IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CB HOLDING CORP., et al.,	)	Case No. 10-13683 (MFW)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	**Re: Docket No. 1245**
	)	

ALLY COMMERCIAL FINANCE LLC'S RESPONSE TO 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 TRSUTEE'S OBJECTION REGARDING NON-PAYMENT OF QUARTERLY FEES

Ally Commercial Finance LLC (the "DIP Lender"), submits this response (the "Response") to the United States Trustee's ("UST") 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 [Doc. No. 1245] (the "Reconsideration Motion"), and hereby represents as follows:

RELEVANT BACKGROUND

1. The DIP Lender is one of the Debtors' Pre-Petition Lenders[1] 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 *Debtors' Modified First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") [Docket No. 1157].

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

2. On February 17, 2012, the Region 3 United States Trustee (the "UST") 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], which, in part, objects to the confirmation of the Plan unless the Debtors pay an additional $272,301.16 in quarterly U.S. Trustee fees allegedly due and owing as of Plan confirmation. Specifically, the Plan Objection asserted that the Debtors under-calculated the fees due under 28 U.S.C. § 1930(a)(6) by not applying the interpretation of "disbursements" set forth *In re Genesis Health Ventures, Inc.*, 402 F. 3d 416 (3d Cir. 2005) and *In re Charter Behavioral Health Systems, LLC*, 292 B.R. 36 (Bankr. D. Del .2003) (Walrath, J.) , both of which decisions addressed the calculation of section 1930(a)(6) fees owed by jointly-administered debtors using centralized cash management systems.

3. 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* [Doc. No. 1220] (the "Lembo Declaration"). In the Lembo Declaration, Gary Lembo specifically states, in opposition to the UST's Plan Objection, the following:

(a) Most, if not all, bills for the Debtors' restaurants were obligations of, and paid for by, either CB Holding Corp., CB Acquisition Corp., or Bugaboo Creek Acquisition, LLC (collectively, "Operating Debtors", and all of the Debtors that are not Operating Debtors, "Non-Operating Debtors"), and the operations of all of the other Debtors were either run through or rolled up into these Operating Debtors. (Lembo Declaration, at ¶77.)

(b) The bank accounts of the Debtors were held almost exclusively at CB Acquisition Corp., and contracts were either with one of the Operating Debtors or non-existent entities, such as "Charlie Brown's Restaurants". (*Id.*)

(c) At most, only rent and certain other direct miscellaneous expenses (i.e., those expenses where Non-Operating Debtors are actually parties to an agreement or on an invoice) should be allocated to Non-Operating Debtors. (Lembo Declaration, at ¶79.)

(d) Food and beverage was primarily purchased from certain Sysco entities, Pepsi Cola and various produce vendors (Costa Fruit & Produce; Gargiulo Produce; Hearn Kirkwood (Gilbert Foods); J. Kings Food Service; Pocono Produce Company; Royal Food Services, Inc.; Seashore Fruit & Produce Co.; Tarantino Food Service; and Tramontano Produce) and these contracts were with CB Holding Corp., and the underlying obligations were debts of, and paid by, CB Acquisition Corp. None of these suppliers contracted with, were owed money by, or were paid by a particular restaurant and/or any other of the Debtors. (Lembo Declaration, at ¶80.)

(e) All employees were employed and paid by one of the Operating Debtors (Bugaboo Creek Acquisition, LLC, for Bugaboo Creek, and either CB Holding Corp. or CB Acquisition Corp., for Charlie Brown's and The Office). None of the Debtors' employees were employed or paid by a particular restaurant. (Lembo Declaration, at ¶81.)

4. On February 23, 2012, the Court held an evidentiary hearing on the confirmation of the Plan (the "Confirmation Hearing"). At the Confirmation Hearing, the Court heard argument from the UST, the Debtors, the Committee and the DIP Lender on the Plan Objection, and delivered the following oral ruling concerning the Plan Objection:

> I'm going to overrule [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 though 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 [a fair] 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) (emphasis added).

5. On February 27, 2012, the Court entered an order confirming the Plan (the "Confirmation Order") [Docket No. 1230], denying in part and sustaining in part the Plan Objection as reflected on the record at the Confirmation Hearing (Confirmation Order, at ¶3),

and ordering the payment of $30,000 in additional fees to be paid to the Office of the United States Trustee (by the DIP Lender, per its agreement at the Confirmation Hearing), instead of the roughly $272,000 deficiency alleged by the UST in its Plan Objection.

