his causes of action are  
12 different. And I do not disagree with that; the actual type  
13 of causes of action are different. But what is important is  
14 Delaware and New York law on the direct versus derivative  
15 distinction have said is that what you need to look at is  
16 where does the harm lie, and what to who would receive the  
17 relief to address those harms.

18           And as explained those are the same between the two  
19 cases. In fact, in the Martillo case the harm, the alleged  
20 harm to Mr. Paladini, to the destruction of his equity value  
21 is a classic derivative claim; only loses that equity value  
22 to the extent that the company was harmed, and would suffer  
23 the same harm as any other shareholder would. Similarly, any  
24 harm alleged due to exposure as a result of his guarantees  
25

1 are only secondary to the failure of the company to meet its  
2 debt obligations.

3 Now as we touched on earlier Mr. Paladini does argue  
4 that he preserved his claims in his lawsuit, but we think  
5 that is incorrect for several reasons.

6 THE COURT: Well the word that was used is, and I was  
7 looking for it that is why I was looking through the pages,  
8 Mr. Caparelli. I think in the settlement agreement it talks  
9 about personal claims.

10 MR. CAPARELLI: Yes.

11 THE COURT: And, I suppose, well what would you say  
12 to the distinction between a personal claim versus a direct  
13 claim versus, you know, a derivative claim? In other words,  
14 is there a difference?

15 MR. CAPARELLI: I think there is a difference. I  
16 think there is probably a nexus of claims that could be both  
17 personal direct, but I do not think they necessarily have to  
18 be. I mean I think, in effect, and the way we, you know,  
19 come at it to the extent that a personal claim could be  
20 treated as a direct claim in which he allegedly suffered a  
21 truly independent harm, those would still fall outside the  
22 scope of the carve out because those claims, as we discussed,  
23 a number of his factual allegations specifically allege that  
24 Moneris was not entitled to the rolling reserves.

25 Specifically alleged that Moneris's reconciliation

1 services miscalculated and misappropriated where the reserves  
2 would go and, therefore, in order for him to recover on the  
3 claims as stated he would actually have to prove or, and how  
4 the Court makes findings to the contrary of the plan and the  
5 settlement order that resolved the allocation entitlement to  
6 calculation and ownership of those reserves. And, in fact,  
7 any claim that directly challenges the allocation calculation  
8 control and ownership of those reserves is not carved out.

9           What the injunction provision of the settlement order  
10 states is that all parties and interest are enjoined from  
11 making any claim related to the reserves, but for any  
12 personal claim of Mr. Paladini's that indirectly relates to  
13 the reserves. But, again, here his claims do not indirectly  
14 touch on the reserves. They directly challenge and require,  
15 again, findings that Moneris was not truly entitled to those  
16 reserves. And that it itself reached its obligations to the  
17 company because it knew that the reserves were not owed to  
18 it, but, again, any type of claim like that is clearly  
19 enjoined by the settlement order.

20           A word here, Your Honor, just on the Court also has  
21 before it now a motion for sur-reply.

22           THE COURT: Yes.

23           MR. CAPARELLI: It mostly touches on this issue. We  
24 did put in opposition papers on Wednesday. I think we got  
25 the motion in on Tuesday last week. You know, we do not

1 believe that there is a basis for a sur-reply because we do  
2 not believe that this the -- why he argues is he needs the  
3 sur-replies because he says our arguments about why the carve  
4 out does not apply are new. We respectfully submit, Your  
5 Honor, that those were responsive arguments in his  
6 objections. We did in our motion papers acknowledge the  
7 carve out language, and explained in a concise manner that it  
8 did not apply.

9           When he emphasized in his objection and spent several  
10 paragraphs on it we addressed that argument by first  
11 explaining as I just did that his claims, whether personal or  
12 direct, are not carved out because, again, even if so called  
13 direct versus derivative claims they do directly challenge  
14 the entitlement to or ownership allocation of the reserves,  
15 and that is not carved out. And to as we did point out, to  
16 the extent that Mr. Paladini preserved claims in the  
17 settlement order, he can only preserve whatever types of  
18 claims he, actually, still possessed up to that point in  
19 time.

20           And what we point out what we did point out as well  
21 in response to his objection was that in the earlier DIP  
22 financing order which came in the fall of 2009 about a year  
23 prior to the settlement order, he had actually released  
24 essentially all claims against Moneris up until the time of  
25 that order. So to the extent that his claims in this action

1 rely on or relate to prepetition conduct, we think that he  
2 released them in the DIP financing order, in any event, to  
3 the extent that any of his claims could be viewed to as  
4 accrued after that, and therefore would be the only nub of a  
5 claim that was even available to be preserved in the  
6 settlement order, you know, we do not believe that they were  
7 preserved for the reasons I have discussed.

8           Leading me back to the fact that, you know, we do  
9 believe that the motion for sur-reply should be denied. But  
10 in the event that it is not, you know, we do not believe that  
11 the reasons stated in the proposed sur-reply hold water.  
12 They actually note that he also uses the opportunity in the  
13 proposed sur-reply to actually, for the first time, make  
14 himself arguments about why his claims are not derivative  
15 something we do not feel that he addressed in the objection.

16           THE COURT: I will hear from Mr. Paladini's counsel  
17 on that motion for sur-reply. I will say this my general  
18 philosophy is to grant those kinds of motions, maybe I'm a  
19 little too liberal, but my thought is at least by making the  
20 arguments in a reply or a sur-reply it provides the Court and  
21 opposing counsel an opportunity to preview arguments that may  
22 be made at the hearing itself, and that is generally helpful.

