

2004). Section 524(e) of the Bankruptcy Code addresses the scope of a bankruptcy discharge and states, in relevant part, that “discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debt.” The Bankruptcy Code contemplates that a discharge only affects the debts of those submitting to its burdens. The weight of case authority is consistent with the view that provisions that effect a discharge of non-debtor liability run afoul of the limitations on discharge set forth in Section 524(e) of the Bankruptcy Code. See e.g., In re Continental Airlines, 203 F.3d 203, 217 (3rd Cir. 2000); In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995), cert. denied, 517 U.S. 1243 (1996) (“Section 524 does not...provide for the release of third parties from liability”); In re Zale Corp., 62 F.3d 746, 760-761 (5th Cir. 1995) (“Section 524 prohibits the discharge of debts of non-debtors”); First Fidelity Bank v. McAteer, 985 F.2d 114, 117-18 (3d Cir. 1993) (Section 524(e) specifically limits the effect of a discharge...This section assures creditors that the discharge of a debtor will not preclude them from collecting the full amount of a debt from co-debtors or other liable parties.”); Green v. Welsh, 956 F.2d 30, 33 (2d Cir. 1992) (“the language of [Section 524(e)] reveals that Congress sought to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit”); In re Western Real Estate Fund, Inc., 922 F.2d 592, 602 (10th Cir. 1990), modified sub nom., Abel v. West, 932 F.2d 898 (10th Cir. 1991) (permanent injunction purporting to release non-debtors from liability improperly insulates non-debtors in violation of Section 524(e)); In re American Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989) (In affirming the denial of a permanent injunction against a claim against third party non-debtor, court noted: “Section 524(e), therefore, limits the court’s equitable power under section 105 to order the discharge of liabilities of non-debtors.”).

4. IRS objects to the Plan to the extent it fails to preserve the setoff and recoupment rights of the IRS. Confirmation of a plan does not extinguish setoff claims when they are timely asserted. United States v. Continental Airlines (In re Continental Airlines), 134 F.3d 536, 542 (3d Cir. 1998), cert. denied, 525 U.S. 929 (1998). Like other creditors, the United States has the common law right to setoff mutual debts. “The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.” United States v. Munsey Trust Co. of Washington, D.C., 332 U.S. 234 (1947) (citing Gratiot v. United States, 40 U.S. (15 Pet) 336, 370, 10 L.Ed. 759 (1841)); see also Amoco Prod. Co. v. Fry, 118 F.3d 812, 817 (D.C. Cir. 1997). This right – “which is inherent in the federal government – is broad and ‘exists independent of any statutory grant of authority to the executive branch.’” Marre v. United States, 117 F.3d 297, 302 (5th Cir. 1997) (quoting United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986)). Hence, the United States can setoff mutual prepetition debts and claims as well as postpetition debts and claims. Zions First Nat’l Bank, N.A. v. Christiansen Bros. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995); Palm Beach County Bd. Of Pub. Instruction (In re Alfar Dairy, Inc.), 458 F.2d 1258, 1262 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); Mohawk Indus., Inc. v. United States (In re Mohawk Indus., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987). The Plan makes no provision for these rights. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, United States v. Maxwell, 157 F.3d 1099, 1102 (7th Cir. 1998). “[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code,” id. at 1103, that alters this principle. Moreover, because “[s]etoff occupie[s] a favored

position in our history of jurisprudence,” Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent “the most compelling circumstances.” Niagra Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.), 41 B.R. 941, 944 (N.D.N.Y. 1984); see also New Jersey Nat’l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952 (2d Cir. 1978) (“The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust.”). Compelling circumstances generally entail criminal conduct or fraud by the creditor. In re Whimsy, Inc., 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the government’s setoff rights. Failure to do so violates section 1129(a)(1). (“The court shall confirm a plan only if ... the plan complies with the applicable provisions of this title”.)

WHEREFORE, IRS respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

CHARLES M. OBERLY, III
United States Attorney

By: /s/ Ellen W. Slights

Ellen W. Slights
Assistant United States Attorney
Delaware State Bar No. 2782
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, DE 19899-2046

Dated: February 10, 2012

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

In re: : Chapter 11
: :
CB HOLDING CORP., et al., : :
: : Case No. 10-13683 (MFW)
: :
: : Jointly Administered
: : Hearing Date: February 23, 2012, at 2:00 PM
Debtors. : Objections Due: February 17, 2012 at 4:00 PM

AFFIDAVIT OF SERVICE

I, Marie Steel, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on February 10, 2012, a copy of the **OBJECTION BY THE INTERNAL REVENUE SERVICE TO THE DEBTORS' FIRST AMENDED JOINT PLAN OF LIQUIDATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE** was served, as indicated, upon:

Joel H. Levitin, Esq.
Stephen J. Gordon, Esq.
Richard A. Stieglitz Jr. Esq.
Maya Peleg, Esq.
Tyler D. Semmelman, Esq.
Cahill Gordon & Reindel, LLP
80 Pine Street
New York, NY 10005
via facsimile (212) 269-5420
via facsimile (212) 378-2449

Office of the United States Trustee
844 King Street
Suite 2207
Wilmington, DE 19801
via facsimile (302) 573-6497

Mark D. Collins, Esq.
Christopher M. Samis, Esq.
Tyler Semmelman, Esq.
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
via facsimile (302) 498-7531

Jeffrey N. Pomerantz, Esq.
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Boulevard, 11th Floor
Los Angeles, CA 90067
via facsimile (310) 201-0760

Douglas J. Lipke, Esq.
Jonathan Aberman
Vedder Price P.C
222 N. LaSalle Street, Suite 2600
Chicago, IL 60601
via facsimile (312) 609-5005

Bradford J. Sandler, Esq.
Pachulski Stang Ziehl & Jone LLP
919 North Market Street, 17th Floor
Wilmington, DE 19899-8705
via facsimile (302) 652-4400

/s/ Marie Steel

Marie Steel