IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CB Holding Corp., et al.,[1]	)	Case No. 10-13683 (MFW)
	)	
Debtors.	)	Re: Docket No. 1245

Objection Deadline: March 28, 2012, at 4:00 p.m.
Hearing Date: April 4, 2012, at 3:00 p.m.

JOINT OBJECTION OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE UNITED STATES TRUSTEE'S MOTION FOR RECONSIDERATION OF THE ORDER CONFIRMING DEBTORS' MODIFIED FIRST AMENDED JOINT PLAN OF LIQUIDATION INSOFAR AS IT OVERRULED THE UNITED STATES TRUSTEE'S OBJECTION REGARDING NON-PAYMENT OF QUARTERLY FEES

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors") and the Official Committee of Unsecured Creditors (the "Committee") in the

[1] 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 Trexlertown, 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.

Debtors' chapter 11 cases (the "Chapter 11 Cases"), by and through their respective undersigned attorneys, hereby jointly submit their objection (the "Objection") to the *United States Trustee's Motion for Reconsideration of the Order Confirming Debtors' First Amended Joint Plan of Liquidation Insofar as it Overruled the United States Trustee's Objection Regarding Non-Payment of Quarterly Fees* (the "Motion") [Docket No. 1245]. In support of this Objection, the Debtors and the Committee respectfully represent as follows:

Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Background

2. On November 17, 2010 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On or about December 1, 2010, the Committee was appointed in the Chapter 11 Cases. No trustee or examiner has been appointed in the Chapter 11 Cases.

4. On January 4, 2012, the Debtors filed the *Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") [Docket No. 1157].

5. On February 17, 2012, the United States Trustee for Region 3 (the "U.S. Trustee") filed the *United States Trustee's Objection to Confirmation of Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan Objection") [Docket No. 1212]. The relevant portion of the Plan Objection concerns a dispute

between the Debtors and the U.S. Trustee over the allocation of disbursements among the Debtors' corporate parents (the "CB Corporate Parents"), on the one hand, and the Debtors' non-operating subsidiaries (the "CB Subsidiaries"), on the other hand, for the purposes of calculating quarterly fees under 28 U.S.C. § 1930(a)(6).

6. On February 21, 2012, the Debtors filed the *Declaration of Chief Restructuring Officer Gary Lembo in Support of Confirmation of Debtors' Modified First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* (the "Lembo Declaration") [Docket No. 1220].

7. A hearing (the "Confirmation Hearing") was held on February 23, 2012, to consider the Plan, and at the conclusion of the Confirmation Hearing, the Court ruled on the Plan Objection as follows:

> I'm going to overrule it [the Plan Objection]. I think that the proper rule really is disbursements are those paid for the debtor who has a legal obligation. It's unfortunate I used the example I did in the *Charter*. I think that if that were the rule, it would truly be impossible to apply because there could be arguments about any disbursement made as to whom it benefited and whom it did not benefit, and I think that everybody needs to know exactly what the obligation's going to be from day one, and even thought the U.S. Trustee did explain that what had to be done was that they had to pay fees based on each individual debtor's disbursements, I think of reading of *Charter* would have led the debtor to believe that it was really only those for whom they were legally obligated to make the payment, so I think the debtor's calculation that includes the rent that is the legal obligation of each store, and the liquor, which is the obligation of each individual store is the proper way to calculate the U.S. Trustee's fees. And since it appears that the number is $30,000, it does not appear that there's a feasibility argument or any argument as to what source the payment should come from.

(Transcript pp. 101-02).

8. Also at the Confirmation Hearing, among other things, the Lembo Declaration was admitted into evidence; counsel for the U.S. Trustee cross examined Mr. Lembo extensively; and Mr. Lembo provided testimony on re-direct.

9. On February 27, 2012, the Court entered an order (the "Confirmation Order") [Docket No. 1230] confirming the Plan.

10. On March 12, 2012, the Office of the U.S. Trustee filed the Motion.

Argument

11. The Motion seeks reconsideration of the Confirmation Order under Rules 7052 (incorporating Rule 52 of the Federal Rules of Civil Procedure (the "Federal Rules")), 9023 (incorporating Rule 59 of the Federal Rules), and 9024 (incorporating Rule 60 of the Federal Rules) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and asserts that the requested relief "can be brought under any of those Rules." (Motion ¶ 19). The Motion does not expressly address the requirements of those Rules but, instead, cites the standard articulated in *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995), and argues that "[r]econsideration is appropriate in this case both to correct manifest errors of law and fact and to present evidence that was not available at the confirmation hearing." (Motion ¶¶ 21-22).