23           MR. CAPARELLI: Okay, understood, Your Honor.

24           THE COURT: But, and I will certainly take it under  
25 consideration at the moment.

1 MR. CAPARELLI: All right, thank you, Your Honor.

2 THE COURT: Yes.

3 MR. CAPARELLI: And, obviously, now I have taken the  
4 opportunity to, I think, address his arguments. I mean, I  
5 think the only other point I would add from his proposed  
6 reply is that he accuses us of having failed to distinguish a  
7 number of the cases he cites in his objection, including  
8 Cumberland Bankers Trust and, I think, Twin Mortgage or Twin  
9 City Mortgage. In each of those cases those dealt with  
10 actual third parties asserting claims. Actual third party  
11 non-Debtors asserting claims. Not parties in interest like  
12 the majority shareholder and guarantor seeking to make a  
13 claim against a third party, and so we do not believe any of  
14 those cases are applicable. A word as well, Your Honor, on  
15 jurisdiction --

16 THE COURT: Yes.

17 MR. CAPARELLI: -- that is in the original objection  
18 papers that the bulk of the papers submitted by Mr. Paladini  
19 challenge this Court's jurisdiction to hear this motion. The  
20 Court has jurisdiction because as a motion to enforce this  
21 Court's prior orders in the bankruptcy cases which, of  
22 course, are Court proceedings this motion itself is a Court  
23 proceeding. We are asking the Court to interpret and enforce  
24 its own orders. And the case law is clear that such motion  
25 to enforce, including in the Bankruptcy Court's decision in



1 SemCrude in 2011 calls that those are Court proceedings. He  
2 also suggests that it was improper to bring a motion rather  
3 than adversary proceeding pursuant to Bankruptcy Rule 7001  
4 sub VII.

5           The exception to that rule is that when the  
6 injunction is already set forth in an order of this Court  
7 which obviously it is both in the plan and the confirmation  
8 order, and the settlement order then you can proceed by  
9 motion. And we note that Your Honor made that observation on  
10 the record during the hearing on the motion made by the  
11 Trustee and Mr. Martillo in that action. Throughout his  
12 objection Mr. Paladini tries to argue that, nevertheless,  
13 this is a case among two non-Debtor third parties that should  
14 not interest the Court.

15           The error there is that the question, and this is  
16 discussed in SemCrude as well is that the question is not  
17 whether the substance of the complaint falls within a Court  
18 proceeding, but the substance of the motion, and the  
19 substance of the motion here is to seek, again, Your Honor's  
20 interpretation enforcement of its orders, those are Court  
21 proceedings. To the extent as a backstop the Court had to  
22 rely on related to jurisdiction, clearly, we think it would  
23 qualify that as well because Mr. Paladini's attempt to assert  
24 claims rightfully belong to the Debtors would have a  
25 conceivable effect on the administration of the estate.

1           Again, the error that pervades Mr. Paladini's papers,  
2 I believe, are just the assumption that his claims are  
3 personal non-derivative claims. Of course, if you accept  
4 that they are derivative claims then I think it is clear they  
5 fall within a Court proceeding. But even if you were to  
6 treat them as a direct claim it would still fall within a  
7 Court proceeding because you are, again, having to interpret  
8 the language of the settlement order and, therefore, still  
9 have jurisdiction over any such claims.

10           Finally, as we note in our papers the Court would  
11 have independent jurisdiction under the All Writs Act to  
12 exercise, and jurisdiction to enforce its orders. And the  
13 Court, of course, reserved its jurisdiction as well in the  
14 plan and the confirmation order. If Your Honor has any  
15 questions I am happy to answer those, although, I said with,  
16 you know, other than reserving perhaps a couple minutes in  
17 response.

18           THE COURT: Yes, certainly. You do have the right to  
19 reply, of course.

20           MR. CAPARELLI: All right.

21           THE COURT: And thank you, Mr. Caparelli.

22           MR. CAPARELLI: Thank you.

23           THE COURT: I know your argument, I think, hit  
24 certainly the point that I was interested in hearing.

25           MR. CAPARELLI: Okay. Thank you, Your Honor.

1 THE COURT: Thank you. Mr. Suttty, are you going to  
2 introduce me to someone?

3 MR. SUTTY: Yes.

4 THE COURT: Good.

5 MR. SUTTY: Good afternoon, Your Honor, Eric Suttty on  
6 behalf of Marcelo Paladini. I would like to introduce you to  
7 my co-counsel, Steve Aschettino. He has been admitted *pro*  
8 *hac vice*.

9 THE COURT: Thank you, Mr. Suttty. Mr. is it  
10 Aschettino did we get it right?

11 MR. ASCHETTINO: Yes, Your Honor, it is.

12 THE COURT: Welcome to our Court, thank you.

13 MR. ASCHETTINO: Thank you, Your Honor, Steven  
14 Aschettino from Aschettino Struhs, LLP. This is, actually,  
15 my third time in this Courtroom, the first time on this side  
16 of the bar.

17 THE COURT: Okay.

18 MR. ASCHETTINO: Your Honor will recall that I was  
19 general counsel for Cynergy Data in the bankruptcy  
20 proceedings.

21 THE COURT: Yes.

22 MR. ASCHETTINO: They were represented by my former  
23 partner Dennis Grebsky [*phonetic*] of Nixon Peabody.

24 THE COURT: Thank you, yes.  
25

1 MR. ASCHETTINO: Your Honor, let me start out by  
2 pointing out the obvious which is I am not a bankruptcy  
3 lawyer. I filed a civil action in the Southern District of  
4 New York on behalf of my client Marcelo Paladini, and what I  
5 expected to happen there was that counsel for Moneris was  
6 going to in all likelihood move to dismiss, and assert  
7 various theories for that dismissal under a 12(b)(6) motion,  
8 including that the claims asserted in that lawsuit are not  
9 direct claims. Instead, they chose to file a motion in this  
10 Court which surprised me.

11 Frankly, my understanding was that Paladini's claims,  
12 all of his personal claims, including claims that may relate  
13 to the reserves were carved out that that was very clear from  
14 all the prior proceedings in the bankruptcy action. And that  
15 at best, that could be a basis or an alleged basis for a  
16 motion to dismiss or, hopefully, more of a defense in an  
17 action like that. The motion before this Court while styled  
18 as a motion to enforce a settlement order, I believe is  
19 misleading, and overreaching. I will get to the jurisdiction  
20 argument in a minute, Your Honor.

21 THE COURT: Sure.

22 MR. ASCHETTINO: But I think what is going on here is  
23 forum shopping. Counsel for Moneris viewed the decision of  
24 this Court in the Martillo action in a light favorable to  
25 them, and they thought they would have a better chance at

1 getting the claims barred, enjoined and, perhaps, even  
2 effectively dismissed by proceeding in this Court. If you  
3 take a look at which I am sure Your Honor already has their  
4 motion papers, they do not just say that the claims are  
5 derivative and not direct, they go on to attack the merits of  
6 the claims. And to say that, effectively, the case is not  
7 the claim is not direct, and if Your Honor believes it may be  
8 direct, it does not hold any water, it lacks merit etc., to  
9 the extent they go that far as to essentially argue the  
10 merits of a claim by Paladini, I believe that is improper,  
11 and it is blatant overreaching.

