

Hearing Date: November 2, 2010 at 10:00 a.m.
Objection Deadline: October 26, 2010 at 4:00 p.m.

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ATTORNEY FOR THE TEXAS
COMPTROLLER OF PUBLIC ACCOUNTS

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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: CHAPTER 11
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In re: : Case No. 08-10152 (JMP)
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Quebecor World (USA) Inc., et al. : Jointly Administered
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Debtors : Honorable James M. Peck
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**MOTION OF THE TEXAS COMPTROLLER OF PUBLIC ACCOUNTS TO
DETERMINE THE DEBTORS' SALES TAX LIABILITIES PURSUANT TO THE
COURT'S PROCEDURES ORDER**

The Texas Comptroller of Public Accounts ("Texas Comptroller"), through the Texas Attorney General's Office, moves the Court to determine the sales taxes due from the Debtors pursuant to the Court's Procedures Order.

1. On October 17, 2008, the Debtors filed their Motion to (A) Implement Procedures to Determine Prepetition and Postpetition Sales Tax Liabilities of Certain Debtors Pursuant to State and Local Voluntary Disclosure Procedures and (B) Determine the Amount of Prepetition and Postpetition Sales Tax Liability of Certain Debtors (the "Sales Tax Motion" or "Motion," Docket No.

1219).

2. On November 14, 2008, the Court entered its Amended Order Pursuant to 11 U.S.C. §§ 105(a), 502 and 505 and Federal Rule of Bankruptcy Procedure 9019 Authorizing the Debtors to (A) Implement Procedures to Determine Prepetition and Postpetition Sales Tax Liabilities of Certain Debtors Pursuant to State and Local Voluntary Disclosure Procedures and (B) Determine the Amount of Prepetition and Postpetition Sales Tax Liability of Certain Debtors (the "Procedures Order," Docket No. 1289).

3. The Texas Comptroller timely filed its Objections to the Debtors' Notice of Procedures to Determine Prepetition and Postpetition Sales Tax Liabilities of Quebecor World (USA) Inc. and its Debtor Affiliates and the Debtors' Notice of Extension of Objection Deadline Pursuant to Procedures to Determine Prepetition and Postpetition Sales Tax Liabilities of Quebecor World (USA) Inc. and its Debtor Affiliates.

4. The Debtors and the Comptroller have held discussions, exchanged information and conducted negotiations in accordance with the Procedures Order to reach an agreement determining the amount of sales taxes that are due. The parties have not reached an agreement as to the correct amount to be paid. Accordingly, pursuant to paragraph 2(f) of the Procedures Order, the Comptroller requests this Court to determine the amount to be paid by the Debtors.

5. The Debtors' Sales Tax Motion seeks to resolve the amount of prepetition and postpetition sales taxes that the Debtors owe the State of Texas. The Motion explains that the Debtors had never properly registered to do business in Texas and had not been filing and paying the sales tax returns that they owed to the Texas Comptroller. The Debtors state that they analyzed their taxable transactions for a three month period (February 2008 - April 2008) and determined a monthly

average tax amount due. The Motion proposes to pay that monthly amount for a four year (48-month) period prior to bankruptcy and for the postpetition months while in bankruptcy in satisfaction of the Debtors sales tax claims owed to Texas. The amount the Debtors propose to pay is not based on the entire time the Debtors conducted business in Texas and does not include any interest or penalties.

6. The Debtors' Motion contends that the Debtors owe \$2,079,624.86 to Texas in sales taxes for the four-year period prior to filing their bankruptcy petitions, for a monthly average of \$43,325.51 per month.

7. The Debtors' own methodology for determining the amount of sales taxes due to Texas demonstrates that they have significantly underestimated the amount of taxes that are due. The Debtors' study greatly overestimates the percentage of nontaxable sales involved in their sample period. The Debtors' study includes a total of \$37,403,891.99 in gross Texas sales during the sample period and concludes that \$35,382,122.38 of those transactions are not taxable. In other words, the Debtors assume that out of over \$37 million in sales transactions only about \$2 million are taxable.