12. The Motion, which attempts to raise additional facts and put forward additional arguments that could have been, but were not, raised or advanced at the Confirmation Hearing, fails to meet the extraordinary standard for reconsideration. Even if the Court were to consider such facts and arguments, which it should not, the Motion should be denied for the reasons set forth below.

A. Legal Summary

13. The purpose of a motion to amend under Rule 52(b) is to "clarify essential findings or conclusions, correct errors of law or fact, or to present newly discovered evidence." 10 COLLIER ON BANKRUPTCY ¶ 7052.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citations omitted). "Generally, a motion to amend findings should be based on 'manifest error of law or mistake of fact.'" *Id.* (citations omitted).

14. As to Rules 59 and 60 of the Federal Rules, "[b]ecause the function of the motion, not the caption, dictates which Rule applies," courts in the Third Circuit do not rely on which label—Rule 59 or Rule 60—is applied by the movant. *See Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988). Which Rule governs essentially depends on the time a motion is served: if the motion is served within 28 days of the judgment, the motion will ordinarily fall under Rule 59(e), and if the motion is served after that time, it falls under Rule 60(b). Here, the Court issued the Confirmation Order on February 27, 2012, and the U.S. Trustee filed the Motion on March 12, 2012, so therefore, Rule 59(e) applies.

15. The standard for obtaining relief under Rule 59(e) is difficult to meet, and courts grant such relief only in very limited circumstances. *See, e.g., Ciena Corp. v. Corvis Corp.*, 352 F. Supp. 2d 526, 527 (D. Del. 2005) ("[m]otions for . . . reconsideration should be granted sparingly and may not be used to rehash arguments which have already been briefed by the parties and considered and decided by the Court.")

16. Under Rule 59(e), a court may properly exercise its discretion to alter or amend a judgment if the movant demonstrates one of the following: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of

law or prevent manifest injustice." *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010); *Vision Metals, Inc. v. SMS Demag, Inc. (In re Vision Metals, Inc.)*, 327 B.R. 719, 721 (Bankr. D. Del. 2005).

17. It is axiomatic that reconsideration under Rule 59(e) is an "extraordinary means of relief in which the movant must do more than simply reargue the facts of the case or legal underpinnings." *Calyon New York Branch v. American Home Mortgage Corp.*, 383 B.R. 585, 589 (Bankr. D. Del. 2008); *see also Golden v. The Guardian (In re Lenox Healthcare, Inc.)*, 366 B.R. 292, 293 (Bankr. D. Del. 2007); *HHCA Tex. Health Servs., L.P. v. LHS Holdings, Inc. (In re Home Healthy Corp. of Am.)*, 268 B.R. 74, 76 (Bankr. D. Del. 2001); *Chama, Inc. v. First Northern Bank and Trust (In re Chama, Inc.)*, No. 99-301 (MFW), 2000 WL 33712473 (Bankr. D. Del. Sept. 21, 2000). "Generally, a motion for reconsideration is not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *American Home Mortgage Corp.*, 383 B.R. at 589 (quotations omitted).

18. Such motions, however, "'may not be used to rehash arguments which have already been briefed by the parties and considered and decided by the Court.'" *In re W. R. Grace & Co.*, 398 B.R. 368, 371 (D. Del. 2008) (denying motion for reconsideration where movant failed to establish clear or manifest error or provide new evidence not previously considered by the court) (citation to internal quote omitted); *Cien Corp.*, 352 F. Supp. at 527 (same). Nor may they be used to advance arguments that are incidental to, and would not change the result of, the court's ruling. *See, e.g., Fellenz v. Lombard Inv. Corp.*, 400 F. Supp. 2d 681, 683 (D.N.J. 2005) (motion for reconsideration must establish that "the court overlooked

dispositive factual matters or controlling decisions of law.") (internal quotations and citations omitted); *In re Intel Corp. Microprocessor Antitrust Litig.*, 436 F. Supp. 2d 687, 690 (D. Del. 2006) (denying motion for reconsideration where, even if the court accepted movant's factual assertions, the result would be the same).

19. As explained below, because there is no basis for the extraordinary relief sought by the U.S. Trustee, the Motion should be denied.

B. Analysis

20. The Motion essentially relies upon two arguments: (a) that the Confirmation Order is contrary to *In re Genesis Health Venture, Inc.*, 402 F.3d 416 (3d Cir, 2005), and *In re GC Companies*, 298 B.R. 226 (D. Del. 2003), and therefore a manifest error of law; and (b) that certain "material statements of fact made at the Confirmation Hearing . . . were demonstrably inaccurate based on evidence discovered by the U.S. Trustee subsequent to the Confirmation Hearing" and are "manifest errors of fact that are ripe for reconsideration." (Motion ¶ 2).

