

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

In re

CD LIQUIDATION CO., LLC, f/k/a
CYNERGY DATA, LLC, *et al.*,

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

Re: Docket No. 1554

**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**

Marcelo Paladini ("Paladini") respectfully moves this Court (the "Motion") for entry of an order, pursuant to Local Bankruptcy Rules 1001-1(c) and 9006-1(d), granting Paladini leave to file a sur-reply (the "Sur-Reply") to the *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* [Docket No. 1554] (the "Reply") or to strike the Reply. In support of this Motion, Paladini states as follows:

1. On August 31, 2012, Moneris Solutions, Inc. and BMO Harris Bank N.A. (hereinafter "Moneris") filed *Motion of Moneris Solutions, Inc. and BMO Harris Bank N.A. for Order (1) Enforcing (A) the Order Approving that Certain Settlement Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund, (B) the Order Confirming the Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation*



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Co. Plus, LLC, and Cynergy Data Holdings, Inc. and (C) Compliance with the Joint Plan of Liquidation of Debtors and (2) Enjoining Marcelo Paladini [Docket No. 1549] (“Moneris Motion”).

2. On October 10, 2012, Paladini filed his *Objection by Marcelo Paladini to Motion by Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and for Related Relief* [Docket No. 1551].

3. On October 24, 2012, Moneris filed its Reply. Responding to Paladini’s argument that his claims were not enjoined, but expressly preserved, Moneris advanced two previously un-raised arguments that Paladini respectfully submits warrant a sur-reply.

4. Movant may not raise new arguments in a reply. *See, e.g., Laborers’ Int’l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (finding that “[an] issue is waived unless a party raises it in its opening brief”) (internal citations omitted); *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 n.15 (3d Cir. 2010) (noting that plaintiff waived argument that was raised for the first time in its reply brief).

5. Where a movant improperly raises a new argument in its reply, courts permit non-movants to file sur-replies. *See, e.g., Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 652 (3d Cir. 2003) (noting that district court “properly” allowed plaintiff to file a sur-reply to respond to arguments raised for the first time in defendant’s reply brief); *Tristate HVAC Equip., LLC v. Big Belly Solar, Inc.*, No. 10-1054, 2010 WL 4139285, at *8 n.8 (E.D. Pa. Oct. 20, 2010) (noting that a party could have filed sur-reply brief to respond to arguments raised for the first time in opponent’s reply brief) (citations

omitted); *U.S. Home Corp. v. Powers*, No. 09-2807, 2010 WL 1328380, at *1 n.1 (D. Md. Mar. 25, 2010) (permitting party to file sur-reply to respond to matters raised for the first time in reply).

6. Alternatively, courts will disregard replies that contain positions raised for the first time. *See, e.g., Teleconference Sys. v. Proctor & Gamble Pharm.*, 676 F. Supp. 2d 321, 322 n.13 (D. Del. 2009) (“Issues raised for the first time in a reply brief should not be heard.”) (citing *Laborers’ Int’l Union of N. Am., AFL-CIO*, 26 F.3d 375, 398); *Mitchell v. C&S Wholesale Grocers, Inc.*, No. 10-2354, 2010 WL 273655, at *6 (D.N.J. July 8, 2010) (“Because Defendants raise this issue for the first time in its reply, the Court will not consider this argument.”)


7. Paladini respectfully submits that the accompanying Sur-Reply will assist the Court in its resolution of the Motion by addressing issues that have not been addressed before. Alternatively, Moneris’s Reply should be stricken because it raises new issues.

CONCLUSION

For the foregoing reasons, Paladini respectfully requests the Court to enter an Order, substantially in the form attached hereto as Exhibit A, allowing Paladini to file the Sur-Reply, in the form attached hereto as Exhibit B, or striking Moneris's Reply, and granting such other and further relief as the Court deems proper.

Dated: November 20, 2012
Wilmington, Delaware

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Exhibit A

10/10/20

10/10/20

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re

CD LIQUIDATION CO., LLC, f/k/a
CYNERGY DATA, LLC, *et al.*,

Debtors.