6. On March 12, 2012, the UST filed the Reconsideration Motion, seeking reconsideration of this Court's ruling which the UST characterizes as holding that "each Debtor's 'disbursements' purposes 28 U.S.C. §1930(a)(6) are limited to those for which the Debtor has a 'legal obligation.'" (Reconsideration Motion, at ¶16.)

7. In the Reconsideration Motion, the UST alleges, in a nutshell, that (1) the Court's reliance on the "legal obligation" theory in calculating fees due to the Office of the United States Trustee is wrong and contrary to other cases which have decided this issue in this District (Reconsideration Motion, at ¶1), which cases (except for *GC Companies*) were raised by the UST in the Plan Objection, and (2) material statements of fact made at the Confirmation Hearing by Gary Lembo and Debtors' counsel were inaccurate based on evidence discovered by the UST and documents reviewed by the UST *subsequent to the Confirmation Hearing*. For the reasons set forth below, the Reconsideration Motion should be denied because it falls far short of satisfying the heavy burden required for the granting of such extraordinary relief.

ARGUMENT

8. The Reconsideration Motion is an attempt by the UST to take a "second bite at the proverbial apple," in that it rehashes the same arguments made in the Plan Objection and at the Confirmation Hearing and otherwise fails to provide the Court with any legitimate basis to reconsider its conclusions. Federal Rule of Civil Procedure 59(e), made applicable here pursuant to Bankruptcy Rule 9023, governs motions for reconsideration. *See In re Catholic Diocese of Wilmington, Inc.*, 437 B.R. 488, 490 (Bankr. D. Del. 2010). Motions for reconsideration should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). Such

motions should only be granted if: (i) there has been an intervening change in controlling law; (ii) new evidence becomes available that was not available when the Court decided the matter; or (iii) there is a need to correct clear error of law or fact or prevent manifest injustice. *See Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999); *Catholic Diocese*, 437 B.R. at 493 (denying motion for reconsideration because movants failed to "identify any evidence presented but overlooked by the court that might reasonably have altered the result").

9. Importantly, a motion for reconsideration is not a proper vehicle to merely attempt to convince the court to rethink a decision it already has made, *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993), "is not an opportunity for a party to re-litigate already decided issues or to present previously available evidence," *Broadcast Music, Inc. v. La Trattoria East, Inc.*, 1995 WL 552881, at *1 (E.D. Pa. September 15, 1995), or "a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Johnson v. Diamond State Port Corp.*, 50 Fed. Appx. 554, 560 (3d Cir. 2002). A motion for reconsideration 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 N.Y. Branch v. Am. Home Mortg. Corp.*, 383 B.R. 585, 589 (Bankr. D. Del. 2008); *see also Pahler v. City of Wilkes-Barre*, 207 F. Supp. 2d 341, 355-56 (M.D. Pa. 2001) (concluding that the court "[had] not committed a manifest error of law or fact, and that the plaintiff ha[d] not presented any newly discovered precedent or evidence which may have affected the court's decision" and, therefore, denying plaintiff's motion for reconsideration).

10. There has been no intervening change in controlling law, nor has any new evidence become available since the Confirmation Hearing. Consequently, any reconsideration by this Court of its ruling on the Plan Objection must be based on a need to correct a clear error of law or fact necessary to prevent manifest injustice. Although the Reconsideration Motion has

attempted to manufacture such a clear error, in reality it merely regurgitates the same issues and arguments that were already raised and dispensed with by the Court at the Confirmation Hearing, falling far short of meeting the strict standard for reconsideration. In fact, as demonstrated below, the Court got it right the first time.

11. The UST sets forth two main arguments in support of the Reconsideration Motion. First, the UST argues that the Court's decision strayed from the rulings on the calculation of quarterly fees in *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 constitutes a manifest error of law. Second, the UST asserts that certain "material statement of fact made at the Confirmation Hearing . . . were demonstrably inaccurate based on evidence discovered by the UST subsequent to the Confirmation Hearing" and are "manifest errors of fact." (Reconsideration Motion, at ¶2.)