21. Initially, as to both arguments, it must be noted that the Court already heard arguments and testimony, among other things, on the exact points raised in the Motion at the Confirmation Hearing and soundly rejected each of them. As set forth above, a motion for reconsideration is not properly grounded on a request that a court rethink a decision already made. *Ciena Corp.*, 352 F. Supp. 2d at 527; *see also Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995) (holding that movant's motion for reconsideration based on theories and facts that could have been originally raised was merely an improper attempt at a "second bite of the apple"); *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109,

1122 (E.D. Pa. 1993) ("It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through—rightly or wrongly"). A party, such as the U.S. Trustee here, that fails in its "first attempt to persuade a court to adopt its position may not use a motion for reconsideration either to attempt a new approach or correct mistakes it made in its previous one . . . [or] to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Kennedy Indus. v. Aparo*, No. 04-5967, 2006 WL 1892685, at *1 (E.D. Pa. Jul. 6, 2006).

1. Allegation of Manifest Legal Error

22. A motion for reconsideration is not an appropriate device to "rehash" arguments already made. *In re W. R. Grace & Co.*, 398 B.R. at 371. The U.S. Trustee previously cited and relied upon the *Genesis* decision in its argument in the Plan Objection (Plan Objection ¶¶ 46-51) and at the Confirmation Hearing (Transcript at 92-95).

23. Moreover, the U.S. Trustee's argument that the Confirmation Order is not in accord with the *Genesis* decision is materially flawed. The ruling in *Genesis* is simply that "[p]ayments made on behalf of a debtor, whether made directly or indirectly through centralized disbursing accounts, constitute that particular debtor's disbursements for the purpose of quarterly fees calculations . . . ." *In re Genesis*, 402 F.3d at 422. The *Genesis* ruling does not reference the "legal obligation" component central to the Court's ruling at the Confirmation Hearing. Consequently, insofar as the U.S. Trustee's argument purports to rely on a manifest error of law in connection with *Genesis*, the argument is a rehashing of arguments already made to and considered and rejected by the Court and does not rise to the level of manifest error of law warranting the extraordinary requested relief.

24. With respect to the U.S. Trustee's reliance on the *GC Companies* decision, which was not referenced by the U.S. Trustee in the Plan Objection or at the Confirmation Hearing (but clearly could have been, given that it was decided in 2003), a motion for reconsideration may not be used to advance new legal theories. *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992). The Court should therefore not even consider this argument. Even if the Court were to consider it, though, the Confirmation Order is not manifestly inconsistent with the *GC Companies* decision.

25. The Court's confirmation ruling provides simply that, in this case and on these facts, for the purposes of calculating U.S. Trustee quarterly fees, (a) the disbursements by the CB Corporate Parents on behalf of the CB Subsidiaries that incurred or were otherwise legally obligated for those debts were to be counted as distributions of the CB Subsidiaries, and (b) disbursements by the CB Corporate Parents for their own legal obligations were to be counted as distributions of the CB Corporate Parents. While the court in *GC Companies* found "erroneous" the "Bankruptcy Court's conclusion that the term 'disbursements' is *limited* to the 'legal obligations' of the debtor . . . .", *In re GC Companies*, 298 B.R. at 230 (emphasis added) (adopting a "broad definition of 'disbursements' which is not limited to a debtor's 'legal obligations'"), the *GC Companies* court cited with approval this Court's prior decision in *In re Charter Behavioral Health Systems, LLC*, 292 B.R. 36 (Bankr. D. Del. 2003), and the conclusion that the relevant determination is "whose expense is being paid." *Id.* at 231.

26. The ruling at issue here does not *limit* disbursements to legal obligations; instead, it allocates in these cases and on these facts the described disbursements among certain

entities, determining "whose expense is being paid." Consequently, the ruling is not inconsistent with *GC Companies*, much less manifest legal error.

2. Allegation of Manifest Factual Error and Presentation of Evidence Not Available

27. The Motion also argues for reconsideration based on allegedly new evidence and alleged manifest factual error. However, the U.S. Trustee's "new evidence" consists entirely of references to proofs of claim filed in these cases and to the Debtors' schedules of assets and liabilities (the "Schedules") (Motion ¶ 18), all of which have been publicly available for some time, and, to the extent relevant to the U.S. Trustee's argument at the Confirmation Hearing, could and should have been raised in its objection and/or at the Hearing.