12 THE COURT: Well I was even -- I meant to ask Mr.  
13 Caparelli this question, and I will ask him when we fight,  
14 but I will ask you first, isn't this the kind of motion where  
15 really I should be accepting all the well pleaded allegations  
16 as true for purposes of their motion?

17 MR. ASCHETTINO: That is absolutely our position,  
18 Your Honor.

19 THE COURT: Yes.

20 MR. ASCHETTINO: And that is exactly what the  
21 Southern District would do had they done what I thought they  
22 would do, which is file a motion there. And, of course, the  
23 Southern District would have many options there to dismiss  
24 some of the claims, all of the claims, to dismiss some claims  
25 without prejudice, to allow Paladini to amend the complaint,

1 to address the Court's concerns about any alleged  
2 efficiencies. Here they are attempting, essentially, to  
3 deprive Paladini of his day in Court by using bankruptcy  
4 procedure under the whole premise that every claim asserted  
5 in that complaint is prohibited by this Court's prior  
6 proceedings. And I think that is a false premise, Your  
7 Honor. Since this Court, apparently, has well we are here to  
8 today so I assume this Court has elected to grant  
9 jurisdiction, at least, over the instant motion, at least,  
10 for now.

11 THE COURT: Well no, I can certainly still find that  
12 I do not have jurisdiction. I think that is an issue before  
13 me as to whether or not I have jurisdiction in the first  
14 instance.

15 MR. ASCHETTINO: Well let me, briefly, address our  
16 views on that subject.

17 THE COURT: So you still you still got your shot at  
18 jurisdiction.

19 MR. ASCHETTINO: Thank you, appreciate that. I would  
20 have lost a whole page, Your Honor.

21 THE COURT: Okay.

22 MR. ASCHETTINO: I will be brief though.

23 THE COURT: Absolutely.

24 MR. ASCHETTINO: First and foremost, we believe this  
25 is clearly a dispute between non-Debtor parties. Paladini is

1 not seeking payment from the Debtors' estate or for that  
2 matter from the rolling reserves, assuming there is any  
3 rolling reserve left. This is a non-Court proceeding  
4 unrelated to the Debtors' bankruptcy. I will address why I  
5 believe that is in a minute. The outcome of this case will  
6 not in any way alter the Debtors' right, liabilities, options  
7 or freedom of action. Moreover, the Harris defendants bring  
8 this motion almost two years post confirmation.

9 I believe there is ample case law that suggests that  
10 this Court's already limited jurisdiction becomes more  
11 limited over time. We do not believe there is any basis for  
12 subject matter jurisdiction over these parties and this  
13 proceeding. The sole basis that counsel relies upon to bring  
14 this motion is that this Court has retained jurisdiction  
15 under the settlement agreement in the liquidation plan.  
16 However, I do not believe that that claim is meritorious. I  
17 think it is manufactured to attempt to give jurisdiction to  
18 this Court.

19 It is very clear from all of the prior proceedings in  
20 this case that there was a complete carve out for all of  
21 Paladini's personal claims. Paladini is represented by  
22 counsel. I think it was Doug Spelfogel of Foley & Lardner.  
23 While he was not a party to some of the agreements that have  
24 been discussed in the motion, discussed today, he made  
25 certain through his counsel that there was a carve out for

1 his claims. Those claims against Harris and Moneris were  
2 expressly contemplated at the time. They were discussed by  
3 Mr. Spelfogel, Mr. Drebsky. There is even comments from Your  
4 Honor in the record about those claims. So I believe it is  
5 ingenious to suggest there is not a carve out for those  
6 claims.

7           If this Court elects to exercise its jurisdiction  
8 over this proceeding in my client's view the only question,  
9 only question before this Court is whether or not the types  
10 of claims included in Paladini's complaint are included  
11 within the carve out to the settlement agreement, nothing  
12 more. Not whether they have merit. Not whether they are  
13 well plead. But it is more of a that that 12(b)(6) analysis  
14 should be deferred to the Southern District. And this court  
15 should simply determine whether any claims in this complaint  
16 are personal to Paladini.

17           We believe, naturally, that many of the claims if not  
18 all of the claims are, indeed, personal and direct claims.  
19 Now counsel would have you believe that this is a shareholder  
20 derivative action. While, clearly, my client lost a lot of  
21 money due to the sale of the company that he co-founded and  
22 was a majority owner of. There are many claims in that  
23 complaint that do not sound of diminishing in value of  
24 shares, and otherwise suggest the shareholder derivative  
25 action. I agree that the names of causes of action in and of



1 themselves are often not very helpful. The names of the  
2 causes of action just for the record to remind everyone are  
3 economic duress.

4 THE COURT: Yes.

5 MR. ASCHETTINO: Breach of the covenant good faith  
6 and fair dealing, breach of fiduciary duty, tortious  
7 interference of business relations, general malpractice and  
8 negligence.

9 THE COURT: See and that is why I asked Mr. Caparelli  
10 about distinction between personal and direct. And to me it  
11 is an important differentiation between those terms;  
12 personal, direct clearly would be saying non-derivative. But  
13 I am not so certain, and what I am searching for is whether  
14 personal is limited to non-derivative claims or is it more  
15 expansive than that. That is really where I am, sort of,  
16 most interested. And I do not know that the parties,  
17 necessarily, have the specific answer for me on that.

18 MR. ASCHETTINO: I will confess that this party does  
19 not have a specific answer, Your Honor, but I would be happy  
20 to brief that issue further if the Court would like.

21 THE COURT: I may ask for short letter memorandum on  
22 that point.

23 MR. ASCHETTINO: We would be happy to do that, Your  
24 Honor.

25 THE COURT: Sure.

1 MR. ASCHETTINO: Let me just talk for a minute if I  
2 could about, let me just back up a second.

3 THE COURT: Yes.

4 MR. ASCHETTINO: As alleged in the complaint here is  
5 what the plaintiff believed happened in terms of the demise  
6 of Cynergy, if you will, that ultimately lead to personal and  
7 direct damage to my client. And I will be brief on this  
8 background because Your Honor knows the background very, very  
9 well.