Chapter 11

Case No. 09-13038 (KG)

Jointly Administered

Re: Docket No. _____

**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**

Upon consideration of *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* (the "Motion") and it appearing that good cause exists for granting the Motion; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of this proceeding and the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and due and adequate notice of the Motion having been given under the circumstances and no further notice need be given; and after due deliberation and cause appearing therefore; it is hereby

ORDERED that the Motion is granted; and

ORDERED that the Court shall retain jurisdiction over all matters arising from or related to the implementation of this Order.

Dated: November __, 2012
Wilmington, Delaware

HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

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

In re

CD LIQUIDATION CO., LLC, f/k/a
CYNERGY DATA, LLC, *et al.*,

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Chapter 11

Case No. 09-13038 (KG)

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Re: Docket No. 1554

**MARCELO PALADINI'S 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**

Marcelo Paladini ("Paladini") respectfully submits this sur-reply (the "Sur-Reply") to the *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* [Docket No. 1554] (the "Reply") or to strike the Reply. In support of this Sur-Reply, Paladini states as follows:

BACKGROUND

1. On August 31, 2012, Moneris Solutions, Inc. and BMO Harris Bank N.A. (hereinafter "Moneris") filed the *Motion of Moneris Solutions, Inc. and BMO Harris Bank N.A. for Order (1) Enforcing (A) the Order Approving that Certain Settlement Regarding Reconciliation of Amounts Related to the Rolling Reserve Fund, (B) the Order Confirming the Joint Plan of Liquidation of CD Liquidation Co., LLC, CD Liquidation*

Co. Plus, LLC, and Cynergy Data Holdings, Inc. and (C) Compliance with the Joint Plan of Liquidation of Debtors and (2) Enjoining Marcelo Paladini [Docket No. 1549] .

2. On October 10, 2012, Paladini filed the *Objection by Marcelo Paladini to Motion by Moneris Solutions and BMO Harris Bank NA to Enforce Settlement Agreement and for Related Relief* [Docket No. 1551].

3. On October 24, 2012, Moneris filed the Reply. In the Reply, Moneris advanced two previously un-raised arguments that Paladini respectfully submits warrant this Sur-Reply.

ARGUMENT

A. Paladini's Claims Were Not Released By The DIP Order

4. In its Reply brief, Moneris argues for the *first time* that “Paladini could not preserve such claims in the Settlement Order because he had already released Moneris from all claims in this Court’s final order approving debtor-in-possession financing.” (Reply at 14.) First, it is inappropriate for Moneris to be raising new arguments in its reply brief. *See, e.g., See, e.g., Laborers’ Int’l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (finding that “[an] issue is waived unless a party raises it in its opening brief”) (internal citations omitted); *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 n.15 (3d Cir. 2010) (noting that plaintiff waived argument that was raised for the first time in its reply brief).

5. Second, to the extent the Court entertains this improper *post hoc* argument, the DIP Order in no way released Paladini’s personal claims, and, in fact, Paladini’s personal claims against Harris were specifically carved out and preserved in the DIP Order. To argue otherwise, as Harris suggests, would mean that this Court,

through its DIP Order, could allow the bankruptcy estate to waive personal claims of third parties, which is nonsensical and outside of this Court's jurisdiction. Moreover, the DIP Order specifically distinguishes between Paladini and the Debtor/borrower, making it clear that Paladini's personal claims are preserved. In particular, the DIP Order expressly provides that the forbearance agreement (the "Forbearance Agreement"), defined as the agreement dated July 24, 2009 between the Debtors, Paladini, Harris and others (DIP Order, p. 12) is "**ratified and confirmed.**" (DIP Order, p. 35 (v))(emphasis added). The Forbearance Agreement in turn states that "borrower and guarantor (**except Marcelo Paladini individually in any capacity**)[emphasis added] . . . waive, discharge and forever release . . . Harris. . . from any and all claims, causes of action, defenses, counterclaims or offsets and/or allegations borrower and/or guarantors (**except Marcelo Paladini individually in any capacity**)[emphasis added] may have or may have made. . . ." (Forbearance Agreement, ¶50).