28. A motion for reconsideration cannot be used to present evidence that was previously available. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 251–52 (3d Cir.2010) ("'[N]ew evidence,' for reconsideration purposes, does not refer to any evidence that a party obtains or submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because the evidence was not previously available."). *See also Bradly v. Work*, 154 F.3d 704, 709 (7th Cir. 1998) (lower court denial of motion for reconsideration under Rule 59(e) was proper where new evidence consisted of pleadings from another case available prior to the judgment). Moreover, a movant's failure to explain why evidence that was allegedly new was unavailable is a valid basis to deny a Rule 59(e) motion. *See Matador Petroleum Corp. v. St. Paul Surplus Lines Inc. Co.*, 174 F.3d 653, 658 n. 1 (5th Cir. 1999); *Anthony v. Runyon*, 76 F.3d 212, 215-16 (8th Cir. 1996).

29. Proofs of claim filed in these cases and the Schedules are documents of public record and could easily have been presented and relied upon by the U.S. Trustee in the Plan Objection and at the Confirmation Hearing. The U.S. Trustee fails to offer any rationale for why this readily-accessible "new" evidence was unavailable prior to the Confirmation Hearing. In fact, the *Declaration of Karen E. Starr* filed in support of the Plan Objection expressly references the Schedules (*see* Starr Declaration ¶ 11) and certain of the Schedules were relied upon by the U.S. Trustee at the Confirmation Hearing. (*See* Transcript p. 56.) Evidence from public records is axiomatically not "new." *See Miller v. Baker Implement Co.*, 439 F.3d 407, 414-15 (8th Cir. 2006) (finding district court did not err in determining that multidistrict litigation records were publicly available and not new evidence for Rule 59(e) purposes); *Crowell v. Campbell Soup Co.*, 264 F.3d 756 (8th Cir. 2001) (finding no abuse of discretion in district court's decision denying Rule 59(e) motion where allegedly "new" evidence came from public minutes). Consequently, the alleged "new" evidence is anything but new, and therefore, it may not now be used as a basis for reconsideration.

30. Finally, even were the Court to consider this belated "new" evidence, it does not support an argument of manifest factual error. At the Confirmation Hearing, Mr. Lembo provided testimony (and was subject to cross examination by the U.S. Trustee) regarding the legal and factual relationship between the CB Corporate Parents and the CB Subsidiaries.

The U.S. Trustee identifies in the Motion four alleged factual errors, each of which however, is inherently flawed:[2]

a. First, the U.S. Trustee challenges the Court's conclusion that the obligations to the Sysco entities were at the parent level. In suggesting that conclusion is factual error, the U.S. Trustee relies upon the fact that the Sysco entities filed claims against each of the Debtors. However, the simple fact that the Sysco entities filed protective claims (each in the full amount asserted to be owed) against each of the Debtors does not in any way establish the validity of those claims (indeed, they are invalid) or contradict the evidence presented to the Court that the obligations to Sysco were indeed at the parent level.[3] Rather, as the addendum to each of the Sysco entities' proofs of claim states, the Sysco entities only filed a claim in each of the Debtors' bankruptcy cases "… out of an abundance of caution," rather than because the

[2] Again, the Committee and Debtors do not believe it is appropriate in this context for the Court to consider any additional evidence raised by the U.S. Trustee. In an abundance of caution, in the unlikely event that the Court determines that it is appropriate to consider new facts or evidence at this time, to refute definitively purported evidence included in the Motion, the Debtors and the Committee have also included certain additional facts and reserve their rights to present additional evidence in support of any necessary facts.

[3] To the extent Debtors' counsel misspoke at the Confirmation Hearing, which the U.S. Trustee could have raised or addressed through cross examination at the Confirmation Hearing with information readily available to it at that time, the Committee and Debtors submit that the Sysco entities' filing of the exact same claims against *all* of the Debtors, as opposed to filing specific dollar amount claims against each one, is equally persuasive and entirely supportive of the Court's ruling.

Sysco entities actually did business with all of the Debtors. *See* Declaration of Jeffrey Heck submitted in support of the Motion, Ex. E.[4]

Moreover, the U.S. Trustee's reliance on the fact that the Sysco entities in their proofs of claim attached "a detailed schedule of invoices by restaurant name," is wholly misplaced, as the actual terms of these invoices undermine any assertion that the Sysco entities transacted with any individual subsidiaries. While such invoices did list a shipping address for the specific designated restaurant location, they did not identify a specific subsidiary name, and they state that the amounts in question were "bill[ed] to" CB Holding. Consistently, the evidence adduced at the Confirmation Hearing, including Mr. Lembo's testimony, demonstrated that all of these invoices were received at, and paid by, one or more of the CB Corporate Parents from the central corporate office by the accounts payable staff, rather than by any individual restaurants or any entities with names similar to the locations of such restaurants. (*See* Lembo Declaration, ¶ 80; *see also generally* Transcript pp. 46-75.)