10 THE COURT: Sure.

11 MR. ASCHETTINO: But I just want to be clear that we  
12 are focusing on the right background facts here,

13 THE COURT: Sure. Please. Take your time, take your  
14 time.

15 MR. ASCHETTINO: The bin sponsor agreement at issue  
16 went into effect on November 1, 2008.

17 THE COURT: Correct.

18 MR. ASCHETTINO: At that time Cynergy was not aware,  
19 this is all set forth in the complaint, of any financial  
20 issues or problems that it had. When Moneris took over the  
21 bin sponsor agreement, and also hopefully it is clear when I  
22 say Moneris it is hard for me to distinguish what Moneris did  
23 versus what Harris did at various times because Moneris acted  
24 as agent for Harris Bank, Harris Bank was actually the

25

1 sponsor bank. So I am using them both as counsel did,  
2 collectively, as Moneris.

3 THE COURT: Okay, all right.

4 MR. ASCHETTINO: Moneris when it took over the bin  
5 sponsor agreement with Cynergy it assumed responsibility for  
6 the movement of all funds to Cynergy. All funds passed  
7 through Moneris, and then found its way to Cynergy. The  
8 whole financial accounting structure, if you will, banking  
9 structure of Cynergy was essentially set up and managed by  
10 Moneris. It was also contracted to reconcile on a daily or  
11 at least a monthly basis the flow of those funds. What  
12 Moneris essentially did was it fell asleep at the wheel. It  
13 did not do its job. It got all its allege in the complaint,  
14 and it allowed merchant reserve, rolling reserve funds, if  
15 you will, to find their way into Cynergy's operating  
16 accounts.

17 This is not something that Cynergy did. Cynergy  
18 assumed that Moneris was doing its job, and Cynergy  
19 rightfully believed that these funds were its own funds.  
20 Moneris, never on its own, realized that it was doing that.  
21 The way they found out, and this was all before this Court in  
22 various proceedings that Paladini was not a party to  
23 involving Moneris's former president Greg Cohen. Moneris  
24 found out that there may be an issue with the rolling  
25

1 reserves through an improper communication it had with  
2 another Cynergy bidder, EVO.

3 Both Moneris and EVO Merchant Services were Cynergy  
4 bidders. They both signed NDA's, and they were not supposed  
5 to communicate with each other. EVO, apparently, called up  
6 Moneris to ask questions, and they discussed this issue. Now  
7 EVO is not just some bidder. EVO is a company with whom  
8 Paladini has had a long history with. Paladini knows the CEO  
9 Ray Sidhom very well. They have done various things  
10 together. They had talked about partnering together at  
11 various times, and they talked about a proposed acquisition  
12 by EVO of Cynergy.

13 That communication with Moneris had two consequences.  
14 Eventually Moneris stopped being a suitor for Cynergy. Evo,  
15 eventually, stopped being a suitor for Cynergy, and Moneris  
16 realized hey we should look into this rolling reserve thing.  
17 And they immediately withheld, I think it was \$7 million  
18 dollars at first, again this is all set forth in the  
19 complaint, I think in or around April of 2009. And they  
20 eventually decided to withhold \$21 million dollars, okay.  
21 So, again, let me just stop there. There is a lot of  
22 allegations of wrongdoing around all that I just said, and as  
23 set forth in the complaint. Now, again, admittedly and we  
24 have never alleged otherwise these are all primarily dealings  
25 between the defendants and Cynergy.

1 THE COURT: Right.

2 MR. ASCHETTINO: Only thing I have said so far about  
3 Mr. Paladini, besides his role as CEO, officer, director,  
4 majority shareholder and the like, is that he had a  
5 relationship with EVO. Now this led up to the forbearance  
6 agreement at issue. Now, again, there has been a lot of  
7 interesting writings and a comment today about a forbearance  
8 agreement how could that be a bad thing? Right, it is a good  
9 thing. Well first of all the whole premise for the \$21  
10 million dollars was nonsensical, and designed to cover up  
11 Moneris's own inaction and its own failures to act, and its  
12 own breaches of the bin sponsor agreement, mastercard/visa  
13 rules, and various other things.

14 Not having to pay \$21 million dollars right away that  
15 was not owed in the first place, I guess, one could argue  
16 that is a benefit. If anyone benefitted from that though  
17 besides Moneris, it may have been, arguably, Cynergy.  
18 Paladini did not benefit from that. To the contrary, Bob  
19 Paladini was personally made worse off. Why is that?  
20 Paladini was a guarantor of Cynergy's indebtedness. Now, I  
21 understand there is a lot of there has been of discussion in  
22 the motion papers, and there is some case law out there that  
23 may suggest that an action on the guarantee is a classic  
24 derivative claim.

25 THE COURT: Yes.

1 MR. ASCHETTINO: Perhaps that is true. We have not  
2 argued otherwise, Your Honor; however, we are not arguing  
3 that because the guarantee was triggered Paladini has a  
4 personal or direct claim. What we have explained we believe  
5 to the Court in the motion papers, and we tried to explain in  
6 the complaint is that by virtue of that forbearance agreement  
7 which may have benefitted the company, it hurt Paladini  
8 because now all of a sudden, first of all, he should have had  
9 to be a signatory to that agreement that was another term  
10 that Moneris insisted on.

11 Ultimately, though he had no real choice because if  
12 he listened to himself or his counsel or whomever and decided  
13 not to be a party to it, Moneris may not have forbore, if  
14 that is the right term, any further. So he had no effective  
15 choice. By signing that agreement and having it go into  
16 effect he now went down the list, so to speak, of creditors  
17 \$21 million dollars.

18 THE COURT: Sure.

19 MR. ASCHETTINO: So company helped Paladini hurt,  
20 that is the sign to me of a direct claim right there which  
21 takes me to the types of allegations that are in the  
22 complaint. I am giving you some of the prudent factual  
23 background. We allege in the complaint that Moneris coerced  
24 Paladini to execute the forbearance agreement for the reasons  
25 I just explained, that nullified certain subordination

1 agreements. Those agreements are discussed in the complaint.  
2 It has affected Paladini to additional personal liability  
3 that he did not have before. In addition, based on those  
4 communications they were improper that Moneris had with EVO  
5 certain information was disclosed that we believe is false,  
6 and regardless of whether if it is veracity hurt Paladini's  
7 reputation.

8           When word got out, so to speak, that there was \$21  
9 million dollars unaccounted for or improperly withheld the  
10 presumption was that Paladini, and/or other officers of the  
11 company somehow siphoned off those funds. That might not  
12 have been directly stated by Moneris, we are not saying that  
13 that was the case, but they are the ones that concocted this  
14 whole theory that Cynergy had breached the bin agreement, and  
15 improperly withheld funds when instead they were the ones  
16 directing those funds.

