

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

---

In re:	)	Chapter 11
	)	
CB HOLDING CORP., <u>et al.</u> , <sup>1</sup>	)	Case No. 10-13683 (MFW)
	)	
	)	Jointly Administered
Debtors.	)	<b>Obj. Deadline: February 17, 2012 at 4:00 p.m. (EST)</b>
	)	<b>Hearing Date: February 23, 2012 at 2:00 p.m. (EST)</b>

---

**OBJECTION OF SYSCO ATLANTA, LLC, SYSCO BOSTON, LLC,  
SYSCO CENTRAL PENNSYLVANIA, LLC, SYSCO CONNECTICUT, LLC,  
AND SYSCO METRO NEW YORK, LLC TO CONFIRMATION OF THE DEBTORS'  
MODIFIED FIRST AMENDED JOINT PLAN OF LIQUIDATION PURSUANT TO  
CHAPTER 11 OF THE BANKRUPTCY CODE**

Sysco Atlanta, LLC, Sysco Boston, LLC, Sysco Central Pennsylvania, LLC, Sysco Connecticut, LLC, and Sysco Metro New York, LLC (the "Sysco Entities"), by their

---

<sup>1</sup> The other Debtors, and the last four digits of each of their tax identification numbers, are: 1820 Central Park Avenue Restaurant Corp. (5151); Bugaboo Creek Acquisition, LLC (4629); Bugaboo Creek Holdings, Inc. (0966); Bugaboo Creek of Seekonk, Inc. (1669); CB Holding Corp. (8640); CB VII, Inc. (9120); CB VIII, Inc. (1468); Charlie Brown North (6721); Charlie Brown's Acquisition Corp. (8367); Charlie Brown's at Clifton, Inc. (7309); Charlie Brown's Mark Corp. (3569); Charlie Brown's Montclair, Inc. (4223); Charlie Brown's 1981, Inc. (7781); Charlie Brown's of Allentown, L.L.C. (8420); Charlie Brown's of Alpha, Inc. (9083); Charlie Brown's of Berwyn, LLC (3347); Charlie Brown's of Blackwood, L.L.C. (5698); Charlie Brown's of Bloomsburg, LLC (3326); Charlie Brown's of Brielle, Inc. (8115); Charlie Brown's of Carlstadt, Inc. (6936); Charlie Brown's of Chatham, Inc. (2452); Charlie Brown's of Commack LLC (4851); Charlie Brown's of Denville, Inc. (1422); Charlie Brown's of East Windsor, LLC (2747); Charlie Brown's of Edison, Inc. (8519); Charlie Brown's of Egg Harbor Twp, LLC (none); Charlie Brown's of Franklin, LLC (5232); Charlie Brown's of Garden City, LLC (7440); Charlie Brown's of Hackettstown, L.L.C. (7493); Charlie Brown's of Harrisburg, LLC (1085); Charlie Brown's of Hillsborough, Inc. (0344); Charlie Brown's of Holtsville, LLC (0138); Charlie Brown's of Jackson, LLC (3478); Charlie Brown's of Lacey, L.L.C. (6282); Charlie Brown's of Lakewood, Inc. (0156); Charlie Brown's of Langhorne, LLC (3392); Charlie Brown's of Lynbrook LLC (2772); Charlie Brown's of Maple Shade, Inc. (0404); Charlie Brown's of Matawan, Inc. (8337); Charlie Brown's of Middletown LLC (7565); Charlie Brown's of Oradell, Inc. (0348); Charlie Brown's of Pennsylvania, Inc. (6918); Charlie Brown's of Piscataway, LLC (8285); Charlie Brown's of Reading, LLC (1214); Charlie Brown's of Scranton, LLC (9817); Charlie Brown's of Selinsgrove, LLC (6492); Charlie Brown's of Springfield, LLC (9892); Charlie Brown's of Staten Island, LLC (1936); Charlie Brown's of Tinton Falls, Inc. (6981); Charlie Brown's of Toms River, LLC (5492); Charlie Brown's of Union Township, Inc. (8910); Charlie Brown's of Tuxedo, LLC (6582); Charlie Brown's of Wayne, Inc. (4757); Charlie Brown's of West Windsor, Inc. (0159); Charlie Brown's of Williamsport LLC (8218); Charlie Brown's of Woodbury, Inc. (0601); Charlie Brown's of York, LLC (0980); Charlie Brown's of Yorktown, LLC (7855); Charlie Brown's Restaurant Corp. (7782); Charlie Brown's Steakhouse Fishkill, Inc. (9139); Charlie Brown's Steakhouse Woodbridge, Inc. (1906); Charlie Brown's, Inc. (4776); Jonathan Seagull Property Corp. (7248); Jonathan Seagull, Inc. (9160); The Office at Bridgewater, Inc. (3132); The Office at Cranford, Inc. (3131); The Office at Keyport, Inc. (1507); The Office at Montclair, Inc. (3128); The Office at Morristown, Inc. (3127); The Office at Ridgewood, Inc. (2949); The Office at Summit, Inc. (3126); and What's Your Beef V, Inc. (4719). The Debtors' address is 1450 Route 22 West, Mountainside, NJ 07092.

undersigned attorneys, respectfully submit this *Objection of Sysco Atlanta, LLC, Sysco Boston, LLC, Sysco Central Pennsylvania, LLC, Sysco Connecticut, LLC, and Sysco Metro New York, LLC to Confirmation of the Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Objection") and in support thereof, respectfully state as follows:<sup>2</sup>

### **INTRODUCTION**

1. The *Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Modified Plan") was submitted by CB Holding Corp. ("CB Holding") and the other above-captioned debtors and debtors-in-possession (collectively, and together with CB Holding, the "Debtors"). The Debtors' Modified Plan improperly segregates the Sysco Entities from other similarly situated creditors by treating the Sysco Entities' 11 U.S.C. § 503(b)(9) administrative expenses differently than all other § 503(b)(9) administrative expenses. The Debtors try to explain and justify the disparate treatment of the Sysco Entities' administrative expenses by asserting that the Debtors may bring avoidance actions against the Sysco Entities in the future and that the possibility of a recovery from those avoidance actions can be used to offset the payment obligation on the Sysco Entities' administrative expenses under the Modified Plan. The Debtors' justification for this action fails as a matter of law. This Court and a majority of the courts addressing this issue have held that a debtor may not withhold payment of a creditor's § 503(b) administrative expenses because of a potential avoidance action. The Sysco Entities' administrative expenses, therefore, should be

---

<sup>2</sup> Terms not defined herein shall have the meaning given to them in the Modified Plan and Modified Disclosure Statement (each as defined below).

paid in full and in cash on the effective date just like other similarly situated holders of administrative expenses.

2. This disparate treatment of the Sysco Entities results from the Unsecured Creditor Settlement between the Debtors, the Administrative Agent, the Creditors Committee, and the Second Lien Noteholders, which has been incorporated in the Debtors' Modified Plan. The Sysco Entities were not parties to the Unsecured Creditor Settlement and are not bound thereby. One motivation for the Debtors to circumvent their present obligation to pay the Sysco Entities' administrative expenses in cash and in full at confirmation is that the payment may render the Modified Plan not feasible and, therefore, not confirmable. The Modified Plan is unclear as to a reasonable estimate of what will fund the Plan Fund and what the extent is of the obligations that will diminish it. Because the Modified Plan is a liquidating plan, any amounts owed to the Sysco Entities that are distributed elsewhere cannot be recovered should the Debtors' assumption that they hold valid Avoidance Actions against the Sysco Entities prove to be incorrect. As discussed more fully below, the Debtors' gerrymandering of the Modified Plan violates 11 U.S.C. § 1129 for a number of reasons. The Debtors' Modified Plan, therefore, should not be confirmed.

### **BACKGROUND**

3. On November 17, 2010 (the "Petition Date"), each of the Debtors filed a petition with this Court under Chapter 11 of the Bankruptcy Code. Prior to the Petition Date, the Sysco Entities provided food-service related products to the Debtors. The Debtors have not filed an objection to the administrative expenses of the Sysco Entities to dispute the amount of the invoices for the products delivered, that the Sysco Entities delivered food service-related products during the twenty-day period prior to the Petition Date, or that the Debtors consumed them in the ordinary course of their business.

4. Because the Sysco Entities were unable to determine which of the Debtors operated each of the Debtors' restaurants, the Sysco Entities filed duplicative proofs of claim against each of the Debtors (the "Sysco Proofs of Claim"). The Sysco Proofs of Claim assert general, unsecured pre-petition amounts owed by the Debtors, listed by each restaurant, and also indicate the portion of these pre-petition amounts that qualify for administrative expense priority under § 503(b)(9) (the "Sysco Administrative Expenses"). Table-1, below, provides a summary of the Sysco Proofs of Claim, which have been reduced by the payment of the Sysco Entities' PACA claims.<sup>3</sup>

**Table-1**

	<b><u>Unsecured Claim</u></b>	<b><u>Entitled to § 503(b)(9) Priority</u></b>
Sysco Atlanta, LLC	\$379,889.46	\$67,603.98
Sysco Boston, LLC	\$1,489,760.14	\$123,514.88
Sysco Central Pennsylvania, LLC	\$1,165,697.12	\$106,885.82
Sysco Connecticut, LLC	\$468,192.04	\$37,264.67
Sysco Metro New York, LLC	\$2,168,576.71	\$201,269.84
<b>Subtotal:</b>	<b>\$5,672,115.47</b>	<b>\$536,539.19</b>
(Minus PACA Principal Payments)	(\$100,540.61)	(\$11,500.00) <sup>4</sup>
<b>Total:</b>	<b>\$5,571,574.86</b>	<b>\$525,039.19*</b>

5. On December 13, 2010, the Court entered the DIP Facility Order (as defined in the Modified Plan). The DIP Facility Order provides that the DIP Facility Lender (as defined in the Modified Plan) was granted a valid perfected security interest in essentially all of the Debtors' assets except for the Avoidance Actions and the Estate Shared Proceeds. *Modified Disclosure Statement* at 13. The DIP Facility Order further provides that certain amounts of cash

<sup>3</sup> The Debtors paid Sysco Atlanta, LLC, Sysco Central Pennsylvania, LLC, Sysco Connecticut, LLC, and Sysco Metro New York, LLC (the "Sysco PACA Claimants") for their PACA claims on or about April 25, 2011 in the aggregate amount of \$109,818.35. The principal amount of the PACA payment attributed to food, as opposed to interests or attorney fees, was \$100,540.61. Exhibit A to the *Notice of Filing of Revised PACA Report*, docket no. 704, provides the amounts paid to each of the Sysco PACA Claimants.

<sup>4</sup> Based on the information available, the Sysco Entities estimate that only approximately \$11,500.00 of the \$100,540.61 PACA payment relates to goods delivered during the twenty-day priority period of § 503(b)(9).

\* This amount reflects the aggregate amount of the Sysco Administrative Expenses as included in the Sysco Proofs of Claim minus the estimated effect of the Debtors' PACA payments.

and recoveries from pending and future sales or legal actions shall be set aside from the assets the DIP Facility Lender holds perfected security interests in for payment to general unsecured creditors of the Debtors under a Chapter 11 plan. *DIP Facility Order* at ¶ 33. Additionally, any excess amounts will be paid to the Pre-Petition Lenders after the DIP Facility Claims are satisfied in full. *Modified Disclosure Statement* at 15. The Pre-Petition Lenders are estimated to recover around twenty cents on the dollar while General Unsecured Claims are estimated to recover, at most, one cent on the dollar. *Modified Disclosure Statement* at 5. The Modified Disclosure Statement's discussion of the DIP Facility Order has been attached as **Exhibit A**.

6. During the Chapter 11 case, the Debtors sold substantially all of their assets and received approximately \$20 million in total proceeds, net of costs of administration of the Debtors' Estates. On August 1, 2011, as a means of disposing of their remaining assets and to provide for distributions to the Debtors' creditors as required by the Bankruptcy Code, the Debtors proposed the *Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "**Original Plan**").

7. On December 29, 2011, the Debtors filed the *Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "**First Amended Plan**"). The First Amended Plan consisted of several changes, including the incorporation of the "Unsecured Creditor Settlement," a separation of the definition of "Sysco 503(b)(9) Claims" from all of the other "Administrative Claims," including other § 503(b)(9) administrative expenses, and many other substantive changes. The pages containing the relevant changes are attached hereto as **Exhibit B** as they appeared in the *Blackline of Amended Plan*, Exhibit C to the *Notice of Filing of Amended Plan and Disclosure Statement*.

