

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

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| In re: | § | Chapter 11 |
| | § | |
| PUMPKIN PATCH LLC | § | Case No. 09-12200 (BLS) |
| | § | |
| Debtor | § | |

**TEXAS COMPTROLLER OF PUBLIC ACCOUNTS’ OBJECTION TO FIRST
AMENDED PLAN OF REORGANIZATION OF PUMPKIN PATCH LLC**

The Texas Comptroller of Public Accounts ("Texas Comptroller"), appearing through the Texas Attorney General’s Office, objects to confirmation of Debtor’s First Amended Plan of Reorganization of Pumpkin Patch LLC (The “Plan”):

1. The Texas Comptroller objects to Paragraph F of the Plan which provides that amended claims will be disallowed without prior authorization to file the amendment. The Texas Comptroller is conducting an ongoing audit of the Debtor and will necessarily have to amend its claims at the conclusion of the audit.

2. The Texas Comptroller objects to the exclusive jurisdiction provided for in Article X of the Plan which gives exclusive jurisdiction to the bankruptcy court post-confirmation to resolve all matters arising out of, and related to, the Chapter 11 Case and the Plan. Such retention of exclusive jurisdiction post-confirmation essentially keeps the debtor as a ward of the bankruptcy court indefinitely and conflicts with 28 U.S.C. § 1334(b), which gives the bankruptcy court original but not exclusive jurisdiction of all civil proceeding arising under title 11 or arising in or related to cases under title 11. The purpose of post-confirmation jurisdiction is essentially and necessarily limited to protecting the order confirming the plan and preventing interference with the execution of the plan. *Warren v. Calania Corp.*, 178 B.R. 279, 282 (M.D. Fla. 1995); *In re American*

Body Armor & Equipment, Inc., 172 B.R. 659, 662 (Bankr. M.D. Fla. 1994). Jurisdiction is limited to those matters which will in fact affect the administration of the plan. *See In re Bankeast Corp.*, 142 B.R. 12 (Bankr. D. N. H. 1992). The Plan should provide that other forums, particularly state courts, have concurrent jurisdiction to enforce the confirmed Plan.

3. The Texas Comptroller further objects to the provisions of Article XI, Paragraph E of the Plan, which provides for a permanent injunction against the right of setoff. Section 553 of the Bankruptcy Code provides that the Bankruptcy Code creates a general rule that any right of setoff that a creditor possessed prior to the bankruptcy case is not affected by the Bankruptcy Code. *Citizen's Bank of Maryland v. Strumpf*, 516 U.S. 16, 20, 116 S.Ct. 286, 289, 133 L.Ed. 2d 258, 263 (1995). Pursuant to 11 U.S.C. § 553, setoff rights survive bankruptcy and are not affected by other sections of the Bankruptcy Code, including § 1141. *IRS v. Luongo (In re Luongo)*, 259 F.3d 323 (5th Cir. 2001); *Carolco Television, Inc. v. National Broadcasting Co. (In re De Laurentis Entertainment Group, Inc.)*, 963 F.2d 1269, 1276-78 (9th Cir. 1992), cert. denied, 506 U.S. 918, 113 S. Ct. 330, 121 L.Ed.2d 249 (1992); *In re Buckenmaier*, 127 B.R. 233 (9th Cir. BAP 1991); *Davidovich v. Welton (In re Davidovich)*, 901 F.2d 1533, 1537 (10th Cir. 1990). Accordingly, the Plan should not be confirmed to the extent it intends to impair the setoff rights of the Texas Comptroller.

4. Finally, the Texas Comptroller objects that the Plan does not contain adequate remedies in the event of a payment default. Default remedy language similar to the following has been approved in many bankruptcy cases:

A failure by the Debtors or reorganized debtors to make a payment to a priority or secured tax creditor pursuant to the terms of the Plan shall be an

Event of Default. If the Debtors or reorganized debtors fail to cure an Event of Default as to tax payments within ten (10) days after service of a written notice of default from a tax creditor, then a tax creditor may (a) enforce the entire amount of its claim, (b) exercise any and all rights and remedies under applicable non-bankruptcy law, and (c) seek such relief as may be appropriate in this court.

Language similar to the above should be added to the Plan or confirmation order to clarify creditors' default remedies pursuant to 11 U.S.C. § 1123(a)(5)(g), which requires that a plan provide adequate means for the plan's implementation.

WHEREFORE, the Texas Comptroller of Public Accounts requests that confirmation be denied unless and until the above objections are remedied, and for such further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 27, 2010, true copy of the foregoing was served by the method and to the following parties as indicated:

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