17           Now, again, one could say again well that is  
18 Cynergy's wrongdoing not Paladini's. Perhaps, but Cynergy  
19 was Paladini in the eyes of the marketplace. That is not a  
20 legal distinction, but it speaks directly to the damage to  
21 his reputation by alleging that his company improperly  
22 withheld funds. We also allege in the complaint that Moneris  
23 failed to monitor and reconcile Cynergy's daily transactions  
24 and accounts. Paladini in making decisions about loans,  
25 guarantees and signing other documents relied on the fact

1 that he had a sponsor bank, presumably, a more sophisticated  
2 organization with more savvy financial controls than  
3 Cynergy's keeping an eye on things.

4 And I have already discussed with Your Honor our  
5 views on the improper dissemination of communication with  
6 EVO. The types of claims I have just described to you which  
7 are not putting, you know, arbitrary labels on things, but  
8 describing certain actual wrongdoing to me these are not the  
9 types of claims and allegations of wrongdoing that belong to  
10 all of the Debtors' creditors. So let's turn for a moment to  
11 damages. We have talked about damage to reputation. I do  
12 not -- unless Your Honor would like me to go to that again.

13 THE COURT: You know what, you will have to forgive  
14 me for one moment I hear something beeping.

15 MR. ASCHETTINO: Sure.

16 THE COURT: I do not know where it is. This thing  
17 and it was just distracting me a little bit, and I apologize.  
18 And the only thing I can figure to do if I had a hammer I  
19 would know what to do, all right. I do not know why I had  
20 chosen to do this at this particular time, but there it goes  
21 okay. I apologize, Mr. Aschettino.

22 MR. ASCHETTINO: That is okay. It is quite all  
23 right, Your Honor. What was that by the way?

24 THE COURT: It is a thermometer, and I think the  
25 battery must have run out. Okay. Thank you.



1 MR. ASCHETTINO: So I was just beginning to talk  
2 about Paladini's damages.

3 THE COURT: Damages, yes.

4 MR. ASCHETTINO: Damage to his reputation by virtue  
5 of the false claim of a breach by Cynergy, and a withholding  
6 of \$21 million dollars.

7 THE COURT: Yes.

8 MR. ASCHETTINO: And the implication that Paladini  
9 and the management team was responsible for that. His loss  
10 of employment, again, this is a classic personal claim.  
11 Because of the damage done by Moneris to Paladini's  
12 reputation he has, essentially, become a peri in the  
13 industry, unavoidable. This is a man that had an incredible  
14 reputation and integrity, and the industry now believes that  
15 he has somehow misappropriated funds or is otherwise  
16 dishonest.

17 The only employment he was able to find, the only  
18 offer of employment he received was from the buyer of Cynergy  
19 Convest [phonetic] but that was, you know, a self serving  
20 transaction designed to glean the maximum information from  
21 the former founder of the company. The forbearance agreement  
22 which we touched upon briefly in the background section of my  
23 argument, remember that other than the company, Paladini was  
24 the only individual signatory. And that forbearance  
25 agreement elevated Moneris's claims above the other lenders,

1 specifically, to Paladini's detriment. That, again, is not  
2 something those are not the types of claims that other  
3 creditors or the Debtor would have.

4 He was personally exposed to additional debt he was  
5 not otherwise responsible for, and that modified his  
6 guarantee. The trigger of the guarantee is not what we are  
7 arguing here. In addition, there were numerous lawsuits by  
8 other creditors. Those lawsuits resulted in Paladini  
9 spending close to \$2 million dollars defending those claims.

10 THE COURT: Lawsuits in which he was personally  
11 named?

12 MR. ASCHETTINO: Personally named. And, lastly, well  
13 I guess I said this before, Your Honor, but Paladini alone  
14 suffered all of the personal un-particularized injury that  
15 are outlined in the complaint. In terms of the legal  
16 analysis, the Tooley case we understand is disseminal case in  
17 this jurisdiction. There is a two prong analysis there that  
18 I believe is who suffered the alleged harm, and who would  
19 receive the benefit of any recovery? And I think if you  
20 apply the Tooley analysis to the claims as I have described  
21 them I cannot imagine this Court could conclude that either  
22 all or at least some of those claims are personal and direct.  
23 This lawsuit is between third parties and not the company.  
24 Paladini's damages are clearly not solely the result of a  
25 decrease in share value.

1           Again, Your Honor, counsel has spent much time in  
2 motion papers and today arguing that the claims are without  
3 merit that should not be before the Court. Those arguments  
4 would be the subject of a 12(b)(6) motion in the Southern  
5 District, and it certainly can be sent back there for that  
6 purpose, Your Honor. The Martillo action --

7           THE COURT: Yes.

8           MR. ASCHETTINO: -- that was referenced in one of the  
9 first pages of Moneris's motions. It was one of the first  
10 things that came up here today. Okay, I see the similarity  
11 Paladini brought an action against somebody else so that  
12 makes it the same type of case. It certainly is not. The  
13 essence of that case was that the company made improper  
14 distributions to Martillo, and that harmed Paladini. It was  
15 the Trustee in that case that brought a motion to the Court.  
16 Now at that time the Trustee had not yet commenced any type  
17 of action against Martillo, and it was not clear whether or  
18 not the Trustee would do that. Paladini had certain facts  
19 and background information that the Trustee did not have.  
20 And Paladini elected as perhaps, you know, he should have  
21 with the advice of his counsel to move forward and pursue an  
22 action there. This Court --

23           THE COURT: Were Paladini correct that money would  
24 have gone back into the company.

25

1 MR. ASCHETTINO: Yes. This case is very different.  
2 Again, these are personal claims expressly carved out of all  
3 the prior proceedings in this Court to dispute between two  
4 non-Debtor parties, and even in Martillo the Court recognized  
5 that Paladini was free to pursue any personal claims he may  
6 have against Martillo just not the types of claims he pursued  
7 in that action. I do not think the outcome of that case  
8 should in any way have any bearing on the outcome of this  
9 case. I have to pay some attention, I suppose, to this  
10 argument about the DIP order which that also confused me. I  
11 thought it was a new argument, Your Honor, meriting the  
12 motion for the sur-reply?