8. From the changes made between the Original Plan and the First Amended Plan, it appears that the Unsecured Creditor Settlement was the genesis for the new, disparate treatment of the Sysco Administrative Expenses. See *Blackline of Amended Disclosure Statement*, Exhibit D to the *Notice of Filing of Amended Plan and Disclosure Statement*, attached here to as **Exhibit C**. Even though the Unsecured Creditor Settlement directly addressed and led to the Modified Plan's treatment of the Sysco Administrative Expenses, the Sysco Entities were not a party to the Unsecured Creditor Settlement and did not consent, and have never consented, to such treatment of the Sysco Administrative Expenses.

9. The Modified Plan proposes to pay outstanding Allowed Administrative Expense Claims in cash equal to the amount of such Allowed Claim from the Plan Fund. *Modified Plan* at 12, 18. The Sysco Administrative Expenses, however, are excluded from the administrative expenses to be paid from the Plan Fund. *Modified Plan* at 18. Instead, the Modified Plan proposes to pay the "Allowed Sysco 503(b)(9) Claims" from the Estate Shared Proceeds.<sup>5</sup> The Estate Shared Proceeds, by definition, will not be immediately available for distribution following the Effective Date and will not guarantee the Sysco Entities will be paid as required by 11 U.S.C. § 1129(a)(9)(A).<sup>6</sup> See *Modified Plan* at 7-8, 12, 16. The pages cited from the Modified Plan are attached hereto as **Exhibit D**. The pages cited from the Modified Disclosure Statement are attached hereto as **Exhibit E**.

10. The Modified Disclosure Statement explains that the unfair and discriminatory treatment of the Sysco Administrative Expenses is somehow justified because of alleged avoidance actions yet to be brought against the Sysco Entities. *Modified Disclosure Statement* at

---

<sup>5</sup> The Estate shared Proceeds consist of (1) the Office Shared Proceeds, (2) the Sharing Percentage Recovery, and (3) the D&O Shared Proceeds. *Modified Plan* at 7-8, 12, 16.

<sup>6</sup> The Modified Plan is a plan of liquidation. Once the Liquidation Trust's assets are distributed, no other means will exist to pay claims.

27-28. Additionally, the Modified Plan does not recognize that the Sysco Entities would be able to assert defenses against the alleged future avoidance actions. *See Modified Plan* at 2, 18.

### **OBJECTIONS AND ARGUMENTS IN SUPPORT THEREOF**

11. In order for the Modified Plan to be confirmed, the Debtors must satisfy each of the requirements of § 1129 of the Bankruptcy Code by a preponderance of the evidence. *See* 11 U.S.C. § 1129; *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006) (citing *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., LTD., II* (*In re Briscoe Enters., LTD., II*), 994 F.2d 1160, 1165 (5th Cir. 1993)). For the reasons set forth below, the Modified Plan fails to satisfy the requirements of § 1129, and accordingly, the Sysco Entities object to confirmation of the Modified Plan.

**A. The Modified Plan Violates § 1129(a)(9) of the Bankruptcy Code Because the Sysco Administrative Expenses Must Be Paid in Cash and in Full on the Effective Date and Cannot be Setoff Because of Alleged Avoidance Actions That May Be Brought in the Future**

12. The Debtors do not expressly assert the Bankruptcy Code sections or other applicable authorities from which they find their “applicable offsets for Avoidance Actions or other available offsets” to trump their obligation to pay the Sysco Administrative Expenses. The Debtors impliedly rely on the applicability of § 502(d) as their authority to withhold payment from the Sysco Entities. This Court and several courts in various circuits have addressed the issue. The majority of courts, including this Court and Judge Walsh, have held that § 502(d) cannot be applied to effect an offset against § 503(b) administrative expenses for future avoidance actions or otherwise. *In re Lids Corp.*, 260 B.R. 680, 683 (Bankr. D. Del. 2001); *Camelot Music, Inc. v. MHW Adver. & Pub. Relations, Inc.* (*In re CM Holdings, Inc.*), 264 B.R. 141, 159 (Bankr. D. Del. 2000).

13. In the *In re Lids Corp.* opinion, this Court addressed the issue as it applied to administrative expenses under § 503(b)(1)(A).<sup>7</sup> *Lids*, 260 B.R. at 682. After a thorough analysis of Judge Walsh’s opinion in *Camelot Music, Inc. v. MHW Adver. & Pub. Relations, Inc. (In re CM Holdings, Inc.)*, this Court concluded that Judge Walsh’s statutory analysis was accurate and found that administrative expenses are accorded special treatment under the Bankruptcy Code and are not subject to § 502(d). *Id.* at 683. Additionally, this Court expressed that the “extension of section 502(d) to administrative claims could have devastating effects on a debtor’s ability to reorganize.” *Id.* at 684. Although the reasoning in *Lids* focused on the effects upon the provision of post-petition credit, applying § 502(d) to § 503(b)(9) administrative expenses could also lead to devastating effects by deterring creditors from continuing to supply a soon-to-be debtor on the eve of bankruptcy because it would, in essence, eliminate the priority § 503(b)(9) is intended to grant to such creditors. *See id.*

14. Under the facts of *Lids*, this Court, as an additional and independent reason for denying an offset, explained that the applicability of § 502(d) to any claim is conditioned on a judicial determination that the claim holder is liable. In *Lids*, the debtor had merely commenced an adversary proceeding alleging preferential transfers to the claimant; and therefore, this Court explained that at least until a judgment was obtained, there was no question that § 502(d) could not be applicable.<sup>8</sup>

15. As stated in *Lids*, this Court relied heavily on Judge Walsh’s analysis of the same issue in *CM Holdings, Inc.* In that case, Camelot, the debtor, asserted that the court must

---

<sup>7</sup> The case was decided in 2001, prior to the existence of § 503(b)(9).

<sup>8</sup> As of the date of filing of this Objection, the Debtors have not filed a single adversary proceeding seeking to avoid any transfers to the Sysco Entities and certainly have not obtained any such judgments against any of the Sysco Entities for the recovery of estate property or avoidable transfers. Rather, the Debtors’ have merely listed the transfers made to the Sysco Entities during the 90 days preceding the Petition Date. *See Supplement to Debtors’ Modified First Amended Joint Plan of Liquidation.*

disallow the administrative expenses of MHW, a creditor, until MHW restored the full amount of alleged preferential payments.<sup>9</sup> *CM Holdings*, 264 B.R. at 157. Judge Walsh held that § 502(d) is inapplicable to § 503 and cannot be used to disallow § 503(b) administrative expenses. *Id.* at 159. In support of his holding, Judge Walsh explained that the exceptions to § 502(d) included in § 502(b) suggest “by negative implication that the drafters did not intend that administrative expense claims be subject to the set off provision of § 502(d).” *Id.* at 158. As further support for the holding that § 502(d) does not apply to § 503, Judge Walsh pointed to § 348(d), which provides that claims that arise post-petition, but pre-conversion are deemed to arise pre-petition. *Id.* Section 348(d) is informative because it exempts administrative expenses under § 503(b) from the same treatment. *Id.* Judge Walsh also found that applying § 502(d) to § 503 would not advance the goal of achieving an equitable distribution for similarly situated creditors that avoidance actions are intended to protect. *Id.* at 159.

16. While *CM Holdings* and *Lids* focused on why § 502(d) should not apply to § 503(b) administrative expenses, *In re Plastech Engineered Products, Inc.* addressed the issue as it specifically applied to § 503(b)(9). *In re Plastech Engineered Prods., Inc.*, 394 B.R. 147, 149 (Bankr. E.D. Mich. 2008). The debtor in *Plastech* argued that § 502(d) requires a court to disallow any claim of any entity, irrespective of whether the claim is pre- or post-petition, was filed or scheduled, or subject to the allowance provision of § 502 or § 503. *Id.* at 155. The debtor, in the alternative, argued that § 502(d) should at least apply to § 503(b)(9). *Id.* at 155, 160. After a comprehensive review of cases on both sides of the issue, the *Plastech* court held

---

<sup>9</sup> The facts of the case are complicated by the involvement of a third party, Independence, who held security interests in MHW’s accounts receivable. The issue regarding whether § 502(d) applies to § 503, however, was addressed as an issue solely between Camelot and MHW. *Camelot Music, Inc. v. MHW Adver. & Pub. Relations, Inc. (In re CM Holdings, Inc.)*, 264 B.R. 141, 151, 157 (Bankr. D. Del. 2000).

that § 502(d) does not apply to § 503(b)(9), disagreeing with the debtor's arguments. *Id.* at 152-60, 164.

17. *Plastech* provided six reasons for agreeing with *CM Holdings* and *Lids* that § 502(d) does not apply to § 503 or, specifically, § 503(b)(9). First, the allowance of claims under § 502 is entirely separate from the allowance of administrative expenses under § 503. *Id.* at 161. If § 502(d) applied to § 503, it would cause the inclusion of the language “notwithstanding subsections (a) and (b) of § 502” in § 502(d) to be superfluous—a violation of basic rules of statutory construction. *See id.* Second, § 503(a) requires a request for payment of administrative expenses and does not allow for such a request by merely filing a proof of claim, a distinction that is included in Official Form B10. *Id.* While § 503(b)(9) administrative expenses can be claims under § 101(5)(A), they are “not a type of claim that is filed under § 501, and allowed or disallowed under § 502.” *Id.* at 162.

18. Third, absent a clause in the Bankruptcy Code or ruling by controlling case law that qualifies whether the mandatory provision in § 502(d) or § 503(b) is suppose to trump the other, a court must give effect to both provisions; thus, § 502(d) cannot trump § 503(b)'s mandatory allowance language.<sup>10</sup> *Id.* (citing *Beasley Forest Prods., Inc. v. Durango Ga. Paper Co. (In re Durango Ga. Paper Co.)*, 297 B.R. 326, 331 (Bankr. S.D. Ga. 2003)). Fourth, the logic and reasoning behind the cases the *Plastech* court reviewed applies equally to § 503(b)(9) administrative expenses even though the cases focused on the issue as it pertained to post-petition obligations. *Id.* at 163. Fifth, although § 503(b)(9) administrative expenses are pre-petition in nature, that distinction is not a factor when determining how the administrative

---

<sup>10</sup> Section 503 provides for the allowance of administrative expenses and makes no reference to potential disallowance under § 502(d). *See* 11 U.S.C. § 503(b); *Beasley Forest Products, Inc. v. Durango Ga. Paper Co. (In re Durango Ga. Paper Co.)*, 297 B.R. 326, 330 (Bankr. S.D. Ga. 2003).

expense will be treated under § 503. *Id.* According to § 507(a)(2), all administrative expenses are granted the same priority, whether pre-petition or post-petition. *Id.*

19. Lastly, if § 503(b)(9) administrative expenses were meant to be treated different from others included in § 503(b) and were meant to be subject to § 502(d), Congress could have amended a section other than § 503 that would not lead to conflicts under a plain reading of the Bankruptcy Code. *Id.* at 163-64. For example, Congress could have merely created a separate pre-petition priority status under § 507 for the value of goods received by the debtor within twenty days before its bankruptcy petition instead of elevating that status of the twenty-day priority to an administrative expense under § 503. *Id.* at 164 n.5 (citing *In re Eye Contact, Inc.*, 97 B.R. 990 (Bankr. W.D. Wisc. 1989) (applying § 502(d) to a pre-petition priority claim under pre-BAPCPA § 507(a)(3)—allowed unsecured wage claims)). Congress, however, did not do so, and instead included the twenty-day priority provision in § 503 and placed it beyond the reach of § 502(d). *Plastech*, 394 B.R. at 163-64.

20. Contrary to *CM Holdings, Lids*, and *Plastech* opinions, the Bankruptcy Court for the Eastern District of Virginia's opinion in *Circuit City* represents the opposing, minority view and allowed the debtors to use § 502(d) to temporarily disallow certain § 503(b)(9) claims. *In re Circuit City Stores, Inc.*, 426 B.R. 560, 569, 571, 2010 Bankr. LEXIS 44 (Bankr. E.D. Va. Jan. 6, 2010) [hereinafter *Circuit City I*]; see also *In re Circuit City Stores, Inc.*, 426 B.R. 560, 571, 2010 Bankr. LEXIS 571 (Bankr. E.D. Va. Feb. 23, 2010) (supplementing opinion in *Circuit City I*) [hereinafter *Circuit City II*].<sup>11</sup> Although, *Circuit City I* cites to several cases that have addressed the issue on some level, it does not provide extensive analysis of any of these cases. Compare *Circuit City I*, 426 B.R. at 569-71, with *Plastech*, 394 B.R. at 152-60. Thus, the

---

<sup>11</sup> References to “*Circuit City*” are when both the original opinion and supplemental opinion support the assertion.

