

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

In re

Carl's Patio, Inc., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No.: 13-10102 (KG)

(Jointly Administered)

Re: D.I. 167, 171, 174, 179

**FIFTH THIRD BANK'S RESERVATION OF RIGHTS REGARDING  
MONTHLY FEE APPLICATIONS OF (I) CROSS & SIMON, LLC;  
(II) CBIZ ACCOUNTING, TAX & ADVISORY OF NEW YORK, LLC  
AND CBIZ, INC.; (III) PLATZER, SWERGOLD, KARLIN, LEVIN,  
GOLDBERG & JASLOW, LLP; AND (IV) BAYARD, P.A.**

Fifth Third Bank ("Fifth Third") files this reservation of rights (the "Reservation")

with respect to the:

- (i) *First Monthly Application of Cross & Simon, LLC for Compensation and Reimbursement of Expenses as Counsel to the Official Committee of Unsecured Creditors For the Period of January 31, 2013 Through February 28, 2013* (the "Cross & Simon Application") [D.I. 167];
- (ii) *Monthly Application for Compensation and Reimbursement of Expenses of CBIZ Accounting, Tax & Advisory of New York, LLC and CBIZ, Inc., Financial Advisors to the Official Committee of Unsecured Creditors for the period February 4, 2013 to February 28, 2013* (the "CBIZ Application") [D.I. 171];
- (iii) *Monthly Application for Compensation and Reimbursement of Expenses of Platzer, Swergold, Karlin, Levin, Goldberg & Jaslow, LLP as Counsel to the Official Committee of Unsecured Creditors for the period of January 31, 2013 to February 28, 2013* (the "Platzer Swergold Application") [D.I. 174]; and

<sup>1</sup> The Debtors and the last four digits of their respective tax identification numbers are: Carl's Patio, Inc. (XX-XXX3884), Carl's Patio West, Inc. (XX-XXX5145), and Terrace 436, Inc. (XX-XXX1263). The address of the Debtors' corporate headquarters is 301 Camino Gardens Blvd., # 101, Boca Raton, Florida 33432.

(iv) *Monthly Application for Compensation (Second) of Bayard, P.A. as Counsel to the Debtors and Debtors in Possession for the period February 1, 2013 to February 28, 2013* (the “Second Bayard Application” and together with the Cross & Simon Application, the CBIZ Application, and the Platzer Swergold Application, the “Applications”) [D.I. 179].

In support of this Reservation, Fifth Third respectfully states as follows:

### **BACKGROUND**

1. On January 21, 2013 (the “Petition Date”), each of the Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code, commencing the above-captioned chapter 11 cases. No trustee or examiner has been appointed in these cases.

2. On January 31, 2013, the Office of the United States Trustee for the District of Delaware appointed an official committee of unsecured creditors in these cases (the “Committee”).

#### **A. The Debtors’ Post-Petition Financing**

3. On the Petition Date, the Debtors filed a motion to authorize the Debtors to enter into a certain post-petition credit agreement between the Debtors and Fifth Third (the “DIP Credit Agreement”), to receive post-petition financing pursuant to such agreement, and to grant related relief (the “DIP Motion”) [D.I. 14]. Thereafter, the Court entered Orders approving the DIP Motion on an interim and a final basis (together, the “DIP Orders”) [D.I. 34, 79].

4. Pursuant to the DIP Credit Agreement, the DIP Orders and the budget related thereto (as amended by further agreements, the “Budget”), Fifth Third has provided certain funding for the benefit of the Debtors and their estates during these cases. The Budget contains certain line item amounts for fees and expenses of Debtor and Committee professionals in these cases, subject to the limitations contained in the

DIP Orders and DIP Credit Agreement (together, the “DIP Financing”). The DIP Financing also created a Professional Fee Carve Out<sup>2</sup> that provides funding for the payment of allowed fees and expenses of estate professionals in budgeted amounts following an Event of Default or the Termination Date.

5. On March 8, 2013, the Termination Date under the DIP Financing occurred.

**B. Professional Retentions**

6. On February 5, 2013, this Court entered orders authorizing the retention of BGA Management, LLC D/B/A Alliance Management (“Alliance”) and Bayard, P.A. (“Bayard”) as professionals for the Debtors [D.I. 76, 78]

7. On March 4-5, 2013, this Court entered orders approving the retention of Cross & Simon, LLC, Platzner, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, and certain CBIZ entities as professionals for the Committee (such professionals, collectively, the “Committee Professionals” and collectively with Alliance and Bayard, the “Professionals”) [D.I. 137, 146, 147].

**C. The Interim Compensation Procedures**

8. On February 5, 2013, this Court entered an Order authorizing procedures for interim compensation and reimbursement of expenses of the Professionals (the “Interim Compensation Procedures”) [D.I. 75].

9. Pursuant to the Interim Compensation Procedures, Professionals may file a monthly fee application seeking interim approval and allowance of compensation for services and reimbursement of expenses incurred in the applicable month.

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the DIP Orders.

10. The Interim Compensation Procedures further provide that parties may file objections to monthly fee application within twenty (20) days following the filing and service of an application. Such procedures, however, also clearly state that:

Neither . . . the filing of or failure to file an Objection, will bind any party-in-interest or the Court with respect to the final allowance of applications for compensation and reimbursement of expenses of Professionals. All fees and expenses paid to the Professionals under these Compensation Procedures are subject to disgorgement until final allowance by the Court

Interim Compensation Procedures Order at p. 5.

### **RESERVATION OF RIGHTS**

11. Pursuant to the DIP Financing, the Budget, and other agreements,<sup>3</sup> limited funds are available for the payment of fees and expenses of Professionals. Aggregate fees and expenses of Committee Professionals requested in monthly applications for the first month of these cases alone exceed by more than \$100,000 the total amount available for such professionals under the Budget and Professional Fee Carve Out for the entirety of these cases. Additionally, fees and expenses of the Debtors' bankruptcy counsel, Bayard, P.A., requested in monthly fee applications for the first two months of these cases exceeds by more than \$100,000 the total amount available for such professionals under the Budget and Professional Fee Carve Out for the entirety of these cases.

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<sup>3</sup> Pursuant to an agreement reached among the Debtors, the Committee, Fifth Third, and the purchaser in connection with that certain *Order (A) Approving the Sale of Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Granting Certain Related Relief* [D.I. 150], Fifth Third agreed to increase the Professional Fee Carve Out line item for fees and expenses of the Committee Professionals from \$75,000 to \$125,000. Such agreement is presently being documented and will be subject to approval of this Court. To the extent that the Court does not approve such agreement, Fifth Third reserves its rights with respect to, *inter alia*, payment or allowance of any amounts in excess of the originally budgeted amounts.

Accordingly, Fifth Third files this reservation of rights and objects to any attempt to require Fifth Third to advance funds to pay fees in excess of the Professional Fee Carve Out.

12. Fifth Third expressly reserves the right to object to any and all fee applications of Professionals, including the Applications, on any basis, including that requested fees and expenses exceed the Budget or are unreasonable.

Dated: April 4, 2013  
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Erin R. Fay

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