Docket #1575 Date Filed: 2/8/2013

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

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:

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

Item No.:	Docket/ Document No.:	Docket Date:	Description
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 "Settlement Order")
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 "Plan")
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 "Confirmation Order")

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

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

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

PAGE	LINE		
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"

PAGE	LINE		
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 *[phonetic]*" 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"

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

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

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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INDEX

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

MR. WARD: Good afternoon, Your Honor.

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

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

THE COURT: Very well, thanks.

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

THE COURT: Yes.

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

THE COURT: Thank you. Mr. Cohen.

MR. COHEN: Good afternoon, Your Honor.

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

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

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

MR. COHEN: Busy with the twins.

THE COURT: They are here?

MR. COHEN: They are four weeks old.

THE COURT: Oh congratulations, how wonderful.

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

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

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

THE COURT: Welcome. Yes.

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

THE COURT: Thank you.

MR. COHEN: Thank you.

THE COURT: Good afternoon, good to see you.

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

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

MR. CAPARELLI: Yes, Your Honor.

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

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

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

MR. CAPARELLI: Not quite, Your Honor.

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

MR. CAPARELLI: No, no we do not.

THE COURT: Okay. Thank you.

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

THE COURT: Sure.

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

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

The only meaningful distinction between the two lawsuits is that the Debtors had not released Mr. Martillo and, therefore, they have a lawsuit currently pending I understand before this Court. The difference here is that the Debtors already released Moneris from any such claims, and all such released claims are enjoined by this Court's prior orders. Observing that Mr. Paladini's conduct in the Martillo action had bordered on bad faith, this Court enjoined Mr. Paladini's lawsuit against Mr. Martillo in an order dated November 2011. For the reasons stated in Your Honor's decision in that matter, we believe Mr. Paladini's lawsuit here against Moneris also should be enjoined.

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

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

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

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

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

Your Honor, in connection with the settlement which the Court approved by the settlement order date of September 13, 2010 the Debtors and their lenders released Moneris from all claims relating to the settlement, any reserves, and the bin sponsorship agreement. Essentially, everything related to Moneris's relationship with the Debtors was released. Moreover, the Court enjoined "all parties and interests to the bankruptcy cases" which undoubtedly included Mr. Paladini, a claimant, the majority shareholder and guarantor of the Debtors from asserting any released claims or any claims related to the Debtors' reserves. That is paragraphs 11 and 12 in the settlement order.

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

Moneris is entitled to that injunction because as I said earlier his claims are derivative and, therefore, belong to the Debtors. The claims are derivative because under Delaware law as the Supreme Court has articulated in Tooley in its [indiscernible], the Debtors, not Mr. Paladini, suffered the alleged harm. And the Debtors not Mr. Paladini would receive the benefit of any recovery if he were able to prove the facts of his complaint.

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

MR. CAPARELLI: Sure.

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

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

THE COURT: I may be wrong on that.

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

THE COURT: Okay.

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

THE COURT: Okay. Thank you.

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

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

THE COURT: Would that include the defamation claim?

MR. CAPARELLI: Well, Your Honor, that that he does not actually, in fact, have a cause of action for defamation. And I believe the reason why that is the case is because under whether you are under New York or Delaware those would be time barred. In New York it is a one year time bar, and in Delaware it is a two year time bar. The events of this as you will recall proceeded September 2009 --

THE COURT: Yes.

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

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

I submit that while that particular harm to the extent you could even find that that is a harm that flows for tortious interference, and I submit that you cannot. But, nevertheless, it is still a derivative harm. But for the harm that Moneris allegedly caused to Cynergy, again, setting in motion, allegedly, a chain of events that led to Cynergy's bankruptcy and sale of assets that are priced lower than, allegedly, would have been obtained by a sale to EVO; that alleged harm to his reputation would not have occurred.

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

So, again, while I take by the grain of salt the allegation that a forbearance agreement could actually cause the bankruptcy, in effect, it undermines the extent to which he can claim that as a direct versus a derivative claim because, ultimately, he himself emphasizes it is at paragraph 158 of the complaint, and on page 6 of the objection, he emphasizes that it is the forbearance of claim which relates to his economic duress -- forbearance agreement which relates to the economic duress, ultimately, results in the harms that are derivative.

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

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

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

And as explained those are the same between the two cases. In fact, in the Martillo case the harm, the alleged harm to Mr. Paladini, to the destruction of his equity value is a classic derivative claim; only loses that equity value to the extent that the company was harmed, and would suffer the same harm as any other shareholder would. Similarly, any harm alleged due to exposure as a result of his guarantees are only secondary to the failure of the company to meet its debt obligations.