*Circuit City* court’s approach to the issue was markedly different from the previous cases in two important ways.

21. From the beginning, the court refers to administrative expenses allowed under § 503(b)(9) as “claims.” *Circuit City II*, 426 B.R. at 571; *Circuit City I*, 426 B.R. at 565. While colloquially referring to administrative expenses under § 503(b)(9) as “claims” is common, it does not reflect the understanding found in the relevant case law or the Bankruptcy Code.<sup>12</sup> *See Circuit City II*, 426 B.R. at 574. *Circuit City II* cites to a portion of a Fourth Circuit case that explains the following:

[T]he term “claim” as used in § 502(d) is not to be construed expansively in accordance with the definition supplied in § 101(5)(A) . . . ; but rather, the term “claim” as used in § 502(d) refers only to claims for which a proof has been filed under § 501(a).

*Id.* at 573-74 (citing *Durham v. SMI Indus.*, 882 F.2d 881, 882-83 (4th Cir. 1989)). Despite the narrow definition of “claim” that *Durham* imposes and the *Circuit City* court recognizes, *Circuit City* construed § 503(b)(9) administrative expenses broadly in order to include them in the “claims” that must file a proof of claim under § 501(a).<sup>13</sup> *Circuit City II*, 426 B.R. at 573-74; *Circuit City I*, 426 B.R. at 570.

22. The *Circuit City* court bridges this logical paradox by explaining that holders of § 503(b)(9) administrative expenses are “creditors” under § 101(10)(A) because § 503(b)(9) administrative expenses are claims under § 101(5) that arise before the petition date. *Id.* Thus, under Bankruptcy Rules 3002 and 3003, any party that fits within the definition of “creditor” is

---

<sup>12</sup> Additionally, nowhere in § 503 does the statute provide that an administrative expense allowed under § 503(b)(9) is a “claim.” *See* 11 U.S.C. § 503(a), (b), (b)(9). In fact, the word “claim” only appears three times in § 503, and in each instance it is used in reference to a claim that falls under § 502 and is excluded from an administrative expense otherwise defined by § 503. *See* 11 U.S.C. § 503(b), (b)(7).

<sup>13</sup> *Circuit City I* holds that to be granted administrative expense priority for a § 503(b)(9) administrative expense, a “creditor” must “first, file a proof of claim under § 501, second, have the claim allowed under § 502, and then, third, request administrative expense priority under § 503(a).” *Circuit City I*, 426 B.R. at 570.

required to file a proof of claim, including parties seeking to have an administrative expense allowed. 11 U.S.C. § 101(10)(A); *Circuit City II*, 426 B.R. at 574; *Circuit City I*, 426 B.R. at 570. Accordingly, *Circuit City I* held that § 503(b)(9) administrative expenses, unlike others under § 503(b), must be filed as claims under § 501(a); and therefore, § 502(d) may be applied to disallow the claim. *Circuit City I*, 426 B.R. at 570. According to *Circuit City I*, this logic is consistent with *Durham* and *In re Ames Dep't Stores, Inc.*<sup>14</sup> *Id.* at 571.

23. But, as the courts in both *Durham* and *Ames* stated, the scope of the term “claim” as it is used under § 502(d) is narrower than the general definition of “claim” in § 101(5). *ASM Capital, LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.)*, 582 F.3d 422, 429 (2d Cir. 2009); *Durham*, 882 F.2d at 882-83. Due to the narrower definition of “claim,” it does not follow that a § 503(b)(9) administrative expense must be a “claim” in the context of §§ 501(a) and 502(d) just because a § 503(b)(9) administrative expense is a “claim” under § 101(5). *See Ames*, 582 F.3d at 429; *Plastech*, 394 B.R. at 162; *Durham*, 882 F.2d at 882-83. The *Circuit City* court fails to recognize this *non sequitur*.

24. *In re Momenta, Inc.* is the most recent case dealing with whether § 502(d) can trump the mandatory language of § 503. *In re Momenta, Inc.*, 455 B.R. 353, 356 (Bankr. D.N.H. 2011). Specifically, the court in *Momenta* considered both the *Plastech* and *Circuit City* opinions and held that section § 503(b)(9) administrative expenses cannot be setoff by an application of § 502(d). *Id.* at 361-65. The *Momenta* court’s holding follows the majority view represented by cases like *Plastech*, *CM Holding*, and *Lids*. *Id.* The primary difference between *Momenta* and *Circuit City* is that the *Momenta* court correctly applied the Second Circuit’s explanation in *Ames* that allowance of administrative expenses under § 503 and allowance of

---

<sup>14</sup> *In re Ames* held § 502(d) does not apply to administrative expenses under § 503(b). *ASM Capital, LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.)*, 582 F.3d 422, 430-32 (2d Cir. 2009) (explaining that the procedure under § 503(a) is separate and independent from the procedure under § 502(d)).

claims under §§ 501 and 502 are separate and distinct mechanisms. *Id.* at 361. *Momenta* continued on to agree with the same reasoning found in *Plastech*, although *Momenta* does not cite directly to *Plastech* for support. *Compare id.* at 362-63 (citing primarily to *Ames*, *CM Holdings*, and *Durango*<sup>15</sup>), with *Plastech*, 394 B.R. at 161-64. *Momenta* concludes that the analysis of the applicability of § 502(d) “does not change just because § 503(b)(9) is an administrative expense that arises prepetition.” *Momenta*, 455 B.R. at 364.

25. Furthermore, *Momenta* explained that the procedure outlined by *Circuit City* conflicts with the Bankruptcy Code because § 503 provides that an entity may request payment of an administrative expense and contains no language that conditions allowance on the filing of a proof of claim. *Id.* Thus, *Circuit City*’s assertion that Bankruptcy Rule 3003 requires holders of § 503(b)(9) administrative expenses to file a proof of claim was misguided because it conflicts with the Bankruptcy Code by requiring holders of administrative expenses to comply with procedures not required under § 503(b). *See id.*

26. While the *Plastech* and *Momenta* cases are not binding on this court, they represent the majority view and provide a well-reasoned approach to the issue. Furthermore, both cases mirror the reasoning and analysis originally provided in *CM Holdings* and *Lids*—cases out of the Bankruptcy Court for the District of Delaware that hold that § 502(d) does not apply to the allowance of administrative expenses under § 503.

27. Section 1129(a)(9) requires a plan to pay administrative expenses in cash in an amount equal to the allowed amount of such claim on the effective date of the plan unless the

---

<sup>15</sup> After citing *Lids* and *CM Holdings*, the court for *In re Durango Georgia Paper Co.* conducted an analysis of the context, structure, and language of §§ 502 and 503 and determined that § 502(d) does not apply to administrative expenses allowed under § 503. *Durango*, 297 B.R. at 328, 331.

holder agrees to different treatment.<sup>16</sup> 11 U.S.C. § 1129(a)(9)(A); *Plastech*, 394 B.R. at 152-53. The Modified Plan, however, does not provide for such payment of the Sysco Administrative Expenses, and the Sysco Entities were not a party to the Unsecured Creditor Settlement and have not and do not consent to different treatment. Because the Debtors cannot establish legal support in this Court to apply an offset, the Modified Plan, therefore, is required to pay the Sysco Administrative Expenses in full and in cash on the effective date of the Modified Plan. Because the Modified Plan does not meet this requirement, it violates § 1129(a)(9) of the Bankruptcy Code and cannot be confirmed.

**B. The Terms of the Modified Plan Are Not Fair and Equitable, Unfairly Discriminate against the Sysco Entities, and Improperly Purport to Gift Estate Assets to Unsecured Creditors Without Paying the Sysco Administrative Expenses First**

28. Section 1129(b) requires that a plan be fair and equitable. Included within the purview of fair and equitable is the absolute priority rule, which prohibits the holders of claims with lower priority from receiving distributions unless and until all senior claims have been paid in full. 11 U.S.C. § 1129(b)(2)(B); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 513 (3rd Cir. 2005); *see also Bank of Am. Nat. Trust & Sav. Assoc. v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 441-42 (1999). A class junior to an impaired class may, however, receive a distribution gifted by a class senior to an impaired class, as long as the distribution is obtained from a carve-out of that senior class's lien or distribution proceeds. *See Armstrong*, 432 F.3d at 512-13; *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 617-18 (Bankr. D. Del. 2001). A rebuttable presumption of unfair discrimination exists where creditors of the same priority are provided different treatment that either provides a materially lower recovery for the creditors subject to the

---

<sup>16</sup> Section 1129(a)(9) requires payment of claims specified in 11 U.S.C. § 507(a)(2) to be paid in such a manner. § 1129(a)(9)(A). Administrative expenses allowed under § 503(b) are claims specified in § 507(a)(2). § 507(a)(2).

discrimination, or alternatively, allocates a materially greater risk to their recovery. *See Genesis*, 266 B.R. at 611.

29. The DIP Facility Order, incorporated into the Modified Plan's distribution structure, provided a compromise between the DIP Facility Lender, the Pre-Petition Lenders, and the Creditors Committee for the DIP Facility Lender to carve-out certain amounts to provide for a nominal distribution to the unsecured creditors. *See Exhibit A*. The DIP Facility Order, however, is not a plan or a confirmation order, and any distributions to unsecured creditors must be done in compliance with § 1129 of the Bankruptcy Code. 11 U.S.C. § 1129.

30. Here, because administrative expenses are not classified by the Debtors and are to be paid in full and in cash, the Modified Plan presupposes that administrative expenses, which are senior in priority to the General Unsecured Claims, are unimpaired and deemed to accept the Modified Plan. However, the ad hoc treatment of the Sysco Administrative Expenses under the Modified Plan—to not pay them in full and in cash on the effective date—will allow unsecured creditors to be paid before the senior-in-priority Sysco Administrative Expenses. Such provisions and generation skipping are not consistent with the absolute priority rule and essentially place the Sysco Administrative Expenses at a level of priority lower than all other § 503(b)(9) administrative expenses. Additionally, the Sysco Administrative expense will be unfairly exposed to the same risks of non-recovery as General Unsecured Claims. By proposing to pay the Sysco Administrative Expenses from the Estate Shared Proceeds, the Debtors' Modified Plan cannot assure that the Sysco Administrative Expenses will be paid in full as required by § 1129(a)(9) and cannot be confirmed. The Sysco Administrative Expenses, therefore, should be paid from the Plan Fund like all other administrative expenses and when all other administrative expenses are paid.

**C. Because the Sysco Administrative Expenses Are Not Subject to Setoff and Must be Paid From the Plan Fund, the Modified Plan Is Not feasible and Violates § 1129(a)(11) of the Bankruptcy Code**

31. Section 1129(a)(11) places the burden on the Debtors to show by a preponderance of the evidence that the Modified Plan has a reasonable probability of success. 11 U.S.C. § 1129(a)(11); *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II)*, 994 F.2d 1160, 1166 (5th Cir. 1993); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 148 (Bankr. D.N.J. 2010). The Modified Plan defines the Plan Fund as follows:

*Plan Fund* means an aggregate amount equal to \$1,777,000 plus any budgeted amounts not paid prior to the Effective Date or such other amount that may be agreed to by the Debtors, the Administrative Agent, and the Creditors Committee at any time up until the Confirmation Date. In the event the Debtors, the Administrative Agent, and the Creditors Committee agree prior to the Confirmation Date that the Plan Fund shall be less than such amount, the Debtors shall File a notice indicating such lower amount.

*Modified Plan* at 12. Under the Modified Plan, the Plan Fund will be used to pay all Allowed Administrative Claims, professional and non-professional; all Other Priority Claims from Class 3; and all costs and expenses associated with the winding down of the Estates and administration of the Liquidating Trust. The Plan Fund will also serve as a secondary fund to satisfy any indemnification claims against the Debtors, the Chief Restructuring Officer, and any other individuals that may be serving to implement the Modified Plan post-confirmation.

32. The definition of the Plan Fund is inherently flawed because it provides for an indeterminate amount that may be insufficient to provide adequate funding to pay for all the claims, costs, and expenses that the Plan Fund will be required to pay under the Modified Plan. Additionally, while the Debtors have provided estimates for many of the costs or expenses to be paid by the Plan Fund, consideration must be given to the fact that the actual costs and expenses may exceed those estimates—certainly as to the professionals.