13 THE COURT: Yes, and I am going to grant that motion,  
14 frankly, Mr. Aschettino, again, because I think it is helpful  
15 to the process to have your arguments in writing before me  
16 that I could consider, you know, prior to arguments so --

17 MR. ASCHETTINO: Thank you, Your Honor, I appreciate  
18 that.

19 THE COURT: -- you would have been allowed to make  
20 those arguments clearly here. I do not see any prejudice to  
21 making them in writing ahead of time.

22 MR. ASCHETTINO: Thank you very much, Your Honor.  
23 The DIP order, I believe, expressly ratified and confirmed  
24 the terms of the forbearance agreement. The forbearance  
25 agreement contained an expressed carve out for all of

1 Paladini's personal claims. So I just do not follow how  
2 Moneris can argue that the DIP order, somehow, precludes the  
3 claims being asserted in this lawsuit. It even states  
4 further in terms of the deadline for parties to bring claims  
5 it says that parties other than the Debtors and Paladini must  
6 bring claims against Harris by November 16, 2009. I do not  
7 see how the DIP order has any bearing on these proceedings  
8 whatsoever.

9 By way of a conclusion, Your Honor, we firmly believe  
10 this Court does not have subject matter jurisdiction over the  
11 dispute between Paladini and the Harris defendants. The  
12 Southern District of New York is the proper forum to resolve  
13 that dispute. And, otherwise, address any defenses the  
14 Harris defendants believe they may have. This Court should  
15 disregard the defense attempt at forum shopping, and conclude  
16 that it does not have jurisdiction and defer to the District  
17 Court. All or at least some of Paladini's claims are direct  
18 and personal.

19 These claims were expressly carved out at the  
20 settlement agreement and liquidation plan. All involved in  
21 those prior proceedings understood and agreed that Paladini's  
22 claims would be preserved. There is simply no basis to  
23 enjoin the Southern District action. Paladini has suffered  
24 substantial harm as a result of the Harris defendant's  
25 actions. He should have his day in Court. This Court should

1 respectfully defer to the District Court for the resolution  
2 of the claims between the instant non-Debtor parties, and  
3 deny the motion. Does Your Honor have any questions?

4 THE COURT: I do not, Mr. Aschettino, thank you very  
5 much. And hereto I will let the parties go back and forth  
6 for a little bit. If you hear something that you would like  
7 to respond to I will certainly give you that opportunity as  
8 long as it is understood that the movant has the last word  
9 prior to.

10 MR. ASCHETTINO: Thank you very much, Your Honor.

11 THE COURT: Thank you. Thank you, sir. Yes, Mr.  
12 Caparelli.

13 MR. CAPARELLI: Thank you, Your Honor. I will try to  
14 keep this short, and just mostly try to touch on I think some  
15 of the key points of dispute. First, that Mr. Paladini  
16 argues that he preserved for himself during the bankruptcy  
17 proceedings and at the confirmation hearing a preservation of  
18 all personal claims that would carry over to this case. The  
19 discussion that he cites during --

20 THE COURT: Let's look; do you have the settlement  
21 agreement in front of you? I just wanted to go to it for a  
22 minute.

23 MR. CAPARELLI: I do, the settlement order, Your  
24 Honor, yes I do have that.

25 THE COURT: It was the settlement order, exactly.

1 narrow carve out because it says with respect to clause 2 so  
2 that is any claims related to reserves. It should not be  
3 construed to preclude Mr. Paladini from asserting claims or  
4 defenses to claims asserted against him, which claims are  
5 indirectly related to the reserves. So it does not even  
6 speak to personal.

7           It just simply says that language does not preclude  
8 him from bringing some type of claim, perhaps for example, a  
9 defamation claim that might indirectly touch on the reserves.  
10 But which is not of the type of cause of action he brings  
11 here. But that do not affect the entitlement to calculation  
12 of ownership, control or distribution of the reserves, and so  
13 that is an exception to the carve out. And so it is our  
14 position, Your Honor, that these claims are derivative;  
15 therefore, they are enjoined even if they are treated as  
16 direct claims not derivative. And really we do not think  
17 there is any position to view them as personal just does not  
18 fit into the calculus.

19           If they are direct claims they are direct claims of  
20 the type that were accepted from the carve out. And just a -  
21 - to then go back to the discussion at the confirmation  
22 hearing, Your Honor, that discussion was talking about the  
23 plans injunction and relief provisions, article 12, sections  
24 G & H. Those are not the injunctive provisions that we are  
25 seeking enforcement of here. And that is what Mr. Spelfogel

1 was seeking clarity on. What we are moving upon is sections  
2 O & R of the plan which make clear that the settlement order  
3 and the settlement term sheet are incorporated into the plan,  
4 and that the settlement order and any of its language remains  
5 binding and in full force in effect.

6 So whatever exception or carve out Mr. Paladini was  
7 able to preserve with respect to the plans injunction  
8 provision has no bearing on what scope of claim he has left  
9 under the settlement order. What we are seeking, of course,  
10 from here is because it affected Moneris directly, is the  
11 settlement orders injunctions of which, again, is the narrow  
12 and inapplicable carve out.

13 Mr. Paladini argues that he was personally worse off  
14 due to the forbearance agreement, and that that establishes  
15 one element of his personal harm. To be honest, Your Honor,  
16 I am not quite sure now today what to make of his reliance  
17 upon the forbearance agreement. On the one hand he asserts  
18 harm as a result of the forbearance agreement. On the other  
19 he points to the fact that the forbearance agreement was  
20 ratified and confirmed by the DIP financing order to which he  
21 was a party.

22 While he uses that to try to benefit himself by  
23 saying, well, by ratifying and confirming the forbearance  
24 agreement which itself had a carve out from my personal  
25 claims, he ignores the DIP financing orders own release



1 provision in which he, a defined credit party, gave a full  
2 waiver up to that point in time of Moneris. So whatever he  
3 did in the forbearance agreement, and to whatever extent it  
4 may have been ratified and confirmed by the DIP financing  
5 order he then gave a new release of Moneris in that order.

6 And then before I get to my next point about the  
7 forbearance agreement I do want to make a point about the  
8 factual allegations here. This is not a motion to dismiss  
9 under rule 12(b)(6). So, respectfully, we believe that Your  
10 Honor can take into account that any facts on the record, and  
11 need not be constrained by the, you know, accepting the  
12 allegations as true.