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

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

MR. CAPARELLI: Yes.

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

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

Specifically alleged that Moneris's reconciliation services miscalculated and misappropriated where the reserves would go and, therefore, in order for him to recover on the claims as stated he would actually have to prove or, and how the Court makes findings to the contrary of the plan and the settlement order that resolved the allocation entitlement to calculation and ownership of those reserves. And, in fact, any claim that directly challenges the allocation calculation control and ownership of those reserves is not carved out.

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

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

THE COURT: Yes.

MR. CAPARELLI: It mostly touches on this issue. We did put in opposition papers on Wednesday. I think we got the motion in on Tuesday last week. You know, we do not believe that there is a basis for a sur-reply because we do not believe that this the -- why he argues is he needs the sur-replies because he says our arguments about why the carve out does not apply are new. We respectfully submit, Your Honor, that those were responsive arguments in his objections. We did in our motion papers acknowledge the carve out language, and explained in a concise manner that it did not apply.

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

And what we point out what we did point out as well in response to his objection was that in the earlier DIP financing order which came in the fall of 2009 about a year prior to the settlement order, he had actually released essentially all claims against Moneris up until the time of that order. So to the extent that his claims in this action rely on or relate to prepetition conduct, we think that he released them in the DIP financing order, in any event, to the extent that any of his claims could be viewed to as accrued after that, and therefore would be the only nub of a claim that was even available to be preserved in the settlement order, you know, we do not believe that they were preserved for the reasons I have discussed.

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

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

MR. CAPARELLI: Okay, understood, Your Honor.

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

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

THE COURT: Yes.

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

THE COURT: Yes.

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

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

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

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

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

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

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

MR. CAPARELLI: All right.

THE COURT: And thank you, Mr. Caparelli.

MR. CAPARELLI: Thank you.

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

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

THE COURT: Thank you. Mr. Sutty, are you going to introduce me to someone?

MR. SUTTY: Yes.

THE COURT: Good.

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

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

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

THE COURT: Welcome to our Court, thank you.

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

THE COURT: Okay.

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

THE COURT: Yes.

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

THE COURT: Thank you, yes.

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

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

THE COURT: Sure.

MR. ASCHETTINO: But I think what is going on here is forum shopping. Counsel for Moneris viewed the decision of this Court in the Martillo action in a light favorable to them, and they thought they would have a better chance at getting the claims barred, enjoined and, perhaps, even effectively dismissed by proceeding in this Court. If you take a look at which I am sure Your Honor already has their motion papers, they do not just say that the claims are derivative and not direct, they go on to attack the merits of the claims. And to say that, effectively, the case is not the claim is not direct, and if Your Honor believes it may be direct, it does not hold any water, it lacks merit etc., to the extent they go that far as to essentially argue the merits of a claim by Paladini, I believe that is improper, and it is blatant overreaching.

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

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

THE COURT: Yes.

MR. ASCHETTINO: And that is exactly what the Southern District would do had they done what I thought they would do, which is file a motion there. And, of course, the Southern District would have many options there to dismiss some of the claims, all of the claims, to dismiss some claims without prejudice, to allow Paladini to amend the complaint, to address the Court's concerns about any alleged efficiencies. Here they are attempting, essentially, to deprive Paladini of his day in Court by using bankruptcy procedure under the whole premise that every claim asserted in that complaint is prohibited by this Court's prior proceedings. And I think that is a false premise, Your Honor. Since this Court, apparently, has well we are here to today so I assume this Court has elected to grant jurisdiction, at least, over the instant motion, at least, for now.

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

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

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

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

THE COURT: Okay.

MR. ASCHETTINO: I will be brief though.

THE COURT: Absolutely.

MR. ASCHETTINO: First and foremost, we believe this is clearly a dispute between non-Debtor parties. Paladini is not seeking payment from the Debtors' estate or for that matter from the rolling reserves, assuming there is any rolling reserve left. This is a non-Court proceeding unrelated to the Debtors' bankruptcy. I will address why I believe that is in a minute. The outcome of this case will not in any way alter the Debtors' right, liabilities, options or freedom of action. Moreover, the Harris defendants bring this motion almost two years post confirmation.