33. Furthermore, the Modified Disclosure Statement presupposes that the Debtors will not have to pay the Sysco Administrative Expenses from the Plan Fund. As discussed above, the Debtors' proposal to pay the Sysco Administrative Expenses from the Estate Shared Proceeds is contingent upon whether or not there will be anything to fund it. Such treatment is improper. Therefore, the Sysco Administrative Expenses should be paid from the Plan Fund.<sup>17</sup>

34. The Plan Fund would be required to pay the Sysco Administrative Expenses in full. The Debtors' underestimate the Sysco Administrative Expenses by in excess of \$55,000. The Debtors have not articulated why their estimate falls short. The Debtors' incorrect assessment of the Sysco Administrative Expenses may very well be an indicator that the Debtors' other estimates of liabilities to be paid by the Plan Fund may also be flawed. Without further detailed information, the Debtors will not be able to satisfy their burden to establish whether the Modified Plan is feasible such that it satisfies the requirements of 11 U.S.C. § 1129(a)(11).

**D. The Modified Plan Is Proposed in Bad Faith and Violates § 1129(a)(3) of the Bankruptcy Code**

35. Section 1129(a)(3) provides that the court shall confirm a plan only if "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). A court typically looks to whether the plan was "proposed with honesty, good intentions, and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy code." *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999).

---

<sup>17</sup> Although Section IV.D.5 of the Modified Plan provides for a reservation of funds from the Estate Shared Proceeds for the "Disputed Sysco 503(b)(9) Claims," this is not sufficient to satisfy the requirements of § 1129, because the Estate Shared Proceeds are a contingent set of funds and § 1129(a)(9) requires payment of § 503(b)(9) administrative expenses on the effective date of a plan. Additionally, any such reservation would have to include the full \$536,039.19 of the Sysco Administrative Expenses as well as funds sufficient to cover the Sysco Entities' distribution on their general, unsecured claims. The Sysco Entities hold in excess of \$5 million in unsecured claims.

36. The Debtors' attempt to circumvent the requirement of § 1129(a)(9) of the Bankruptcy Code by discriminating against the Sysco Administrative Expenses and providing for disparate treatment of the Sysco Entities from all other entities that qualify as holders of unclassified administrative expenses is an act of bad faith. The Unsecured Creditor Settlement also proposes to bind the Sysco Entities, without their consent, to treatment different from the treatment of other similarly situated creditors, which is contrary to the requirements of § 1129(a)(9). This conduct is forbidden by the Bankruptcy Code and cannot be justified as anything other than bad faith.

**E. The Unsecured Creditor Settlement Violates the Sysco Entities' Rights and Has Not Been Approved by the Court Under the Standards Required by Bankruptcy Rule 9019**

37. Although described as a "compromise and settlement," the Debtors have not subjected the Unsecured Creditor Settlement to the scrutiny required by Bankruptcy Rule 9019. Here, the Debtors have not sought approval of the Unsecured Creditor Settlement as an independent settlement, but rather are attempting to bypass any such scrutiny by simply folding the settlement into the Modified Plan. The Debtors cannot escape the scrutiny required by Bankruptcy Rule 9019 simply by including the Unsecured Creditor Settlement as part of the Modified Plan. *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 832 (Bankr. D. Del. 2008) (citing *In re New Century TRS Holdings, Inc.*, 390 B.R. 140, 167 (Bankr. D. Del. 2008) (explaining that "the standards for approving settlements as part of a plan of reorganization are the same as the standards for approving settlements under Fed. R. Bankr. P. 9019"); *Resolution Trust Corp. v. Best Prods., Co. (In re Best Prods. Co., Inc.)*, 177 B.R. 791, 794 n. 4 (S.D.N.Y. 1995) *aff'd*, 68 F.3d 26 (2d Cir. 1995) (explaining that a court applies the same standard whether a claim is settled as part of a plan or as a separate motion under Bankruptcy Rule 9019).

38. Further, a bankruptcy court may not simply defer to a debtor-in-possession's judgment, but "has a duty to make an informed, independent judgment that the compromise is fair and equitable." *Key3Media Grp., Inc. v. Pulver.com, Inc. (In re Key3Media Grp., Inc.)*, 336 B.R. 87, 92 (Bankr. D. Del. 2005). The Third Circuit requires a court to determine fairness and equity of a compromise in bankruptcy by considering the following factors: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors. *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 515 (Bankr. D. Del. 2010) (citing *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)). A bankruptcy court must make an independent determination that a settlement or compromise meets the requirements of Rule 9019 and cannot rely on the Debtor's business judgment alone; however, it is the Debtor's burden to persuade the court that a compromise is fair and equitable and is deserving of approval. See *In re Key3Media Grp.*, 336 B.R. at 93.

39. The Unsecured Creditor Settlement cannot be approved because a settlement upon the same terms, and affecting interests of the Sysco Entities would not survive scrutiny under Bankruptcy Rule 9019. The parties to the Unsecured Creditor Settlement cannot modify the treatment of the Sysco Administrative Expenses and attempt to bind the Sysco Entities in a settlement or compromise to which the Sysco Entities were not a party. Section 1129(a)(9) provides for payment of the Sysco Administrative Expenses in full, in cash, on the effective date, and the Sysco Entities have not agreed otherwise. Additionally, to the extent that the resulting Modified Plan does not reserve sufficient cash funds to pay the Sysco Administrative Expenses in full on the Effective Date, the Unsecured Creditor Settlement cannot be approved because the

Unsecured Creditors Settlement seeks the Court's blessing and approval of a settlement that will cause a violation of the provisions of the Bankruptcy Code as set forth above.

**PRAYER**

WHEREFORE, the Sysco Entities request that the Court enter an order (i) denying confirmation of the Modified Plan and (ii) granting the Sysco Entities such other and further relief to which they are entitled.

Dated: February 16, 2012  
Wilmington, Delaware

**WHITE AND WILLIAMS LLP**

\_\_\_\_\_  
/s/ Marc S. Casarino  
Marc S. Casarino (#3613)  
824 North Market Street, Suite 902  
P.O. Box 709  
Wilmington, DE 19899-0709  
Telephone: 302-654-0424  
Facsimile: 302-467-4550  
and

HAYNES AND BOONE, LLP  
Trey A. Monsour (admitted *pro hac vice*)  
Jordan Bailey (admitted *pro hac vice*)  
2323 Victory Ave., Suite 700  
Dallas, TX 75219  
Telephone No.: (214) 651-5000  
Facsimile No.: (214) 200-0514

**Exhibit A**

(Section discussing the *DIP Facility Order* from the *Modified Disclosure Statement*, Exhibit B to the *Notice of Filing of Modified Amended Plan and Disclosure Statement*)

- *Order Approving Stipulation Deeming Second Lien Lenders to Have Filed Consolidated Claims Against Each of the Debtors* (ECF No. 1062, approved by ECF No. 1067).

5. The DIP Facility and the Lenders/Committee Resolution. On the Petition Date, the Debtors filed a motion (the “*DIP Motion*”) (ECF No. 13) seeking approval of a stipulation and order, among other things, (a) authorizing secured post-petition financing, (b) authorizing the use of cash collateral, and (c) granting adequate protection. On November 19, 2010, the Bankruptcy Court entered an order (ECF No. 48) approving the DIP Motion and the DIP Facility on an interim basis, subject to approval of various items at a subsequent, final hearing. This final hearing was scheduled for December 10, 2010. The DIP Facility Lender initially made available a \$2.5 million facility as an overadvance to the Debtors pursuant to the DIP Facility Order.

After the Creditors Committee announced its intention to object to various aspects of the proposed financing under the DIP Facility, the Debtors and the Administrative Agent, on behalf of the Pre-Petition Lenders, engaged in settlement discussions with the Creditors Committee over the terms of a consensual DIP financing and other matters. On December 13, 2010, the Bankruptcy Court entered an order approving the financing under the DIP Facility on a final basis (the “*DIP Facility Order*”) (ECF No. 177), including an agreement and resolution (as described below, the “*Lenders/Committee Resolution*”) among the Debtors, the Creditors Committee, the DIP Facility Lenders, and the Pre-Petition Lenders, resolving the Creditors Committee’s asserted objections to the DIP Facility and providing for the allocation of net proceeds of Sales and other assets during these Chapter 11 Cases.

Pursuant to Paragraph 5 of the DIP Facility Order, as security for the DIP Facility and as part of the Lenders/Committee Resolution, the DIP Facility Lender were granted valid and perfected security interests in, and liens upon, essentially all assets of the Debtors, except for liens on Avoidance Actions and the Estate Shared Proceeds. In addition, no waiver of the Debtors’ surcharge rights under Bankruptcy Code § 506(c) was contained in the DIP Facility Order, and the DIP Facility Order contained carve-outs, subject to amendment based on agreed-upon and subsequently-filed budgets under the DIP Facility Order, for Administrative Claims and Professional Fees.

Specifically, as set forth in Paragraph 33 of the DIP Facility Order, and as memorialized by the Plan, in exchange for the Creditors Committee’s agreement to consent to the terms of the DIP Facility Order, under the Lenders/Committee Resolution, the DIP Facility Lender and the Pre-Petition Lenders agreed to share certain proceeds of the Sales and liquidation of the Debtors’ Estates, as follows:

- \$125,000 plus five percent (5%) of the net proceeds (after costs of sale) from the sale of The Office in excess of \$2.5 million (the “*Office Shared Proceeds*”) will be paid to the Estates (as opposed to the Pre-Petition Lenders or the DIP Facility Lender) to be distributed under the Plan to General Unsecured Creditors, and the first \$125,000 of such proceeds will be distributed to Holders of Allowed General Unsecured Claims and will not be shared with

the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claim (the “*Office Resolution Consideration*”);

- \$125,000 (the “*First \$125,000*”) plus four percent (4%) of the net proceeds from the sale or liquidation of the Debtors’ estates (other than (i) The Office Restaurants, (ii) the D&O Claim, and (iii) Avoidance Actions) in excess of \$4 million (the amount over \$4 million, the “*Sharing Percentage Recovery*”) will be paid to the Estates to be distributed under the Plan, and the First \$125,000 and the first \$125,000 of the Sharing Percentage Recovery will be distributed to Holders of Allowed General Unsecured Creditors and will not be shared with the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claim; and
- 50% of the net proceeds (after litigation fees, costs, and expenses) of the D&O Claim will be paid to the Estates to be distributed under the Plan (the “*D&O Shared Proceeds*”), with the first \$1,000,000 of the D&O Shared Proceeds to be distributed under the Plan to General Unsecured Creditors and will not be shared with the Pre-Petition Lenders as Holders of General Unsecured Claims (the “*D&O Resolution Consideration*”).

On March 4, 2011, the Debtors filed an emergency motion seeking approval of an amendment (the “*DIP Amendment*”) of the DIP Facility Order (ECF No. 571). The Bankruptcy Court approved the DIP Amendment on March 9, 2011 (ECF No. 597), which, among other things, extended the term of the DIP Facility Order and increased the maximum permitted borrowings under the DIP Facility to \$5.5 million. The DIP Lenders increased the facility available by an additional \$3 million as an overadvance to the Debtors under the DIP Facility Order according to the DIP Amendment. The term of the DIP Facility Order has subsequently been extended by several agreed-upon modified budgets related thereto filed with the Bankruptcy Court since the DIP Amendment (ECF Nos. 751, 876, and 885).

Pursuant to, and in accordance with, the DIP Facility Order and the DIP Amendment, during these Chapter 11 Cases, the Administrative Agent has collected approximately \$61 million from the Sales and the Debtors’ operations and has advanced to the Debtors an aggregate of approximately \$45 million (at no one time more than \$5.5 million). Moreover, as of the date hereof, the Administrative Agent is holding approximately \$17.8 million in segregated accounts on account of proceeds of Sales of the Lenders’ collateral that have closed and other funds from the Debtors’ operations during these Chapter 11 Cases and the carve-out in favor of the Debtors’ Professionals under Paragraph 6 of the DIP Facility Order, and the Debtors estimate that the Administrative Agent will, on or about the currently-anticipated Confirmation Date, hold a total of approximately \$20 million (assuming that all currently-pending Sales of liquor licenses have closed and that no payments have been made on account of the DIP Facility), which, except for the amount of the Estate Resolution Consideration of approximately \$[482,000], is the proceeds of the Lenders’ collateral sold during these Chapter 11 Cases and is to be applied in accordance with the Confirmation Order, the Plan, and the DIP Facility Order on the Effective Date. In addition, the Administrative Agent asserts that all funds

in the possession of the Debtors (except for the Estate Resolution Consideration) constitute the proceeds of the collateral of the DIP Facility Lender and, under the plan, shall be distributed to the Administrative Agent in accordance with, and subject to, the Confirmation Order, the Plan, and the DIP Facility Order on the Effective Date. As set forth below and described in detail in Section II.B of the Plan, these funds held by the Administrative Agent other than the Estate Resolution Consideration, after payments of any and all amounts required to fully fund the Plan Fund, in the manner set forth in Section IV.B of the Plan, will be distributed by the Administrative Agent in accordance with the terms of the DIP Facility Order, the Financing Agreement, the Plan, and the Confirmation Order, to the respective Holders of: the Allowed DIP Facility Claims, in the amount required to satisfy in full all then outstanding Allowed DIP Facility Claims, with any excess to be distributed to Holders of Allowed Pre-Petition Lender Claims in accordance with Section III.B.1 of the Plan. Any amounts funded by the Administrative Agent in connection with the Plan, including but not limited to any portion of the Plan Fund, will be the Administrative Agent's and the DIP Facility Lender's final contribution to the Debtors' Estates.