A. <u>The Court Did Not Make a Clear Error of Law.</u>

12. A motion for reconsideration is not intended to be an opportunity for a losing party to take a "second bite at the apple" to rehash previously decided matters or to rehash rejected arguments. *See Watson v. City of Phila.*, 2006 WL 2818452, at *2 (E.D. Pa. September 28, 2006); *see also Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844 at *1 (S.D.N.Y. Feb. 27, 2003). As described by one court, "[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . . strike [it] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989). "To grant motions for reconsideration for lesser causes not only wastes judicial resources, but is also unjust to the parties that have invested the time and effort arguing on the original papers." *First Options of Chicago, Inc. v. Kaplan*, 198 B.R. 91, 92 (E.D. Pa. 1996).

13. In the Plan Objection and at the Confirmation Hearing, the UST already argued that the *Genesis Health* decision (cited above) was controlling upon this Court's calculation of the fees owed to the Office of the United States Trustee. *See* Plan Objection, at ¶¶46-51 (citing *In re Genesis Health Ventures, Inc.*, 402 F. 3d 416 (3d Cir. 2005)). Tellingly, in the Plan Objection, the UST admits that "[t]his Court's decision in *In re Charter Behavioral Health Systems, LLC*, 292 B.R. 36 (Bankr. D. Del .2003)(Walrath, J.) is consistent with *Genesis Health.*" In its ruling denying the Plan Objection, this Court clearly indicated that it was following its prior ruling in *Charter*.

14. Contrary to the UST's recent claim that this Court's decision is at odds with the *Genesis Health* and *GC Companies* (cited above), and by implication at odds with *Charter* as well, this Court's ruling in denying the Plan Objection can be squared with all three decisions. In *Genesis*, the Court posed the following hypothetical as the essential question it faced:

> "[I]s an amount owed by Debtor A, but paid by Debtor B, attributed as a disbursement for U.S. Trustee quarterly fees to A (which would pay absent the cash management order) or B (***which did not owe the amount itself*** but as an operational convenience was making A's payment)?

Genesis Health, 402 F.3d at 421 (emphasis added). The Court concluded that it must be attributed to Debtor A. In that Court's hypothetical, Debtor B (which equates to the CB Corporate Parent here), *did not* owe the amount itself. Here, the Debtors asserted that the CB Corporate Parents *do* owe the money. This key element distinguishes the *Genesis Health* case from the case at hand. Nothing in the *Genesis Health* decision would prohibit the imposition of quarterly fees upon the debtor obligated to make such payments, whether the payment was made by that debtor or not, nor would it impose such fees upon a debtor *which did not owe the amount itself*.

15. As for the *GC Companies* decision, while that Court did state that "the term 'disbursements' should not be "limited to a debtor's legal obligations," that Court did not state that a determination of "legal obligations" is irrelevant to the analysis. *See GC Companies*, 298 B.R. at 230. Importantly, the *GC Companies* court relied upon this Court's decision in *Charter* with respect to this key analysis, and stated as follows:

> "As the Court in *Charter Behavioral* explained, "In non-accounting jargon, an expense is a disbursement. Therefore, we conclude that section 1930(a)(6) requires a determination of *whose expense is being paid* by the disbursement of cash, regardless of who actually writes the check or when it is posted on the Debtors' accounting records."

GC Companies, 298 B.R. at 231 (emphasis in original). Clearly, the GC Companies court believed that its opinion was in line with *Charter*, even though the *Charter* decision clearly announced the importance of determining *whose expense is being paid* with respect to the assessment of quarterly fees.

16. Everything in this Court's decision denying the Plan Objection and in the record before this Court can be harmonized with the decisions set forth above, including *Charter*. Although the Court stated that it "was unfortunate that I used the example I did in *Charter*," the Court ruled that a 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." (Transcript, at 102:1-2, 102:9-11.) Each of these prior decisions allowed for the Court's determination of whose expense was being paid (regardless of who paid it) as a key component to the quarterly fee analysis. Here, the testimony presented at the Confirmation Hearing and documents in the record supported the Debtors contention that many (if not most) of the Debtors' key obligations rested at the parent level, and not at the "restaurant level" (other than lease/rental obligations and certain liquor license matters). These key facts and circumstances informed this Court's assessment of the underlying obligations of the Debtors and led to this Court's denial of the Plan

Objection, which is clearly in accord with the aforementioned line of cases and should not be reconsidered.