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

It is very clear from all of the prior proceedings in this case that there was a complete carve out for all of Paladini's personal claims. Paladini is represented by counsel. I think it was Doug Spelfogel of Foley & Lardner. While he was not a party to some of the agreements that have been discussed in the motion, discussed today, he made certain through his counsel that there was a carve out for his claims. Those claims against Harris and Moneris were expressly contemplated at the time. They were discussed by Mr. Spelfogel, Mr. Drebsky. There is even comments from Your Honor in the record about those claims. So I believe it is ingenious to suggest there is not a carve out for those claims.

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

We believe, naturally, that many of the claims if not all of the claims are, indeed, personal and direct claims. Now counsel would have you believe that this is a shareholder derivative action. While, clearly, my client lost a lot of money due to the sale of the company that he co-founded and was a majority owner of. There are many claims in that complaint that do not sound of diminishing in value of shares, and otherwise suggest the shareholder derivative action. I agree that the names of causes of action in and of themselves are often not very helpful. The names of the causes of action just for the record to remind everyone are economic duress.

THE COURT: Yes.

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

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

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

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

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

THE COURT: Sure.

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

THE COURT: Yes.

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

THE COURT: Sure.

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

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

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

THE COURT: Correct.

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

THE COURT: Okay, all right.

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

This is not something that Cynergy did. Cynergy assumed that Moneris was doing its job, and Cynergy rightfully believed that these funds were its own funds. Moneris, never on its own, realized that it was doing that. The way they found out, and this was all before this Court in various proceedings that Paladini was not a party to involving Moneris's former president Greg Cohen. Moneris found out that there may be an issue with the rolling reserves through an improper communication it had with another Cynergy bidder, EVO.

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

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

THE COURT: Right.

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

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

THE COURT: Yes.

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

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

THE COURT: Sure.

MR. ASCHETTINO: So company helped Paladini hurt, that is the sign to me of a direct claim right there which takes me to the types of allegations that are in the complaint. I am giving you some of the prudent factual background. We allege in the complaint that Moneris coerced Paladini to execute the forbearance agreement for the reasons I just explained, that nullified certain subordination agreements. Those agreements are discussed in the complaint. It has affected Paladini to additional personal liability that he did not have before. In addition, based on those communications they were improper that Moneris had with EVO certain information was disclosed that we believe is false, and regardless of whether if it is veracity hurt Paladini's reputation.

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

Now, again, one could say again well that is Cynergy's wrongdoing not Paladini's. Perhaps, but Cynergy was Paladini in the eyes of the marketplace. That is not a legal distinction, but it speaks directly to the damage to his reputation by alleging that his company improperly withheld funds. We also allege in the complaint that Moneris failed to monitor and reconcile Cynergy's daily transactions and accounts. Paladini in making decisions about loans, guarantees and signing other documents relied on the fact that he had a sponsor bank, presumably, a more sophisticated organization with more savvy financial controls then Cynergy's keeping an eye on things.

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

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

MR. ASCHETTINO: Sure.

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

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

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

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

THE COURT: Damages, yes.

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

THE COURT: Yes.

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

The only employment he was able to find, the only offer of employment he received was from the buyer of Cynergy Convest [*phonetic*] but that was, you know, a self serving transaction designed to gleen the maximum information from the former founder of the company. The forbearance agreement which we touched upon briefly in the background section of my argument, remember that other than the company, Paladini was the only individual signatory. And that forbearance agreement elevated Moneris's claims above the other lenders, specifically, to Paladini's detriment. That, again, is not something those are not the types of claims that other creditors or the Debtor would have.

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

THE COURT: Lawsuits in which he was personally named?

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

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

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

These claims were expressly carved out at the settlement agreement and liquidation plan. All involved in those prior proceedings understood and agreed that Paladini's claims would be preserved. There is simply no basis to enjoin the Southern District action. Paladini has suffered substantial harm as a result of the Harris defendant's actions. He should have his day in Court. This Court should respectfully defer to the District Court for the resolution of the claims between the instant non-Debtor parties, and deny the motion. Does Your Honor have any questions?

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

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

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

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

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

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

THE COURT: It was the settlement order, exactly.

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

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

If they are direct claims they are direct claims of the type that were accepted from the carve out. And just a -- to then go back to the discussion at the confirmation hearing, Your Honor, that discussion was talking about the plans injunction and relief provisions, article 12, sections G & H. Those are not the injunctive provisions that we are seeking enforcement of here. And that is what Mr. Spelfogel was seeking clarity on. What we are moving upon is sections O & R of the plan which make clear that the settlement order and the settlement term sheet are incorporated into the plan, and that the settlement order and any of its language remains binding and in full force in effect.