Furthermore, the Debtors' agreement with Sysco (a "Master Distribution Agreement"), which was referenced in evidence presented at the Confirmation Hearing, was between Sysco and one of the CB Corporate Parents, and invoices pursuant thereto were billed to, and payments made thereunder were made by, one of the CB Corporate Parents. (*See* Transcript, pp. 71-74.)

[4] Tellingly, the Sysco entities' proofs of claim also stated that while Sysco delivered food-service related products to "certain dbas" of the Debtors, "[d]espite Sysco's investigation of the issue, it remains unclear which dba corresponds to which Debtor entity." *See* Declaration of Jeffrey Heck submitted in support of the Motion, Ex. E. It strains credulity that the Sysco entities could have been doing business with the various debtor subsidiaries when they cannot at this point even identify which ones they were purportedly transacting with.

All of these facts, which were available to the Court at the Confirmation Hearing, and subject to contradiction at that time, prove that the Sysco entities did business with the CB Corporate Parents, a conclusion already correctly reached by the Court.

b. Second, in an attempt to contradict the Court's conclusion that food was bought at the corporate level, the U.S. Trustee relies upon the fact that other vendors filed claims against debtors other than the CB Corporate Parents. Again, the mere fact that these entities filed claims against any of the CB Subsidiaries does not make those claims properly asserted against those entities (which they are not) or in any way render the conclusions reached by the Court based on facts proven by the Debtors at the Confirmation Hearing manifest error.

c. Third, to attempt similarly to contradict the Court's conclusion that, in most instances, there was a contract or relationship between food suppliers and one or more of the CB Corporate Parents, rather than with any of the CB Subsidiaries, the U.S. Trustee relies upon the purported "paucity" of contracts listed on the Schedules of those Debtors and yet again on the existence of proofs of claim filed against one or more of the CB Subsidiaries. However, in the absence of any reference to the existence of such contracts on the Schedules of any of the CB Subsidiaries, which the U.S. Trustee does not allege, and the existence of proofs of claim filed against the CB Subsidiaries—when those claims are erroneously asserted against those entities—does not make the Court's conclusion at the Confirmation Hearing manifest error.

In addition, the U.S. Trustee is incorrect in stating that CB Holding did not list on its Schedules the contract with the nine primary produce suppliers the Debtors referred to in

support of confirmation. These produce vendors collectively contracted under the name of Pro Act with CB Holding, pursuant to a master agreement that, in fact, appears on Schedule G of CB Holding's Schedules.

Moreover, during the course of the Chapter 11 Cases, CB Holding entered into a contract with an entity called Garjuilio Produce to provide the majority of the required produce going forward. Thus, once again contrary to the U.S. Trustee's unsupported allegations, CB Holding was the sole party with which the produce suppliers contracted and did business, and the Court's conclusions in this regard are not manifest error.

d. Finally, as to the Court's conclusion that certain of the CB Corporate Parents employed the employees, the U.S. Trustee again attempts to contradict it by relying upon the fact that several employees filed claims against certain of the CB Subsidiaries. However, and again, the simple fact that these individuals filed claims against those subsidiaries does not make those claims properly asserted against those entities, which they are not, or make his Court's conclusion with respect thereto based on the evidence at the Confirmation Hearing manifest error.

Specifically, all employees were paid by CB Holding from the CB Holding payroll account (as the individual restaurants or any entities similar in name to the locations of such restaurants did not maintain any such accounts); received their W-2 forms from either Charlie Brown's Acquisition Corp. (for those employees who were located at a Charlie Brown's or The Office restaurant) or Bugaboo Creek Holdings, Inc. (for those located at a Bugaboo Creek restaurant). Thus, regardless of whether a relatively small amount of the total number of employees (52 out of the approximately 740 employees as of the Petition Date) filed proofs of claim against certain entities that had names similar to the locations of specific restaurants, these

individuals were at all times actually employed by certain of the CB Corporate Parents (*see* Lembo Declaration, ¶ 81), and not by any of the CB Subsidiaries. Thus, the Court's conclusions in this regard are not manifest error.

[*Remainder of page intentionally left blank*]

CONCLUSION

WHEREFORE, the Debtors and the Committee jointly respectfully request that the Motion be denied and that the Court grant such other relief as may be just and proper under the circumstances.

Dated: March 28, 2012

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