

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

In re:)	Chapter 11
)	
CB HOLDING CORP., <u>et al.</u> ,)	Case No. 10-13683 (MFW)
)	
Debtors.)	Jointly Administered
)	
)	Re: Docket Nos. 1168, 1212
)	

**ALLY COMMERCIAL FINANCE LLC’S RESPONSE
TO UNITED STATES TRUSTEE’S OBJECTION TO CONFIRMATION
OF DEBTORS’ MODIFIED FIRST AMENDED JOINT PLAN OF
LIQUIDATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Upon the objection of the United States Trustee dated February 17, 2012 [Doc. No. 1212] (the “Objection”) to confirmation of the Debtors’ *Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the “Modified Plan”) [Docket No. 1168], on the grounds that the Debtors have failed to pay \$272,301.16 in outstanding United States Trustee fees (the “Outstanding UST Fees”), Ally Commercial Finance LLC (the “DIP Lender”) hereby responds to the Objection and states as follows:

1. The DIP Lender is one of the Debtors’ Pre-Petition Lenders¹ as a participant in the financing provided under the pre-petition Financing Agreement. The DIP Lender is also administrative agent and collateral agent to the DIP Facility Lender under the post-petition DIP Facility. The DIP Lender is also the “Administrative Agent” as that term is defined in the Modified Plan.

¹ All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Modified Plan.

2. The Debtors filed their initial proposed *Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 944] and *Disclosure Statement for the Debtors' Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 945] on August 1, 2011. After the initial plan and disclosure statement were filed, the Debtors put the Court approval process on hold while it negotiated with the DIP Lender and the Creditors' Committee, among others, in an attempt to arrive at a consensual plan. Central to these negotiations was the question of how much money would be required by the DIP Lender to fund a liquidating plan – through the so-called “Plan Fund” – and how the Plan Fund would be funded. In the months to follow, the DIP Lender reviewed numerous budgets and claims estimates prepared by CRG, and the DIP Lender and its attorneys negotiated in good faith with the Debtors and their respective professionals over the amount and sources of the Plan Fund.

3. On December 29, 2011, following numerous rounds of negotiations, the Debtors filed the *Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the “Amended Plan”) and *First Amended Disclosure Statement for Debtors' First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Doc. No. 1149], which reflected the DIP Lender's agreement to fund the Plan Fund in an amount equal to \$1,777,000. (Amended Plan, Articles I.B.(94) and IV.B.)

4. On January 4, 2012, just one day prior to the disclosure statement hearing, the Debtors filed the Modified Plan and the Modified First Amended Disclosure Statement for the Debtors' Modified Plan [Docket No. 1169], but the amount of the Plan Fund and contributions by the DIP Lender thereto was not modified.

5. On that same day, **after** the conclusion of extensive and vigorous negotiations between the Debtors, the Creditors' Committee and the DIP Lender regarding the amount and sources of the Plan Fund and all other plan issues previously raised between them, counsel for the Debtors informed counsel for the DIP Lender *for the first time* that the United States Trustee (the "UST") may be disputing the Debtors' calculation of the fees due from the Debtors to the Office of the United States Trustee as too low.

6. Unbeknownst to the DIP Lender and its attorneys - until it was revealed much later in an email from Debtors' counsel on January 27, 2012 - Debtors' counsel had known since *December 16, 2011*, that the UST had claimed over \$292,000 remained due and owing in UST's fees as of October 31, 2012. Yet none of the budgets and claims estimates provided by the Debtors to the DIP Lender throughout the negotiations over the Plan Fund prior to the filing of the Modified Plan, nor any correspondence between counsel for the Debtors and the DIP Lender during this time, contained any mention whatsoever of any of additional UST Fees owed or any dispute raised by the UST. The failure of the Debtors to bring the UST's claim to the DIP Lender's attention until after the conclusion of negotiations over the Plan Fund misled the DIP Lender into an agreement based upon an incomplete set of facts.

7. Counsel for the Debtors attempted to diffuse the apparent discrepancy by steadfastly maintaining to the DIP Lender and its attorneys that the UST's methodology for its calculation was unfounded, but that even if it was not, the UST's calculation itself was definitely overstated.

8. On or about February 8, 2012, the Debtors informed the DIP Lender that, assuming the UST's calculation methodology was correct, the UST's calculation was overstated by approximately only \$17,000.

9. Not one of the budgets prepared by the Debtor, signed off on by the DIP Lender and submitted to this Court for approval in this case, ever accounted for any additional amounts which were owed to the UST's office.

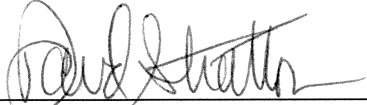
10. If the DIP Lender had been made aware of this issue at any point in these cases, the DIP Lender would have had the ability to address it through the budgeting process. Most of all, if the DIP Lender had been informed at any time *during* its negotiations over the Plan Fund with the Debtors and the Creditors' Committee that there was another \$275,000 obligation that needed to be funded by the DIP Lender in order to confirm the Plan, the DIP Lender would not have agreed to fund the Plan Fund in the amount set forth in the Plan. The DIP Lender was deprived from having a meaningful opportunity to make a fully informed decision about the amount it would fund towards the Plan Fund, and as a result, the DIP Lender should not be compelled through the Modified Plan or otherwise to bear any responsibility for the Outstanding UST Fees.

11. The Modified Plan specifically provides that "[a]ny such funding by the Administrative Agent of a portion of the Plan Fund shall be the final contribution by the Administrative Agent and the DIP Facility Lender to the Debtors' Estates." (Modified Plan, Article IV.B.) Accordingly, it is unfair and inappropriate to suggest that the DIP Lender be responsible not only contributing to fund the Plan Fund, but also any additional contribution, much less a \$275,000 payment of UST's fees under these circumstances.

Dated: February 21, 2012

Respectfully Submitted,

PEPPER HAMILTON LLP

By:  _____

David B. Stratton, Esq. (Bar No. 960)

Hercules Plaza

1313 Market Street

Suite 5100

P.O. Box 1709

Wilmington, Delaware 19899-1709

Telephone: (302) 777-6566

Facsimile: (302) 421-8390

Douglas J. Lipke, Esq. (IL Bar No. 0312457)

Jonathan E. Aberman, Esq. (IL Bar No. 6255541)

Vedder Price P.C.

222 N. LaSalle Street, Suite 2600

Chicago, Illinois 60601

Telephone: (312) 609-7500

Facsimile: (312) 609-5005

Counsel to Ally Commercial Finance LLC