Net proceeds of any remaining Sales will be distributed by the Liquidating Trustee as follows: (i) 96% to the Administrative Agent for distribution in accordance with Section III.B.1 of the Plan and (ii) 4% to General Unsecured Creditors (which, other than any funds that constitute the Estate Resolution Consideration, will be shared with the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claims). In addition, the proceeds of any D&O Claims realized will be distributed by the Liquidating Trustee as follows: (y) 50% to the Administrative Agent for distribution, in accordance with Section III.B.1 of the Plan, and (z) 50% to General Unsecured Claims (which, after \$2 million in such proceeds are realized, will be shared with the Pre-Petition Lenders on account of the Pre-Petition Lenders Deficiency Claims).

Notwithstanding the foregoing, all of the Pre-Petition Lenders' pre-petition or post-petition collateral, or the proceeds thereof, which are returned or refunded to the Debtors or the Liquidating Trustee (as applicable), including without limitation, Workers Compensation Insurance Policy deposits or any other deposits, or any retainers, once returned or refunded will be paid 100% to the Administrative Agent, for subsequent distribution thereby to the Holders of Allowed Pre-Petition Lenders Secured Claims, until all such Allowed Claims are satisfied in full, in the manner set forth in the Financing Agreement.

Upon the closing of the Sale of Bugaboo Creek on April 21, 2011, as described below, the Debtors believed that they were in receipt of sufficient funds necessary to satisfy all obligations under the DIP Facility, but at the request of the Administrative Agent, such funds are being held in segregated accounts, to be applied in accordance with the terms of the Plan on the Effective Date. Since April 21, 2011, the DIP Facility Lender has not been charging the Debtors any interest on the DIP Facility, but have, instead, been charging unused line fee of 0.5% on the undrawn amount of the DIP Facility.

6. The Office Sale. Prior to the Petition Date, the Debtors had engaged in certain limited efforts to sell The Office, and in September 2010, the Debtors, with the assistance of Raymond James & Company, Inc. ("*Raymond James*"), began an extensive marketing campaign.

**Exhibit B**

(Pages from the *Blackline of Amended Plan*, Exhibit C to the *Notice of Filing of Amended Plan and Disclosure Statement*)

Claim is entitled to and does timely elect application of Bankruptcy Code § 1111(b)(2), then such Holder's entire Claim shall be a Secured Claim to the extent such Claim is Allowed.

127. ~~122.~~ *Senior Creditor Claims* collectively means all remaining and outstanding: (a) Pre-Petition Lender Secured Claims and (b) Second Lien Note Secured Claims.

128. ~~123.~~ *Sharing Percentage Recovery* means the amount equal to 4% of the net proceeds (after costs of sale) from the sale or liquidation of the Estates (other than (i) the Sale of The Office, (ii) the D&O Claims, and (iii) Avoidance Actions) in excess of \$4 million.

129. ~~124.~~ *Subordinated Notes Claims* collectively means all Claims represented by, related to, arising under, or in connection with the Subordinated Notes and any and all guarantees issued with respect thereto.

130. ~~125.~~ *Subordinated Notes* means the Senior Subordinated Notes due June 21, 2013, issued by the Subordinated Notes Issuers under the Subordinated Notes Purchase Agreement.

131. ~~126.~~ *Subordinated Notes Issuers* means CB Holding Corp., Charlie Brown's Acquisition Corp., Charlie Brown's Inc., Bugaboo Creek Acquisition, LLC, Bugaboo Creek Holdings, Inc., and each other issuer party under the Subordinated Notes Purchase Agreement, in their capacity as the issuers thereunder.

132. ~~127.~~ *Subordinated Notes Purchase Agreement* means that certain Note Purchase Agreement, dated as of June 21, 2007 (as amended on February 29, 2008, and on September 26, 2008), by and between Kohlberg Capital Corporation, as purchaser, and the Subordinated Notes Issuers, as issuers, for the purchase of \$10 million in principal face amount of Senior Subordinated Notes, together with all documents, instruments, and agreements related thereto or entered into in connection therewith.

133. *Sysco 503(b)(9) Claims* means any and all Claims of Sysco Corporation and its affiliates against the Estates under Bankruptcy Code § 503(b)(9) (subject to all applicable offsets for Avoidance Actions or other available offsets, affirmative defenses, and any other defenses and objections with respect thereto).

134. ~~128.~~ *Tax Code* means the Internal Revenue Code of 1986, as amended from time to time.

135. ~~129.~~ *Third-Party Releasees* collectively means: (a) the Pre-Petition Lenders and the DIP Facility Lender, solely in their respective capacities as such; (b) the Administrative Agent, solely in its capacity as such; (c) the Creditors Committee and the members thereof, solely in their respective capacities as such; (d) the Second Lien Noteholders, ~~solely in their respective capacities as such;~~ (e) the Liquidating Trustee, ~~solely in its capacity as such;~~ (f) (e) with respect to each of the foregoing Persons, and except as otherwise set forth ~~herein~~ in the Plan, such Person's predecessors, successors, and assigns, and current and former directors, officers, employees, stockholders, members, subsidiaries, affiliates, principals, agents, advisors, financial advisors, attorneys, accountants, investment bankers, consultants, underwriters, appraisers,

representatives, and other professionals, in each case in their respective capacities as such; and (g) any Person claimed to be liable derivatively through any Person referred to in clauses (a), (b), (c), (d), (e), (f), or (g) of this definition.

136. ~~130.~~ *Transferred Causes of Action* means all Causes of Action, including D&O Claims, that (i) have not been released ~~herein~~ in the Plan or pursuant to the Confirmation Order, the DIP Facility Order, or any other order of the Bankruptcy Court and (ii) do not otherwise constitute assets acquired by, or transferred to, any of the Purchasers or any other non-Debtor party prior to the Effective Date and the products and proceeds thereof.

137. ~~131.~~ *Transferred Property* means, except as otherwise set forth ~~herein~~ in the Plan or in the Confirmation Order, (i) any and all Avoidance Actions and other Transferred Causes of Action and any products or proceeds thereof; (ii) the Office Sale Consideration Shared Proceeds; (iii) the D&O Shared Proceeds (to the extent available); (iv) the Sharing Percentage Recovery; (v) the Plan Fund; and (vi) all other remaining unliquidated property and Assets of the Debtors or the Estates (including any Preserved Collateral), other than (a) any collateral securing an Other Secured Claim that is to be distributed to the Holder of such Claim in the manner provided in Section III.B.2 ~~hereof~~ of the Plan, (b) any assets that were the subject of any of the Sales or any other sale or transfer approved pursuant to a Final Order of the Bankruptcy Court or was otherwise subject to a motion to sell or transfer pending as of the Effective Date, or (c) any other Assets that were otherwise previously duly transferred, sold, distributed, waived, abandoned, or disposed of as of the Effective Date.

138. ~~132.~~ *Unimpaired* means, when used with reference to a Claim or Equity Interest, a Claim or Equity Interest that is not Impaired.

139. ~~133.~~ *United States Trustee* means the United States Department of Justice, Office of the United States Trustee for Region 3.

140. *Unsecured Creditor Settlement* shall have the meaning ascribed thereto in Section IV.K of the Plan.

141. *Utility Companies* means those Persons who, in connection with the operation of the Debtors' businesses and the Debtors' management of their properties, supplied or provided electricity, water, sewer, telephone, communications, trash collection, and/or other services of this general character to any of the Debtors prior to the Effective Date.

142. *Vested Insurance Agreements* means those agreements related to Insurance Policies to be set forth in a schedule or exhibit to be included in the Plan Supplement or otherwise filed with the Bankruptcy Court.

143. ~~134.~~ *Voting Deadline* means the deadline established by the Bankruptcy Court as the last date to timely submit a Ballot for voting to accept or to reject the Plan.

**ARTICLE II.**  
**ADMINISTRATIVE CLAIMS; DIP FACILITY CLAIMS; PRIORITY TAX CLAIMS**

**A. Administrative Claims**

~~(a)~~ (a) Non-Professional Fee Administrative Claims. Other than the Holder of any Claim (including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of any Sale Order, Asset Purchase Agreement, or management or other agreement entered into by the Debtors in connection with a Sale or otherwise) that the applicable Purchaser has agreed to satisfy, and is therefore obligated to pay, under the relevant Sale Order ~~and/~~ Asset Purchase Agreement, or management or ~~sale~~ other agreement, each Holder of any then outstanding Allowed Administrative Expense Claim shall receive from the Plan Fund, or, in the case of any Allowed Sysco 503(b)(9) Claims, from the Estate Shared Proceeds (in each instance as set forth in Section IV.D.2(h)(2)(A) of the Plan), in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim (except to the extent that such Holder has agreed to a less favorable treatment of such Allowed Claim), Cash equal to the amount of such Allowed Claim on the later of (i) the Initial Distribution Date and (ii) the date that is 10 days after the Allowance Date of such Claim; provided, however, that and without limiting the applicable Holder's obligation to file a properly-completed Proof of Claim prior to the Administrative Claims Bar Date with respect to any purported unpaid and outstanding Administrative Claim, Allowed Administrative Claims representing obligations incurred in the ordinary course of the Debtors' businesses shall be paid or performed in accordance with the terms and conditions of the particular transactions and any agreements related thereto (including any sale or management agreement entered into in connection with a Sale or otherwise). Notwithstanding anything to the contrary ~~herein~~ in the Plan, the applicable Purchaser shall pay or otherwise satisfy any Claim, including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of the applicable Sale Order, Asset Purchase Agreement, or management or other agreement that it has agreed to pay under such order and/or agreement in the time and manner set forth therein or that otherwise became the obligation of a particular Purchaser upon the closing of the underlying Sale (or portion thereof), and the Debtors shall have no liability or responsibility therefor.

~~(b)~~ (b) Professional Fee Claims. All Persons seeking an award by the Bankruptcy Court of Professional Fees shall be required to file their respective final applications for allowance of Professional Fees for services rendered and reimbursement of expenses incurred by the date that is ~~60~~ 30 days after the ~~Confirmation~~ Effective Date (the "*Professional Fee Bar Date*") and, in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim, shall be paid in full from ~~the Plan Fund~~ separate escrow accounts funded by a portion of the Plan Fund (in an amount to be determined by the Debtors, the Creditors Committee, and the Administrative Agent) (the "*Professional Fee Escrows*"), in such amounts as are allowed by the Bankruptcy Court (A) within 10 days of the date upon which the order relating to any such Professional Fee Claim is entered or (B) upon such other terms as may be mutually agreed upon between the Holder of such Claim for Professional Fees and the Debtors. Unless otherwise expressly set forth in the Plan, a Professional Fee Claim will be Allowed only if: (i) on or before the

## **I. Dissolution of the Creditors Committee**

On the first (1st) Business Date following the Effective Date, and provided the Liquidating Trust has become effective as provided under the Plan, the Creditors Committee shall be dissolved, and the Creditors Committee and its members shall be released and discharged from the rights and duties arising from or related to the Chapter 11 Cases, and the retention or employment of the Creditors Committee's Professionals shall terminate, except with respect to final applications for Professional Fee Claims. ~~The~~After the Effective Date, the Professionals retained by the Creditors Committee and the members thereof shall ~~not only~~ be entitled to compensation or reimbursement of expenses or fees for any services rendered or expenses incurred in their capacity as such after the first (1st) Business Day following the Effective Date, ~~except for services rendered and expenses incurred in connection with the~~Effective Date that exclusively relate to the prosecution of any final applications by such Professionals or Creditors Committee members for allowance of Professional Fees and reimbursement of expenses (as applicable) pending on the Effective Date or timely filed after the Effective Date as provided for in ~~this~~the Plan.

## **J. Accounting**

Except as otherwise set forth ~~herein~~in the Plan, the Liquidating Trust Agreement, or the Confirmation Order, the Liquidating Trustee will establish a separate bank account for the Plan Fund and for any and all other reserves or funds maintained by the Debtors or the Liquidating Trustee, as the case may be, in connection with the distribution of funds on account of Allowed Claims or their other respective functions under ~~this~~the Plan, the Confirmation Order, or the Liquidating Trust Agreement (as the case may be).