13 THE COURT: But I am not really in a position to make  
14 --

15 MR. CAPARELLI: No, no I agree, but that is and we  
16 made clear in our papers that we, of course, our -- we  
17 believe that the relief we seek, we are entitled to, when you  
18 accept his allegations as true, but with the caveat that you  
19 even in a 12(b)(6) no Court is obligated to accept as true  
20 conclusory allegations --

21 THE COURT: Sure.

22 MR. CAPARELLI: -- or inferences that do not  
23 reasonably, can be reasonably drawn from the factual  
24 allegations or are contradicted by documents outside the four  
25 corners that themselves are incorporated by reference to or

1 attached to the complaint. The forbearance agreement is one  
2 of the agreements that was attached to the complaint. The  
3 forbearance agreement itself states that Mr. Paladini had  
4 counsel in entering into it, and did not enter into it by  
5 virtue of any duress. It also makes clear that nothing in  
6 the forbearance agreement creates any new obligations or  
7 otherwise increases any debts owed or otherwise creates any  
8 new guarantee by Mr. Paladini.

9           So we do not believe contrary to Mr. Aschettino's  
10 argument that the forbearance agreement put Mr. Paladini in  
11 any worse position. And the Court is entitled to take into  
12 account the terms of that agreement because it was attached  
13 to the plaintiff's complaint. He also argues that the  
14 forbearance agreement in some way prioritized Moneris, vis-a-  
15 vie the other creditors, again, not true. Mr. Paladini  
16 attached to his complaint the intercreditor agreement between  
17 and among the lenders to Cynergy and Moneris which through  
18 that agreement prior to the forbearance agreement already  
19 prioritized Harris to those reserved funds.

20           Again, just to reiterate during argument what was  
21 made clear is that the alleged conduct and wrongdoing,  
22 however named, was directed at Cynergy and then had a  
23 secondary effect on Mr. Paladini. While it is true that this  
24 might not be classified as a "shareholder derivative suit"  
25 that too is not a test. Numerous cases including several

1 cited by this Court in the Martillo order, including  
2 Amusement Industry vs. Stern in the Southern District of New  
3 York are cases that were not "shareholder derivative suits,"  
4 but instead were suits by third parties who alleged that the  
5 defendants set in motion a chain of events as here that led  
6 to a bankruptcy and an enforcement of a guarantee against the  
7 plaintiff.

8 And in those cases the shareholder guarantor's  
9 assertion of those claims no matter how hard they try to say  
10 I was hurt personally because of my guarantee or because of  
11 my exposure as a result of those guarantees was,  
12 nevertheless, considered a derivative claim even though it  
13 was not, again, "shareholder derivative context." And we  
14 believe those authorities would prevail here just as it did  
15 in the Martillo action, and on those authorities and this  
16 Court's prior order would require an injunction under the  
17 current orders in this bankruptcy case here as well.

18 THE COURT: All right. Thank you, Mr. Caparelli.  
19 Mr. Aschettino, yes.

20 MR. ASCHETTINO: I may try to briefly respond, Your  
21 Honor?

22 THE COURT: Sure you may.

23 MR. ASCHETTINO: I will try to take these in order.  
24 In terms of the carve out.

25 THE COURT: Yes.

1 MR. ASCHETTINO: The ultimate language in the  
2 liquidation plan, I believe, it contains some errors to be  
3 honest with you, Your Honor. I believe that there is a coma,  
4 and maybe a word missing the way it reads there. But, again,  
5 if you look at the history of all of the prior proceedings,  
6 the settlement agreement, the transcripts, it makes very  
7 clear that all personal claims were preserved. And, in fact,  
8 what it is supposed to say in the plan is even claims  
9 pertaining to the reserves.

10 Nowhere in this lawsuit is Paladini seeking  
11 disgorgement of any portion of the reserves to him. He is  
12 essentially trying to hold Moneris accountable for their  
13 tortious actions. The carve out preserves all personal  
14 claims. In fact and, again, I could read as much as the  
15 Court would like to hear, but if you if Your Honor reviews  
16 the --

17 THE COURT: Show me where you are -- tell me where  
18 you are reading from, Mr. Aschettino.

19 MR. ASCHETTINO: I am looking at the transcript of  
20 the settlement hearing.

21 THE COURT: And I do not know if I have got that in  
22 the binder, but I will listen to you.

23 MR. ASCHETTINO: And attached to that is the  
24 transcript. On page 60, again, there is a lot of colloquy  
25 between Mr. Spelfogel, Mr. Drebsky and the Court, and on page

1 64 of that transcript --

2 THE COURT: Yes.

3 MR. ASCHETTINO: -- Your Honor clarifies, tries to, I  
4 think, move past a lot of that, and says the Court  
5 (indiscernible) beginning on line 3 on page 64 of the  
6 transcript, and my ruling finding that the plan should be  
7 confirmed incorporates those representations, Mr. Drebsky,  
8 mainly that the injunction does not limit personal claims  
9 from being pursued. And the prior reference on the prior  
10 previous pages is all from Mr. Spelfogel, Mr. Drebsky,  
11 specifically referring to Mr. Paladini's claims. I really do  
12 not think the Court or, you know, should spend much time  
13 trying to decode this. That was the clear intent of the  
14 parties what the Paladini's claims would be carved out.

15 Now turning to the forbearance agreement and the DIP  
16 order, the realities of the forbearance agreement were such  
17 that at the time Paladini had no choice but to sign it. So  
18 he did the best that he could with the advice of counsel  
19 which was we will sign it because we really have not material  
20 choice, and we are going to have a carve out for any claims  
21 we may have in the future because of the shenanigans that led  
22 to this forbearance agreement.

23 THE COURT: Okay.

24 MR. ASCHETTINO: Why we reference the DIP order  
25 referencing the forbearance agreement is because the DIP

1 order expressly incorporates that carve out by reference.  
2 Paladini was, in fact, personally harmed by the forbearance  
3 agreement, but it certainly is logical and prudent if one is  
4 to sign a document one does not wish to sign, and that is  
5 going to make you worse off to have a carve out so that you  
6 can in the future pursue litigation against the parties that  
7 led you to that agreement. That was discussed then.

8           It was discussed at the various hearings, and always  
9 contemplated. Again, back to my initial comments about being  
10 surprised that our lawsuit in New York which should have been  
11 fully expected led to motion practice here. Again, much of  
12 what Mr. Caparelli just said went to attack the merits of the  
13 claims. The exact type of 12(b)(6) arguments that I do not  
14 believe are appropriate for this motion. Whether the claims  
15 are good or not good that is for the Southern District to  
16 decide.