B. The Court's Ruling Did Not Rely Upon Facts Which Were Inaccurate.

17. In the Reconsideration Motion, the UST claims that documents it reviewed *after* the Confirmation Hearing reveal several factual inaccuracies in the testimony of Gary Lembo and that the arguments of Debtors' counsel misled this Court's opinion. However, the testimony provided at the hearing was consistent with Mr. Lembo's statements provided in his declaration filed two days prior to the Confirmation Hearing, which statements were probed during Mr. Lembo's cross examination by the UST at the Confirmation Hearing. Additionally, the documents used by the UST to claim that Mr. Lembo's and Mr. Stieglitz's statements were factually inaccurate, such as the Debtors' schedules and proofs of claim filed by various creditors in this case, were also available to the UST prior to the Confirmation Hearing.

18. In essence, the UST's efforts to create a factual controversy after the fact is nothing more than a transparent attempt to re-litigate the veracity of the testimony already probed, and the matters already decided, at the Confirmation Hearing. This is emphatically not the purpose of a motion for reconsideration. Again, reconsideration motions are not intended to be opportunities to take a second bite at the apple. *See Watson,* 2006 WL 2818452, at *2; *see also Greenwald,* 2003 WL 660844 at *1.

19. Furthermore, the documents upon which the UST relies in its Reconsideration Motion do not clearly contradict the testimony presented at the Confirmation Hearing. First, the various proofs of claim filed in these cases identified by the UST in its Reconsideration Motion are insufficient to demonstrate clear errors of fact. Specifically, the proofs of claim filed by Sysco, which appear to have been filed against each and every debtor as a prophylactic measure, and the information they attach, are not dispositive of which Debtor actually owed the

contractual obligation to Sysco. Similarly, the proofs of claim filed against non-Corporate Parent Debtors by various vendors and service providers do not conclusively prove that corresponding obligations rested with them rather than the CB Corporate Parents. Likewise, the proofs of claim filed by a subset of the Debtors' employees does not conclusively prove which Debtor was their actual employer. It is flawed logic to presume that the filing of a claim against one or more debtor entities conclusively shows which debtor was *legally* obligated to pay the debt claimed. The only evidence of the Debtors' respective legal obligations presented is the uncontroverted testimony of Gary Lembo at the Confirmation Hearing.

20. Second, the UST's reliance on the Debtors' schedules to contradict Mr. Lembo's testimony about the universe of the Debtors' contractual obligations (oral and written) and business operations is equally flawed. The Debtors' schedules do not conclusively controvert Mr. Lembo's testimony that the legal obligation to the Debtors' primary food and beverage vendors, Sysco and Pepsi, or to the Debtors' employees, was at the parent debtor level. In fact, Schedule G of CB Holding Corp. lists the "Food Services Master Contract" of "Sysco Corporation," Schedule G of Charlie Brown's, Inc. lists the "FoodService Operator Agreement" with "PepsiCo Foodservice," and Schedule E of Charlie Brown's Acquisition Corp. lists the employee claimants. None of the other Debtors, including the restaurant level debtors, listed any executory contract with Sysco or Pepsi, or scheduled any employee claims.

21. Although the UST argues that the five CB Corporate Parents did not schedule any other contracts with food and beverage vendors other than Pepsi or Sysco, neither did the non-Corporate Parent Debtors include such contracts on their respective schedules. However, the schedules filed by parent-level debtor Charlie Brown's Acquisition Corp., for example, did in fact schedule (i) $413,126.00 in priority claims consisting of "wages, salaries and commissions" and "taxes and certain other debts owed to governmental units," which included taxes to

numerous municipalities/townships (Schedule E), and (ii) $16,907,523.00 in unsecured debts from all sorts of vendors and service providers (Schedule F), whereas the restaurant-level debtors did not, all of which supports the testimony of Gary Lembo at the Confirmation Hearing.

Ultimately, the Reconsideration Motion fails to cite any manifest example of clear error of law on the part of this Court or clear error of fact in denying the Plan Objection. The Reconsideration Motion largely revisits the same facts and legal arguments it previously raised in the Plan Objection and at the Confirmation Hearing. This falls far short of establishing a proper basis for the extraordinary relief requested. *See Glendon Energy Co.*, 836 F. Supp. at 1122. Therefore, it is respectfully submitted that the Reconsideration Motion must be denied.

Dated: March 28, 2012
Wilmington, DE

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David B. Stratton, hereby certify that on the 28th day of March, 2012, I caused the foregoing **Ally Commercial Finance LLC's Response to 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** to be served upon the following individuals in the manner indicated.

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