## **K. Settlement with Respect to Fees, Costs, and the Plan by and Among the Administrative Agent, the Creditors Committee, the Second Lien Noteholders, and the Debtors**

As set forth further in the Plan (including, without limitation, in Sections II.A(b), III.B.1(c), IV.D.1(a), IV.D.1(g), IV.D.2(h), X.D, X.E, and X.F of the Plan), the Plan incorporates and implements a further compromise and settlement reached by and among (i) the Administrative Agent, (ii) the Creditors Committee, (iii) the Second Lien Noteholders, and (iv) the Debtors (the "Unsecured Creditor Settlement"). As a result of the Unsecured Creditor Settlement, the Creditors Committee, the Administrative Agent, and the Second Lien Noteholders have agreed to support and recommend the confirmation of the Plan, and shall not object to (or support any party in objecting to) the Plan or to any provisions thereof.

## **ARTICLE V. TREATMENT OF DISPUTED CLAIMS**

### **A. Objections to Claims; Prosecution of Disputed Claims**

1. Except as otherwise set forth ~~herein~~in the Plan, the Confirmation Order, the DIP Facility Order, the Sale Orders, or any other order of the Bankruptcy Court, (1) prior to the

**Exhibit C**

(Pages from the *Blackline of Amended Disclosure Statement*, Exhibit D to the *Notice of Filing of Amended Plan and Disclosure Statement*)

~~in excess of the amount listed on the Schedules as other than unliquidated, disputed, and/or contingent, or (iv) that is otherwise disputed by any of the Debtors or any other party in interest in accordance with applicable law, which dispute has not been withdrawn, resolved, or overruled by a Final Order.~~

A Chapter 11 plan of liquidation may also specify that certain classes of claims or interests are to have their claims or interests remain unaltered by the Chapter 11 plan. Such classes are referred to as “unimpaired”, and they are conclusively deemed under Bankruptcy Code § 1126 to have accepted the Chapter 11 plan and, therefore, need not be solicited to vote to accept or to reject the Chapter 11 plan. ~~Holder~~ ~~of Other Secured Claims and Other Priority Claims in Classes 2 and 3, respectively, are unimpaired~~ Class 3 are Unimpaired and, therefore, conclusively be deemed to have accepted the Plan. No Ballot is enclosed for ~~Holder~~ ~~of Class 2 Other Secured Claims and Class 3 Other Priority Claims.~~

A Chapter 11 plan of liquidation may also specify that certain classes will not receive any distribution under the Chapter 11 plan. Under Bankruptcy Code § 1126(g), such classes are conclusively deemed to have rejected the Chapter 11 plan and, therefore, also need not be solicited to accept or to reject the Chapter 11 plan. Holders of Equity Interests in Class 6 will not receive any recovery under the Plan on account of such Equity Interests, and that Class is, therefore, conclusively deemed to reject the Plan. No Ballot is enclosed for Holders of Class 6 Equity Interests.

The “Effective Date” of the Plan means the date on which each of the conditions precedent to the occurrence of the Effective Date of the Plan specified in Article IX of the Plan has been satisfied or waived.

This Section of ~~this~~ the Disclosure Statement summarizes the Plan, which is set forth in its entirety as Exhibit A hereto and made a part hereof. This summary is qualified in its entirety by reference to the Plan, and in the event of any discrepancy or inconsistency between this summary and the Plan, the terms of the Plan shall govern. **YOU SHOULD READ THE PLAN IN ITS ENTIRETY BEFORE VOTING TO ACCEPT OR TO REJECT THE PLAN.**

**B. Description of Classification and Treatment of Claims and Equity Interests Under the Plan**

1. Unclassified Claims: Administrative Claims, DIP Facility Claims, and Priority Tax Claims. As contemplated under the Bankruptcy Code, Administrative Claims, DIP Facility Claims, and Priority Tax Claims are not classified under the Plan. In order to confirm the Plan, Allowed Administrative Claims, Allowed DIP Facility Claims, and Allowed Priority Tax Claims must be paid in full or in a manner otherwise agreeable to the Holders of those Claims. The Debtors anticipate having more than sufficient Cash (either on hand or from amounts already paid to, and being held in ~~a segregated account~~ accounts by, the Administrative Agent) available on the Effective Date to pay all of the foregoing in full.

a. *Administrative Claims*

Administrative claims are Claims for costs and expenses of administration of the Chapter 11 Cases with priority under Bankruptcy Code § 507(a)(2), costs and expenses allowed under Bankruptcy Code § 503(b) (including, without limitation, under Bankruptcy Code § 503(b)(9)), the actual and necessary costs and expenses of preserving the respective Estates of the Debtors and operating the respective businesses of the Debtors (prior to the closing of a particular Sale or portion thereof), any indebtedness or obligations incurred or assumed by any of the Debtors pursuant to Bankruptcy Code § 364 or otherwise (other than any DIP Facility Claims), and Professional Fee Claims of the Debtors' and the Creditors Committee's respective Professionals (including, without limitation, the expenses incurred by each member of the Creditors Committee in its capacity as such), in each case to the extent allowed by an order of the Bankruptcy Court under Bankruptcy Code § 330(a) or 331 or otherwise, and any fees or charges assessed against the respective Estates under 28 U.S.C. § 1930; *provided, however, that the Holder of an Administrative Claim (except for an Administrative Claim based upon (i) Professional Fee Claims, the allowance and timing for filing of applications for Professional Fees being governed by Section II.A(b)) of the Plan, (ii) DIP Facility Claims, or (iii) fees or charges asserted against the respective Estates under 28 U.S.C. § 1930, and (iv) goods or services provided to the Debtors during the Chapter 11 Cases (prior to the closing of a particular Sale or portion thereof) in the ordinary course of the Debtors' businesses by non-Professionals* 1930) must file a request for payment on or before the Administrative Claims Bar Date for such Administrative Claim to be eligible to be considered an Allowed Claim.

As of the date hereof, the Debtors estimate that, as of the Effective Date, the total amount of Allowed Administrative Claims will be approximately \$600,000. The two primary categories of Allowed Administrative Claims in these Cases are non-Professional Fee Administrative Claims (which for the most part consist of Claims under Bankruptcy Code § 503(b)(9)) and Professional Fee Claims. As the Debtors have not operated their businesses for some time, they believe that unpaid Allowed Administrative Claims other than Allowed Professional Fee Claims or Allowed Claims under Bankruptcy Code § 503(b)(9) will total less than \$50,000.

(i) Non-Professional Fee Administrative Claims. Other than the Holder of any Claim (including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of any Sale Order, Asset Purchase Agreement, or management or other agreement entered into by the Debtors in connection with a Sale or otherwise) that the applicable Purchaser has agreed to satisfy, and is therefore obligated to pay, under the relevant Sale Order ~~and~~ Asset Purchase Agreement, or management or ~~sale~~ other agreement, each Holder of any then outstanding Allowed Administrative Expense Claim will receive from the Plan Fund, or, in the case of any Allowed Sysco 503(b)(9) Claims, from the Estate Shared Proceeds (in each instance as set forth in Section IV.D.2(h)(2)(A) of the Plan), in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim (except to the extent that such Holder has agreed to a less favorable treatment of such Allowed Claim), Cash equal to the amount of such Allowed Claim on the later of (A) the Initial Distribution Date and (B) the date that is 10 days after the Allowance Date of such Claim; ~~that~~ and without limiting the applicable Holder's obligation to file a properly-completed Proof of Claim prior to the Administrative Claims Bar Date with respect to any purported unpaid and outstanding Administrative Claim, Allowed Administrative Claims representing obligations incurred in the ordinary course of the Debtors' businesses will

be paid or performed in accordance with the terms and conditions of the particular transactions and any agreements related thereto (including any sale or management agreement entered into in connection with a Sale or otherwise). Notwithstanding anything to the contrary in the Plan, the applicable Purchaser will pay or otherwise satisfy any Claim, including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of the applicable Sale Order, Asset Purchase Agreement, or management or other agreement that it has agreed to pay under such order and/or agreement in the time and manner set forth therein or that otherwise became the obligation of a particular Purchaser upon the closing of the underlying Sale (or portion thereof), and the Debtors will have no liability or responsibility therefor.

As set forth further herein, in accordance with the Unsecured Creditor Settlement, all Allowed Claims against the Estates under Bankruptcy Code § 503(b)(9) other than the Sysco 503(b)(9) Claims (as set forth on Exhibit C hereto) will be paid from the Plan Fund.<sup>14</sup> As of the date hereof, the Debtors estimate that, as of the Effective Date, the total amount of such Allowed Claims will be approximately \$206,000. As further set forth in the Unsecured Creditor Settlement, any Allowed Sysco 503(b)(9) Claims would (after application of any applicable offsets for Avoidance Actions or other available offsets or defenses, in accordance with Section IV.D.2(e) of the Plan or otherwise) be paid from the Estate Shared Proceeds. The aggregate stated amount of the Sysco 503(b)(9) Claims is approximately \$470,000; however, there appear to be valid defenses and objections to the Sysco 503(b)(9) Claims, including offsets in connection with Avoidance Actions against the Sysco entities, such that there ultimately may not be any Allowed amount of such Claims.

(ii) Professional Fee Claims. All Persons seeking an award by the Bankruptcy Court of Professional Fees will be required to file their respective final applications for allowance of Professional Fees for services rendered and reimbursement of expenses incurred by the date that is ~~60 days after the Confirmation Date (the “Professional Fee Bar Date”)~~ and, in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim, will be paid in full from ~~the Plan Fund~~ separate escrow accounts funded by a portion of the Plan Fund (in an amount to be determined by the Debtors, the Creditors Committee, and the Administrative Agent) (the “Professional Fee Escrows”), in such amounts as are allowed by the Bankruptcy Court (A) within 10 days of the date upon which the order relating to any such Professional Fee Claim is entered or (B) upon such other terms as may be mutually agreed upon between the Holder of such Claim for Professional Fees and the Debtors. Unless otherwise expressly set forth in the Plan, a Professional Fee Claim will be Allowed only if: (i) on or before the Professional Fee Bar Date the entity holding such Professional Fee Claim files with the Bankruptcy Court a final fee application and serves the application on counsel to the Debtors, counsel to the Creditors Committee, counsel to the Administrative Agent, the Liquidating Trustee, and the United States Trustee; and (ii) the Bankruptcy Court enters an order allowing the Claim. *Entities holding Professional Fee Claims that do not timely file and serve a fee application by the Professional Fee Bar Date in the foregoing manner will be forever barred*

---

<sup>14</sup> Exhibit C lists those timely-asserted alleged Claims under Bankruptcy Code § 503(b)(9) that the Debtors believe will ultimately be Allowed. All rights, defenses, objections, offsets, and counterclaims are reserved.

**Exhibit D**

(Pages from the *Modified Plan*, Exhibit A to the *Notice of Filing of Modified Amended Plan and Disclosure Statement*)

## B. Defined Terms

Unless the context otherwise requires, the following terms shall have the meanings ascribed to them below when used in capitalized form in the Plan:

1. *Administrative Agent* means Ally Commercial Finance LLC, in its capacities as (i) one of the Pre-Petition Lenders and a participant in the financing provided under the Financing Agreement and (ii) administrative agent and collateral agent to the DIP Lender under the DIP Facility, and all successors and assigns thereof.

2. *Administrative Claims* means the collective reference to all Claims for costs and expenses of administration of the Chapter 11 Cases with priority under Bankruptcy Code § 507(a)(2), costs and expenses allowed under Bankruptcy Code § 503(b) (including, without limitation, under Bankruptcy Code § 503(b)(9)), the actual and necessary costs and expenses of preserving the respective Estates of the Debtors and operating the respective businesses of the Debtors (prior to the closing of a particular Sale or portion thereof), any indebtedness or obligations incurred or assumed by any of the Debtors pursuant to Bankruptcy Code § 364 or otherwise (other than any DIP Facility Claims), and Professional Fee Claims of the Debtors' and the Creditors Committee's respective Professionals (including, without limitation, the expenses incurred by each member of the Creditors Committee in its capacity as such), in each case to the extent allowed by an order of the Bankruptcy Court under Bankruptcy Code § 330(a) or 331 or otherwise, and any fees or charges assessed against the respective Estates under 28 U.S.C. § 1930; provided, however, that the Holder of an Administrative Claim (except for an Administrative Claim based upon (i) Professional Fee Claims, the allowance and timing for filing of applications for Professional Fees being governed by Section II.A(b) of the Plan), (ii) DIP Facility Claims, and (iii) fees or charges asserted against the respective Estates under 28 U.S.C. § 1930 must file a request for payment on or before the Administrative Claims Bar Date for such Administrative Claim to be eligible to be considered an Allowed Administrative Claim; provided further, however, that nothing in this Plan or the Confirmation Order shall require the Internal Revenue Service or any state or local taxing authorities to file a post-petition claim or request for payment for any tax obligations that arose after the Petition Date prior to the Administrative Claims Bar Date.