17           THE COURT: Sure.

18           MR. ASCHETTINO: You know, we agree that conclusory  
19 allegations in a complaint, and labels to causes of action  
20 are not dispositive of whether the claims have merit. Again,  
21 it is not for this Court, respectfully, to say whether the  
22 claims have merit. Again, if any of the claims in that  
23 complaint are deemed to be direct personal claims of the type  
24 carved out from the settlement plan and joint liquidation  
25 plan, the action should be allowed to proceed. And any

1 defenses or claims they may have can be addressed by the  
2 Southern District. Thank you, again, Your Honor.

3 THE COURT: And that to me is the point here when you  
4 refer to when you say direct personal claims. Direct  
5 personal claims are not derivative claims. So basically your  
6 argument is, first of all, I do not have jurisdiction to even  
7 be involved at this point in this proceeding on this motion.  
8 And if I take it beyond that, and I say I do have  
9 jurisdiction, that I have to basically give broad reading to  
10 the term personal.

11 MR. ASCHETTINO: Yes, Your Honor, and broad reading  
12 to the allegations in the complaint.

13 THE COURT: And to the complaint, exactly.

14 MR. ASCHETTINO: As the Southern District would do.

15 THE COURT: Yes. All right, all right. Thank you,  
16 thank you, Mr. Aschettino.

17 MR. ASCHETTINO: And since you're on that point, Your  
18 Honor, I do not see why this Court need undertake that heavy  
19 lift, if you will, when the Southern District already has  
20 this action and can do just that.

21 THE COURT: All right, thank you.

22 MR. ASCHETTINO: Thank you, Your Honor.

23 THE COURT: I appreciate that. Mr. Caparelli, this  
24 will be the last word. At some point we do have have that.  
25 But I do like the parties to have an opportunity to go back

1 and forth a little bit to expand on their arguments, and it  
2 helps me. Mr. Caparelli, yes sir.

3 MR. CAPARELLI: Thank you, Your Honor. Well first  
4 if it would help I do have a copy of the December 2010  
5 transcript. If it would help for me to hand up?

6 THE COURT: Certainly, thank you, sure. Thank you  
7 for doing that, thanks, Mr. Caparelli. All right, and we  
8 will look at page --

9 MR. CAPARELLI: Hopefully, I believe that is a clean  
10 copy.

11 THE COURT: Page 65, I think that was it. I wrote it  
12 down.

13 MR. CAPARELLI: That is where he focuses on, but it  
14 is important to note that --

15 THE COURT: 64.

16 MR. CAPARELLI: -- for example, you know, they kind  
17 of get into the issues earlier. And, for example, at page  
18 28, Mr. Paladini's counsel at the time Mr. Spelfogel said,  
19 you know, I believe we are talking about sub-section G, the  
20 permanent injunction, and sub-section H, Debtors' releases of  
21 article 12 which, again, are the plans, releases and  
22 injunctions. And from there, I mean having then dove into  
23 that because, again, that this is the confirmation hearing in  
24 which they are talking about Mr. Paladini's objection to the  
25 plans injunction and release provisions that they get to the



1 point in time at page 65 or so where the Debtors and Mr.  
2 Paladini agree that those provisions will not limit his  
3 personal claims.

4 But the permanent injunction provision in the  
5 confirmed plan itself says, after the confirmation hearing,  
6 and the language as confirmed says this injunction shall not  
7 however apply to limit, abridge or, otherwise, affect the  
8 rights of the parties to the settlement term sheet or as  
9 provided in the settlement order, including without  
10 limitation, the rights of Moneris Solutions and Harris N.A.,  
11 and any and all other parties to enforce the terms of the  
12 settlement term sheet, or compel compliance with the  
13 settlement order.

14 So the whole discussion at the confirmation hearing  
15 about what Mr. Paladini preserved with respect to the plans  
16 injunction is a red herring that has no application here.  
17 This is a settlement orders injunction provision that applies  
18 here. To the extent that there is a narrow carve out that  
19 does not carve out any so called or "personal claims." It  
20 allows them to preserve whatever he had left following his  
21 releases in the DIP financing order to any claim that might  
22 indirectly touch on the reserves. But, again, did not carve  
23 out claims directly as these claims do challenge the  
24 allocation distribution, control, ownership of the reserves.

25 Again, all of this this is a reminder all of this is

1 we do not even think you get into that language, Your Honor,  
2 because we think it is argued that those claims are  
3 derivative, and when you are into the derivative bucket you  
4 are in the first injunction provision because the Debtors  
5 clearly, and there is no dispute here, the Debtors clearly  
6 released and, therefore, the Court enjoined any such claim,  
7 thank you.

8 THE COURT: All right. Mr. Caparelli, Mr.  
9 Aschettino, thank you for really an excellent argument. I  
10 want to go back and think a little further about it, and I  
11 will enter into a ruling. Mr. Suttty.

12 MR. SUTTY: Your Honor, Eric Suttty on behalf of Mr.  
13 Paladini, I do have a copy of the order approving the motion  
14 for relief.

15 THE COURT: Thank you. Thank you.

16 MR. SUTTY: If I may approach?

17 THE COURT: Thank you. Please, Mr. Suttty, that way I  
18 will not forget to do it when I go back, thank you. So does  
19 mine and that is fine, that is perfectly fine. And I did, I  
20 enjoyed the argument. I thought it was extremely helpful  
21 beyond, you know, the papers which were also excellent, but I  
22 think it really clarified some of my thinking, and I  
23 appreciate it very much. Well done, and we will stand in  
24 recess. Good to see everyone, and good trips home. Thank  
25 you.

1 (Court Adjourned)

2  
3 CERTIFICATE

4  
5 I certify that the foregoing is a correct transcript from the  
6 electronic sound recording of the proceedings in the above-  
7 entitled matter.

8 /s/Mary Zajackowski  
9 Mary Zajackowski, CET\*\*D-531

December 3, 2012  
Date

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

-----	X
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, the undersigned, hereby certify that on the 8th day of February, 2013, I caused a true and correct copy of **Appellee's Designation of Record on Appeal** to be served via CM/ECF on all parties who have entered notice of appearance in this matter pursuant to Fed. R. Bankr. P. 2002 and upon the following parties in the matter indicated:

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Howard A. Cohen (DE Bar I.D. #4082)