6. In addition to preserving Paladini's personal claims through ratification of the Forbearance Agreement, the DIP Order states, in relevant part, that parties **other than the Debtors and Paladini** must bring claims against Harris by November 16, 2009 or the claims are released. (DIP Order, p. 13, 40(b)). Nowhere does the DIP Order provide for the release of Paladini's personal claims (nor any other third party), nor could it.

B. Paladini's Claims Were Preserved In The Settlement Order

7. Also for the *very first time*, Moneris raises in its Reply the argument that the scope of the carve-out for Paladini's claims extends only to those claims relating to the rolling reserves. First, as previously established above, it is wholly improper to raise new arguments for the first time in a reply brief. *See Foster Wheeler*, 26 F.3d 375, 398.

8. Moreover, the Settlement Agreement released “estate” claims, not third-party claims, together with claims against the so-called disputed escrow/reserve which was divided up between the settling parties under the Settlement Agreement. The Order approving the Settlement Agreement not only did not extend to release non-debtor third-party claims (which is beyond this Court’s jurisdiction), but makes clear that claims by Paladini relating to the reserves (other than claims seeking recovery against the reserve itself) were expressly reserved. In this case, Paladini is not seeking payment (or disgorgement) against the reserved funds, rather he is seeking damages relating to Moneris’s conduct as against Paladini relating to the reserves – exactly what was contemplated by the Order. Indeed, if such claims were not carved out by this language, the carve out language would be superfluous.

9. Moreover, the sections of the transcript from the Plan Confirmation Hearing make clear that Paladini’s personal claims are reserved. Specifically, counsel for the Debtors emphasized to the Court that Paladini’s personal claims were carved out and not enjoined when it stated, “The releases to third parties do not affect any claims that are personal for Mr. Paladini.” Transcript of Confirmation Hearing at 24:17-20, *In re CD Liquidation Co. LLC* (December 21, 2010) (No. 09-13038). Further, the Court expressly adopted this representation by Debtor’s counsel into the Court’s Order Confirming the Debtors’ Plan: “And my ruling finding that the plan should be confirmed incorporates those representations, Mr. Drebsky, namely, that the *injunction does not limit personal claims from being pursued.*” *Id.* at 64:3-6 (emphasis added). Nowhere does the Court’s ruling mention anything about tying this language to rolling reserves.

10. In addition, Moneris misstates the law and incorrectly characterizes Paladini's claims and injuries in an improper attempt to shield itself from personal claims between two non-debtors far removed from confirmation. In particular, Moneris cites to *Tooley* and *Feldman* arguing that Paladini cannot assert his claims without showing a harm to Cynergy, and, therefore, his claims are not direct. However, *Tooley* and *Feldman* have been applied to the limited fact circumstances present in those cases, which are not applicable here. In both of these, cases former shareholders sued the company and alleged they were harmed by decrease in their share value. Here the subject suit is between third parties and not the company. Courts reviewing these cases have made clear that the holding was limited to those facts, which are in no way analogous to the facts alleged in the Complaint. See *Amirsaleh v. Bd. Of Trade*, 2008 Del. Ch. LEXIS 131 (Del. Ch. Sept. 11, 2008) (holding that *Tooley* does not apply to third party standing and is "more about the ripeness of a third-party contract claim than it is about the appropriateness of shareholder standing. . . ."); *In re Enron Corp. Sec.*, 2005 U.S. Dist. LEXIS 44869 (S.D. Tex. Sept. 12, 2005) (determining that *Tooley* is factually distinguishable because it "did not deal with ultimate loss in value of the stock of shareholders because they were induced to hold their Enron securities by false representations about the corporation's financial strength. . . in *Tooley*, shareholders brought a class action for the loss of the time-value of (i.e., interest on) the money they were entitled to in exchange for their stock under a merger agreement during an unauthorized 22-day delay in the closing of the tender offer.").