3. *Administrative Claims Bar Date* means the deadline for timely filing any Administrative Claims incurred through and including the Confirmation Date, other than DIP Facility Claims, Professional Fee Claims, claims of governmental units for the payment of an expense described in Bankruptcy Code § 503(b)(1)(B) or (C) and the Internal Revenue Service or any state or local taxing authorities for tax obligations that arose after the Petition Date, or fees or charges asserted against the respective Estates under 28 U.S.C. § 1930, *which deadline shall be 4:00 P.M. (prevailing Eastern time) on the date that is 30 days after the Confirmation Date.*

4. *Affiliate Debtors* means all of the Debtors other than CB Holding.

5. *Allowance Date* means, with reference to a particular Claim, the date on which such Claim becomes an Allowed Claim; provided, however, that, if a Claim becomes an

same has been (and may further be) modified, amended, or supplemented from time to time, together with (a) all of the documents, instruments, and agreements related thereto or entered into in connection therewith and (b) the DIP Facility Order and any subsequent orders of the Bankruptcy Court related thereto.

39. *DIP Facility Claims* means all Claims of the DIP Facility Lender against the Debtors represented by, related to, arising under, or in connection with the DIP Facility for any outstanding obligations thereunder incurred through and including the Effective Date, after taking into account the sum of all payments made by any of the Debtors to the DIP Facility Lender prior to the Effective Date on account of such Claims (pursuant to the Sale Orders, the DIP Facility Order, any other order of the Bankruptcy Court, or otherwise).

40. *DIP Facility Lender* means Ally Commercial Finance LLC, in its capacity as the lender under the DIP Facility, and all successors and assigns thereof.

41. *DIP Facility Order* collectively means (i) the *Final Order (I) Authorizing Secured Post-Petition Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363, and (III) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361, 363, and 364*, entered by the Bankruptcy Court on December 13, 2010 (ECF No. 177), and (ii) the *Order Amending Final Order (I) Authorizing Secured Post-Petition Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363, and (III) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361, 363, and 364* (ECF No. 177), entered by the Bankruptcy Court on March 9, 2011 (ECF No. 597), as the same may have been amended, modified, or supplemented by subsequent filings of budgets related thereto or otherwise.

42. *D&O Claims* means the claims against certain of the Debtors' former officers and directors that are not otherwise released pursuant to the Plan (including in Article X of the Plan), including, but not limited to those claims asserted in the complaint filed in Ableco Finance LLC vs. CB Holding Corp., et al., in the Supreme Court of the State of New York, New York County, as Case No. 650437/2010.

43. *D&O Shared Proceeds* means fifty percent (50%) of the net proceeds (after litigation fees, costs, and expenses actually incurred) of the D&O Claims, including any insurance proceeds or restitution received in connection therewith or otherwise related thereto.

44. *D&O Resolution Consideration* means the first \$1 million of the D&O Shared Proceeds that is distributed to the Holders of Allowed General Unsecured Claims from the Liquidating Trust.

45. *Disclosure Statement* means the disclosure statement and all supplements and exhibits thereto that relate to the Plan and are approved by the Bankruptcy Court pursuant to Bankruptcy Code § 1125, as the same has been and may be further amended or modified by the Debtors from time to time, pursuant to the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or any applicable orders of the Bankruptcy Court.

46. *Disputed Claim or Equity Interest* means a Claim or Equity Interest, or any portion thereof: (i) listed on the Schedules as unliquidated, disputed, and/or contingent for which no Proof of Claim in a liquidated and non-contingent amount has been filed or (ii) that is the subject of an objection or request for estimation Filed by any of the Debtors or the Liquidating Trustee or any other party-in-interest in accordance with applicable law and which objection has not been withdrawn, resolved, or overruled by a Final Order of the Bankruptcy Court.

47. *Disputed Claims Reserve* shall have the meaning ascribed thereto in Section IV.D.1(h) of the Plan.

48. *Dissolution* shall have the meaning ascribed thereto in Section IV.F.(a) of the Plan

49. *Distribution Record Date* means the record date for purposes of making distributions under the Plan on account of Allowed Claims, which date shall be the Bar Date.

50. *Effective Date* means the Business Day on which the Plan becomes effective, as provided for in Article IX of the Plan.

51. *Entity* means a Person, a corporation, a general partnership, a limited partnership, a limited liability company, a limited liability partnership, an association, a joint-stock company, a joint venture, an Estate, a trust, an unincorporated organization, a governmental unit or any subdivision thereof, the United States Trustee, or any other entity.

52. *Equity Interest* means any interest in any Debtor, including, without limitation, (i) a share or membership interest in a corporation or limited liability corporation, whether or not denominated “stock”, “interest”, or similar security, and whether or not issued, unissued, authorized, or outstanding, (ii) an interest of a limited partner in a limited partnership, (iii) an interest of a general partner in a general partnership, or (iv) a warrant, option, contract, or right to purchase, sell, or subscribe to a share, security, or interest of a kind specified or similar to those referenced in subsections (i), (ii), or (iii) of this definition, as well as (a) any rights to any dividends or distributions as a result of such ownership, and (b) any and all Claims (1) for damages arising from the rescission of the purchase or sale of any such interest or (2) for reimbursement or contribution allowed under Bankruptcy Code § 502 on account of such Claim, which Claims are subordinated pursuant to Bankruptcy Code § 510.

53. *Estate(s)* means individually, the estate of each Debtor in the Chapter 11 Cases, and, collectively, the Estates of all of the Debtors in the Chapter 11 Cases, created pursuant to Bankruptcy Code § 541 upon commencement of the Chapter 11 Cases.

54. *Estate Resolution Consideration* collectively means (1) the Office Resolution Consideration, (2) the Other Assets Resolution Consideration, and (3) the D&O Resolution Consideration.

55. *Estate Shared Proceeds* collectively means (1) the Office Shared Proceeds, (2) the Sharing Percentage Recovery, and (3) the D&O Shared Proceeds.

84. *Office Resolution Consideration* means the first \$125,000 of the proceeds from the Office Shared Proceeds that is distributed to the Holders of Allowed General Unsecured Claims from the Liquidating Trust.

85. *Office Shared Proceeds* means (a) the first \$125,000, plus (b) 5% of the net proceeds (after costs of sale) from the Sale of The Office in excess of \$2.5 million.

86. *Other Assets Resolution Consideration* means (a) the first \$125,000, plus (b) the first \$125,000 of the Sharing Percentage Recovery that is distributed to the Holders of Allowed General Unsecured Claims from the Liquidating Trust.

87. *Other Priority Claim* means any Claim accorded priority in right of payment under Bankruptcy Code § 507(a), other than a Priority Tax Claim or an Administrative Claim.

88. *Other Secured Claim* means a Secured Claim other than the Pre-Petition Lender Secured Claims, the Second Lien Notes Secured Claims, and the DIP Facility Claims.

89. *Other Secured Claim Deficiency Claim* means that portion of the Claim held by the Holder of an Other Secured Claim that exceeds the value of such Holder's interest in the Debtors' interest in such Holder's collateral.

90. *Oversight Committee* shall have the meaning ascribed thereto in Section IV.D.1(g) of the Plan.

91. *Person* means a "person" as defined in Bankruptcy Code § 101(41).

92. *Petition Date* means November 17, 2010.

93. *Plan* means the *Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code*, including, without limitation, any exhibits, supplements, appendices, and schedules hereto, either in its present form or as it may be amended, modified, altered, or supplemented from time to time in accordance with the terms and provisions of the Plan or of the Confirmation Order.

94. *Plan Fund* means an aggregate amount equal to \$1,777,000 plus any budgeted amounts not paid prior to the Effective Date or such other amount that may be agreed to by the Debtors, the Administrative Agent, and the Creditors Committee at any time up until the Confirmation Date. In the event the Debtors, the Administrative Agent, and the Creditors Committee agree prior to the Confirmation Date that the Plan Fund shall be less than such amount, the Debtors shall File a notice indicating such lower amount.

95. *Plan Supplement* means the supplement to the Plan that contains the form of the Liquidating Trust Agreement and certain related documents, which will be filed on or before the Plan Supplement Filing Date.

125. *Second Lien Notes Secured Claims* means that portion (if any) of the Second Lien Notes Claims that are Secured Claims.

126. *Secured Claim* means all Claims that are secured by a properly-perfected, valid, enforceable, and not otherwise avoidable Lien on property in which an Estate has an interest or that is subject to setoff under Bankruptcy Code § 553, to the extent of the value of the Claim Holder's interest in the applicable Estate's interest in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to Bankruptcy Code § 506(a) and, if applicable, Bankruptcy Code § 1129(b); provided, however, that if the Holder of a Secured Claim is entitled to and does timely elect application of Bankruptcy Code § 1111(b)(2), then such Holder's entire Claim shall be a Secured Claim to the extent such Claim is Allowed.

127. *Senior Creditor Claims* collectively means all remaining and outstanding (a) Pre-Petition Lender Secured Claims and (b) Second Lien Note Secured Claims.

128. *Sharing Percentage Recovery* means the amount equal to 4% of the net proceeds from the sale or liquidation of the Estates (other than (i) the Sale of The Office, (ii) the D&O Claims, and (iii) Avoidance Actions) in excess of \$4 million.

129. *Subordinated Notes Claims* collectively means all Claims represented by, related to, arising under, or in connection with the Subordinated Notes and any and all guarantees issued with respect thereto.

130. *Subordinated Notes* means the Senior Subordinated Notes due June 21, 2013, issued by the Subordinated Notes Issuers under the Subordinated Notes Purchase Agreement.

131. *Subordinated Notes Issuers* means CB Holding Corp., Charlie Brown's Acquisition Corp., Charlie Brown's Inc., Bugaboo Creek Acquisition, LLC, Bugaboo Creek Holdings, Inc., and each other issuer party under the Subordinated Notes Purchase Agreement, in their capacity as the issuers thereunder.

132. *Subordinated Notes Purchase Agreement* means that certain Note Purchase Agreement, dated as of June 21, 2007 (as amended on February 29, 2008, and on September 26, 2008), by and between Kohlberg Capital Corporation, as purchaser, and the Subordinated Notes Issuers, as issuers, for the purchase of \$10 million in principal face amount of Senior Subordinated Notes, together with all documents, instruments, and agreements related thereto or entered into in connection therewith.

133. *Sysco 503(b)(9) Claims* means any and all Claims of Sysco Corporation and its affiliates against the Estates under Bankruptcy Code § 503(b)(9) (subject to all applicable offsets for Avoidance Actions or other available offsets, affirmative defenses, and any other defenses and objections with respect thereto).

134. *Tax Code* means the Internal Revenue Code of 1986, as amended from time to time.

142. *Vested Insurance Agreements* means those agreements related to Insurance Policies to be set forth in a schedule or exhibit to be included in the Plan Supplement or otherwise filed with the Bankruptcy Court.

143. *Voting Deadline* means the deadline established by the Bankruptcy Court as the last date to timely submit a Ballot for voting to accept or to reject the Plan.

## **ARTICLE II.**

### **ADMINISTRATIVE CLAIMS; DIP FACILITY CLAIMS; PRIORITY TAX CLAIMS**

#### **A. Administrative Claims**

(a) Non-Professional Fee Administrative Claims. Other than the Holder of any Claim (including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of any Sale Order, Asset Purchase Agreement, or management or other agreement entered into by the Debtors in connection with a Sale or otherwise) that the applicable Purchaser has agreed to satisfy, and is therefore obligated to pay, under the relevant Sale Order, Asset Purchase Agreement, or management or other agreement, each Holder of any then outstanding Allowed Administrative Expense Claim shall receive from the Plan Fund, or, in the case of any Allowed Sysco 503(b)(9) Claims, from the Estate Shared Proceeds (in each instance as set forth in Section IV.D.2(h)(2)(A) of the Plan), in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim (except to the extent that such Holder has agreed to a less favorable treatment of such Allowed Claim), Cash equal to the amount of such Allowed Claim on the later of (i) the Initial Distribution Date and (ii) the date that is 10 days after the Allowance Date of such Claim; provided, however, and without limiting the applicable Holder's obligation to file a properly-completed Proof of Claim prior to the Administrative Claims Bar Date with respect to any purported unpaid and outstanding Administrative Claim, Allowed Administrative Claims representing obligations incurred in the ordinary course of the Debtors' businesses shall be paid or performed in accordance with the terms and conditions of the particular transactions and any agreements related thereto (including any sale or management agreement entered into in connection with a Sale or otherwise). Notwithstanding anything to the contrary in the Plan, the applicable Purchaser shall pay or otherwise satisfy any Claim, including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of the applicable Sale Order, Asset Purchase Agreement, or management or other agreement that it has agreed to pay under such order and/or agreement in the time and manner set forth therein or that otherwise became the obligation of a particular Purchaser upon the closing of the underlying Sale (or portion thereof).