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

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

While he uses that to try to benefit himself by saying, well, by ratifying and confirming the forbearance agreement which itself had a carve out from my personal claims, he ignores the DIP financing orders own release provision in which he, a defined credit party, gave a full waiver up to that point in time of Moneris. So whatever he did in the forbearance agreement, and to whatever extent it may have been ratified and confirmed by the DIP financing order he then gave a new release of Moneris in that order.

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

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

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

THE COURT: Sure.

MR. CAPARELLI: -- or inferences that do not reasonably, can be reasonably drawn from the factual allegations or are contradicted by documents outside the four corners that themselves are incorporated by reference to or attached to the complaint. The forbearance agreement is one of the agreements that was attached to the complaint. The forbearance agreement itself states that Mr. Paladini had counsel in entering into it, and did not enter into it by virtue of any duress. It also makes clear that nothing in the forbearance agreement creates any new obligations or otherwise increases any debts owed or otherwise creates any new guarantee by Mr. Paladini.

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

Again, just to reiterate during argument what was made clear is that the alleged conduct and wrongdoing, however named, was directed at Cynergy and then had a secondary effect on Mr. Paladini. While it is true that this might not be classified as a "shareholder derivative suit" that too is not a test. Numerous cases including several cited by this Court in the Martillo order, including Amusement Industry vs. Stern in the Southern District of New York are cases that were not "shareholder derivative suits," but instead were suits by third parties who alleged that the defendants set in motion a chain of events as here that led to a bankruptcy and an enforcement of a guarantee against the plaintiff.

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

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

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

THE COURT: Sure you may.

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

THE COURT: Yes.

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

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

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

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

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

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

64 of that transcript --

THE COURT: Yes.

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

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

THE COURT: Okay.

MR. ASCHETTINO: Why we reference the DIP order referencing the forbearance agreement is because the DIP order expressly incorporates that carve out by reference. Paladini was, in fact, personally harmed by the forbearance agreement, but it certainly is logical and prudent if one is to sign a document one does not wish to sign, and that is going to make you worse off to have a carve out so that you can in the future pursue litigation against the parties that led you to that agreement. That was discussed then.

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

THE COURT: Sure.

MR. ASCHETTINO: You know, we agree that conclusory allegations in a complaint, and labels to causes of action are not dispositive of whether the claims have merit. Again, it is not for this Court, respectfully, to say whether the claims have merit. Again, if any of the claims in that complaint are deemed to be direct personal claims of the type carved out from the settlement plan and joint liquidation plan, the action should be allowed to proceed. And any defenses or claims they may have can be addressed by the Southern District. Thank you, again, Your Honor.

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

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

THE COURT: And to the complaint, exactly.

MR. ASCHETTINO: As the Southern District would do.

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

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

THE COURT: All right, thank you.

MR. ASCHETTINO: Thank you, Your Honor.

THE COURT: I appreciate that. Mr. Caparelli, this will be the last word. At some point we do have have that. But I do like the parties to have an opportunity to go back and forth a little bit to expand on their arguments, and it helps me. Mr. Caparelli, yes sir.

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

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

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

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

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

THE COURT: 64.

MR. CAPARELLI: -- for example, you know, they kind of get into the issues earlier. And, for example, at page 28, Mr. Paladini's counsel at the time Mr. Spelfogel said, you know, I believe we are talking about sub-section G, the permanent injunction, and sub-section H, Debtors' releases of article 12 which, again, are the plans, releases and injunctions. And from there, I mean having then dove into that because, again, that this is the confirmation hearing in which they are talking about Mr. Paladini's objection to the plans injunction and release provisions that they get to the point in time at page 65 or so where the Debtors and Mr. Paladini agree that those provisions will not limit his personal claims.

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

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

Again, all of this this is a reminder all of this is we do not even think you get into that language, Your Honor, because we think it is argued that those claims are derivative, and when you are into the derivative bucket you are in the first injunction provision because the Debtors clearly, and there is no dispute here, the Debtors clearly released and, therefore, the Court enjoined any such claim, thank you.

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

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

THE COURT: Thank you. Thank you.

MR. SUTTY: If I may approach?

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

(Court Adjourned)

CERTIFICATE

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

/s/Mary Zajaczkowski
Mary Zajaczkowski, CET**D-531

December 3, 2012
Date

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

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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