11. Accordingly, notwithstanding Moneris's bald assertion that these cases are controlling, both of these cases are distinguishable from the facts here in two key respects

that make the test put forth in these cases (i.e., that if there is a harm to the corporation, an individual shareholder cannot hold a direct claim against that corporation) inapplicable to this case. First, Paladini alleges harm other than dilution in share value, including harm to his reputation by virtue of Moneris spreading false rumors and concocting breaches, coercing Paladini to enter into that certain Forbearance Agreement that elevated Moneris's claims above other lenders to Paladini's detriment, damaging Paladini's ability to obtain gainful employment (including, but not limited to, through interference with Paladini's relationship with EVO and other business relations), and in providing incorrect and negligent accounting functions to Paladini, which Paladini relied upon to his detriment as further detailed in the Objection, page 21-22. Second, Paladini has sued a third party -- not Cynergy. Therefore, Moneris cannot allege that the rule in *Tooley* and *Feldman* applies to transform Paladini's complaint against companies other than Cynergy into a derivative claim.

12. In addition, Moneris's argument attempting to distinguish certain case law cited in opposition to the Motion is plainly inapposite. Contrary to Moneris's assertions, the *E.F. Hutton* and *Hirsch* cases affirm a creditor's standing to sue a third party, as here, regardless of whether the underlying debtor corporation suffered an injury. Indeed, the court in *Hirsch*, while acknowledging that there may be a harm to the debtor corporation, found that the claim belonged to the creditors. *Hirsch*, 72 F.3d. at 1094. Similarly, the *E.F. Hutton* court also determined that a third party has standing to sue another third party irrespective of a harm to the debtor corporation.

13. Moreover, Moneris weakly tries to distinguish *E.F. Hutton* by arguing that Paladini did not have a contract with Moneris and therefore has no claim. However, the

E.F. Hutton decision never mentions a contract between the debtor and the injured creditors (or the defendant and the injured creditors for that matter) and did not base its standing decision on privity. Furthermore, Moneris incorrectly construes a creditor's standing to bring a malpractice claim in an overly narrow fashion. Although alleging that the debtor has joined with a third party to defraud its creditors is one way to garner standing to bring a malpractice claim, the *Hirsch* court does not rule, as Moneris argues, that a debtor joining with a third party is the only way for third-party standing to exist for a malpractice claim. Instead, a malpractice claim is premised upon whether Moneris had a duty to Paladini and did exercise this duty with reasonable, skill, care and diligence, and whether Paladini relied on this duty to his detriment, as alleged in the Amended Complaint.

14. Finally, Moneris does not even make an attempt to distinguish, nor could it, the other remaining cases Paladini cites on pages 20 and 21 of his Objection, including *Bankers Trust*, *Twin Mfg.*, and *Cumberland*, which all hold that when a third party is suing another third party for a particularized injury he suffered as a result of the third party's conduct, these claims belong to the third party -- not to the debtor corporation. Accordingly, these cases, along with *E.F. Hutton* and *Hirsch*, plainly are determinative that Paladini's claims are direct.

CONCLUSION

For the foregoing reasons, this Court should respectfully defer to the District Court for resolution of the claims between the instant non-debtor parties and deny the Motion.

Dated: November 20, 2012
Wilmington, Delaware

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Attorneys for Marcelo Paladini

CERTIFICATE OF SERVICE

I, Eric Satty, hereby certify that on the 20th day of November, 2012, I caused a copy of the *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* to be served via CM/ECF on all parties who have entered a 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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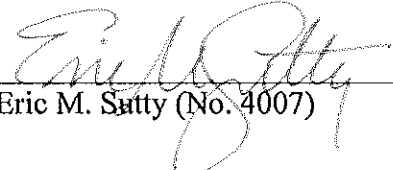
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