(b) Professional Fee Claims. All Persons seeking an award by the Bankruptcy Court of Professional Fees shall be required to file their respective final applications for allowance of Professional Fees for services rendered and reimbursement of expenses incurred by the date that is 30 days after the Effective Date (the "*Professional Fee Bar Date*") and, in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim, shall be paid in full from separate escrow accounts funded by a portion of the Plan Fund (in an amount to be determined by the Debtors, the Creditors Committee, and the Administrative Agent) (the "*Professional Fee*

**Exhibit E**

(Pages from the *Modified Disclosure Statement*, Exhibit B to the *Notice of Filing of Modified Amended Plan and Disclosure Statement*)

The “Effective Date” of the Plan means the date on which each of the conditions precedent to the occurrence of the Effective Date of the Plan specified in Article IX of the Plan has been satisfied or waived.

This Section of the Disclosure Statement summarizes the Plan, which is set forth in its entirety as Exhibit A hereto and made a part hereof. This summary is qualified in its entirety by reference to the Plan, and in the event of any discrepancy or inconsistency between this summary and the Plan, the terms of the Plan shall govern. **YOU SHOULD READ THE PLAN IN ITS ENTIRETY BEFORE VOTING TO ACCEPT OR TO REJECT THE PLAN.**

**B. Description of Classification and Treatment of Claims and Equity Interests Under the Plan**

1. Unclassified Claims: Administrative Claims, DIP Facility Claims, and Priority Tax Claims. As contemplated under the Bankruptcy Code, Administrative Claims, DIP Facility Claims, and Priority Tax Claims are not classified under the Plan. In order to confirm the Plan, Allowed Administrative Claims, Allowed DIP Facility Claims, and Allowed Priority Tax Claims must be paid in full or in a manner otherwise agreeable to the Holders of those Claims. The Debtors anticipate having more than sufficient Cash (either on hand or from amounts already paid to, and being held in segregated accounts by, the Administrative Agent) available on the Effective Date to pay all of the foregoing in full.

a. *Administrative Claims*

Administrative claims are Claims for costs and expenses of administration of the Chapter 11 Cases with priority under Bankruptcy Code § 507(a)(2), costs and expenses allowed under Bankruptcy Code § 503(b) (including, without limitation, under Bankruptcy Code § 503(b)(9)), the actual and necessary costs and expenses of preserving the respective Estates of the Debtors and operating the respective businesses of the Debtors (prior to the closing of a particular Sale or portion thereof), any indebtedness or obligations incurred or assumed by any of the Debtors pursuant to Bankruptcy Code § 364 or otherwise (other than any DIP Facility Claims), and Professional Fee Claims of the Debtors’ and the Creditors Committee’s respective Professionals (including, without limitation, the expenses incurred by each member of the Creditors Committee in its capacity as such), in each case to the extent allowed by an order of the Bankruptcy Court under Bankruptcy Code § 330(a) or 331 or otherwise, and any fees or charges assessed against the respective Estates under 28 U.S.C. § 1930; *provided, however, that the Holder of an Administrative Claim (except for an Administrative Claim based upon (i) Professional Fee Claims, the allowance and timing for filing of applications for Professional Fees being governed by Section II.A(b)) of the Plan, (ii) DIP Facility Claims, or (iii) fees or charges asserted against the respective Estates under 28 U.S.C. § 1930) must file a request for payment on or before the Administrative Claims Bar Date for such Administrative Claim to be eligible to be considered an Allowed Claim.*

As of the date hereof, the Debtors estimate that, as of the Effective Date, the total amount of Allowed Administrative Claims will be approximately \$600,000. The two primary categories of Allowed Administrative Claims in these Chapter 11 Cases are non-Professional Fee

Administrative Claims (which for the most part consist of Claims under Bankruptcy Code § 503(b)(9)) and Professional Fee Claims. As the Debtors have not operated their businesses for some time, they believe that unpaid Allowed Administrative Claims other than Allowed Professional Fee Claims or Allowed Claims under Bankruptcy Code § 503(b)(9) will total less than \$50,000.

(i) Non-Professional Fee Administrative Claims. Other than the Holder of any Claim (including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of any Sale Order, Asset Purchase Agreement, or management or other agreement entered into by the Debtors in connection with a Sale or otherwise) that the applicable Purchaser has agreed to satisfy, and is therefore obligated to pay, under the relevant Sale Order, Asset Purchase Agreement, or management or other agreement, each Holder of any then outstanding Allowed Administrative Expense Claim will receive from the Plan Fund, or, in the case of any Allowed Sysco 503(b)(9) Claims, from the Estate Shared Proceeds (in each instance as set forth in Section IV.D.2(h)(2)(A) of the Plan), in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim (except to the extent that such Holder has agreed to a less favorable treatment of such Allowed Claim), Cash equal to the amount of such Allowed Claim on the later of (A) the Initial Distribution Date and (B) the date that is 10 days after the Allowance Date of such Claim; provided, however, and without limiting the applicable Holder's obligation to file a properly-completed Proof of Claim prior to the Administrative Claims Bar Date with respect to any purported unpaid and outstanding Administrative Claim, Allowed Administrative Claims representing obligations incurred in the ordinary course of the Debtors' businesses will be paid or performed in accordance with the terms and conditions of the particular transactions and any agreements related thereto (including any sale or management agreement entered into in connection with a Sale or otherwise). Notwithstanding anything to the contrary in the Plan, the applicable Purchaser will pay or otherwise satisfy any Claim, including any Claim that could have otherwise potentially constituted an Allowed Administrative Claim against the Debtors but for the terms of the applicable Sale Order, Asset Purchase Agreement, or management or other agreement that it has agreed to pay under such order and/or agreement in the time and manner set forth therein or that otherwise became the obligation of a particular Purchaser upon the closing of the underlying Sale (or portion thereof).

As set forth further herein, in accordance with the Unsecured Creditor Settlement, all Allowed Claims against the Estates under Bankruptcy Code § 503(b)(9) other than the Sysco 503(b)(9) Claims (as set forth on Exhibit C hereto) will be paid from the Plan Fund.<sup>15</sup> As of the date hereof, the Debtors estimate that, as of the Effective Date, the total amount of such Allowed Claims will be approximately \$206,000. As further set forth in the Unsecured Creditor Settlement, any Allowed Sysco 503(b)(9) Claims would (after application of any applicable offsets for Avoidance Actions or other available offsets or defenses, in accordance with Section IV.D.2(e) of the Plan or otherwise) be paid from the Estate Shared Proceeds. The aggregate stated amount of the Sysco 503(b)(9) Claims is approximately \$470,000; however, there appear

---

<sup>15</sup> Exhibit C lists those timely-asserted alleged Claims under Bankruptcy Code § 503(b)(9) that the Debtors believe will ultimately be Allowed. All rights, defenses, objections, offsets, and counterclaims, as well as the ability to amend this exhibit, are reserved.

to be valid defenses and objections to the Sysco 503(b)(9) Claims, including offsets in connection with Avoidance Actions against the Sysco entities, such that there ultimately may not be any Allowed amount of such Claims.

(ii) Professional Fee Claims. All Persons seeking an award by the Bankruptcy Court of Professional Fees will be required to file their respective final applications for allowance of Professional Fees for services rendered and reimbursement of expenses incurred by the Professional Fee Bar Date and, in full satisfaction, settlement, and release of, and in exchange for, such Allowed Claim, will be paid in full from separate escrow accounts funded by a portion of the Plan Fund (in an amount to be determined by the Debtors, the Creditors Committee, and the Administrative Agent) (the “*Professional Fee Escrows*”), in such amounts as are allowed by the Bankruptcy Court (A) within 10 days of the date upon which the order relating to any such Professional Fee Claim is entered or (B) upon such other terms as may be mutually agreed upon between the Holder of such Claim for Professional Fees and the Debtors. Unless otherwise expressly set forth in the Plan, a Professional Fee Claim will be Allowed only if: (i) on or before the Professional Fee Bar Date the entity holding such Professional Fee Claim files with the Bankruptcy Court a final fee application and serves the application on counsel to the Debtors, counsel to the Creditors Committee, counsel to the Administrative Agent, the Liquidating Trustee, and the United States Trustee; and (ii) the Bankruptcy Court enters an order allowing the Claim. *Entities holding Professional Fee Claims that do not timely file and serve a fee application by the Professional Fee Bar Date in the foregoing manner will be forever barred from asserting any such Professional Fee Claim against the Debtors, the Estates, the Liquidating Trust, the Liquidating Trust Assets (including the Preserved Collateral) or the respective property thereof.*

Until all Professional Fee Claims have been Allowed, Disallowed, expunged, settled, resolved, or otherwise adjudicated pursuant to a Final Order of the Bankruptcy Court, the funds contained in the Professional Fee Escrows may not be utilized for any purpose by the Liquidating Trustee or otherwise other than the payment of Allowed Professional Fee Claims. To the extent any funds remain in the Professional Fee Escrows after all Professional Fee Claims have been Allowed, Disallowed, expunged, settled, resolved, or otherwise adjudicated pursuant to a Final Order of the Bankruptcy Court and subsequently paid to the applicable Professional, the Liquidating Trustee may utilize such funds in a manner consistent with the Plan, the Confirmation Order, and the Liquidating Trust Agreement.

In accordance with the Unsecured Creditor Settlement, notwithstanding anything to the contrary set forth in Paragraph 6 of the DIP Facility Order, the Professional Fee Claims of the Professionals retained by the Creditors Committee may not exceed \$250,000 (less amounts previously Allowed and paid to such Professionals in these Chapter 11 Cases). To the extent the final Allowed Professional Fee Claims of the Professionals retained by the Creditors Committee are less than \$250,000, the difference between the ultimately-Allowed amount and \$250,000 will be deemed to constitute Liquidating Trust Assets to be distributed to the beneficiaries of the Liquidating Trust in the manner set forth in the Plan and in the Liquidating Trust Agreement. To the extent the final Allowed Professional Fee Claims of Professionals retained by the Creditors Committee exceeds \$250,000, any such excess over \$250,000 shall be paid from the Estate Resolution Consideration.

**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)
Debtors.	)	
_____	)	

**CERTIFICATE OF SERVICE**

I, Marc S. Casarino, Esquire, hereby certify that on this 16<sup>th</sup> day of February, 2012, I caused a true and correct copy of the **Objection of Sysco Atlanta, LLC, Sysco Boston, LLC, Sysco Central Pennsylvania, LLC, Sysco Connecticut, LLC, and Sysco Metro New York, LLC to Confirmation of the Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code** to be served upon the parties referenced below via first class mail and email:

(Counsel to Official Committee of Unsecured Creditors)  
Bradford J. Sandier, Esquire  
Pachulski Stang Ziehi & Jones LLP  
919 N. Market Street, 17th Floor  
Wilmington, DE 19899

(Counsel to Official Committee of Unsecured Creditors)  
Jeffrey N. Pomerantz, Esquire  
Jason S. Pomerantz, Esquire  
Pachulski Stang Ziehl & Jones LLP  
10100 Santa Monica Boulevard  
11th Floor  
Los Angeles, CA 90067-4003

(United States Trustee)  
Juliet Sarkessian, Esquire  
Office of the United States Trustee  
J. Caleb Boggs Federal Building  
844 King Street, Suite 2207  
Wilmington, DE 19801

(Counsel for Debtors)  
Christopher M. Samis, Esquire  
Mark D Collins, Esquire  
Tyler D. Semmelman, Esquire  
Richards Layton & Finger P.A.  
920 North King Street  
Wilmington, DE 19801

(Counsel to Debtors)  
Maya Peleg, Esquire  
Joel H Levitan, Esquire  
Richard A Stieglitz, Jr., Esquire  
Cahill Gordon & Reindell LLP

Vedder Price P.C.  
Douglas J. Lipke, Esquire  
Jonathan E. Aberman, Esquire  
222 N. LaSalle Street, Suite 2600  
Chicago, IL 60601

Eighty Pine Street  
New York, NY 10005

---

/s/ Marc S. Casarino  
Marc S. Casarino (#3613)