8. The Texas Comptroller strongly disagrees with the conclusion that such a high percentage of the transactions are not taxable. This is based on an itemized review of each of the specific transactions included in the Debtor's study. The Comptroller also disagrees with certain discount factors used by the Debtors in their study to adjust downward the tax amount they had found to be due. The Comptroller concludes that the correct amount of tax due based on the Debtor's own data is \$11,720,422.28 for the four-year period prior to filing the bankruptcy cases, or \$244,175.46 per month, not including interest or penalties.

9. The Debtors' Motion proposes also to use the monthly average to determine the amount of the postpetition sales tax due for each month of the postpetition period. The postpetition

period extended from January, 2008 through July, 2009, or 18 months. Using the Comptroller's monthly average of \$244,175.46 yields the sum of \$4,395,158.28 for the postpetition period. The Debtors' actually paid \$828,813.82, leaving a balance due of \$3,566,344.46 for the postpetition period in tax alone.

10. Thus, based on its review of the Debtors' own data, the Comptroller contends that the Debtors owe a minimum of \$11,720,422.28 in tax for the four year period prior to filing and a minimum of \$3,566,344.46 in tax for the postpetition period, for a total of \$15,286,766.74 in tax alone. The Comptroller emphasizes that these figures are based on the Debtors' own data adjusted only by the Comptroller's independent determination of the taxability of the transactions in the Debtors' study and the Comptroller's adjustment of the discount factors used by the Debtors.

11. Further, the \$2,079,624.86 that the Debtors admit they owe for the four year prepetition period assumes that the Debtors have the benefits of the Texas Voluntary Disclosure Agreement ("VDA") process. It is not the total amount of their true tax liability. The Debtors are asking the Court to assume they are eligible to participate in a tax amnesty program designed to allow non-compliant taxpayers to admit their guilt and come into compliance with Texas tax laws.

12. The Debtors incorrectly assume that the "VDA amount" of sales taxes is the same as the amount of the allowable claims the Texas Comptroller may assert under the Bankruptcy Code. For example, the Debtors' VDA proposal assumes a look back period of four years. Bankruptcy Code § 507(a)(8)(C), however, does not contain any time limit for sales tax claims. Texas state law does not contain any statute of limitations on taxes due for which no returns were filed. Texas Tax Code § 111.205(a)(2). The allowable amount of the Comptroller's sales tax claims in this case therefore should include the entire time period the Debtors conducted business in Texas. Assuming that only

an additional two-year period is used, the Debtors' prepetition liability increases by an additional \$5,860,211.14 in tax alone.

13. Further, the Debtors assume that they are not liable for any interest or penalties associated with the taxes they owe. Adding applicable penalties and interest increases the Debtors' liability significantly. Including penalties and interest for the four year prepetition period alone adds an additional \$4,084,567.16 to the Debtors' tax liability. Significant additional interest and penalties also would still be owed for the postpetition period, and under Code § 503(b)(1)(C) and well-established case law,¹ those penalty and interest amounts are required to be paid in full as administrative expenses.

14. In sum, the Comptroller contends that the Debtors owe significantly more than \$2,079,624.86 in tax debt to the State of Texas. Because of the present inability of the parties to agree, the Texas Comptroller asks this Court to determine the amount that the Debtors must pay to satisfy their sales tax obligations to the State of Texas.

WHEREFORE, the Texas Comptroller respectfully requests that the Court determine the Debtors' sales tax liabilities to be paid to the Comptroller, enter its order directing the Debtors to pay the amount as determined by the Court and for such other and further relief to which the Comptroller may be entitled.

Respectfully submitted,

GREG ABBOTT

¹ See, United States v. Yellin (In re Weinstein), 272 F.3d 39 (1st Cir. 2001); United States v. Flo-Lizer, Inc. (In re Flo-Lizer, Inc.), 916 F.2d 363 (6th Cir. 1990); United States v. Crenshaw (In re Allied Mechanical Services, Inc.), 885 F.2d 837 (11th Cir. 1989); United States v. Ledlin (In re Mark Anthony Construction, Inc.), 886 F.2d 1101 (9th Cir. 1989); United States v. Friendship College, Inc. (In re Friendship College, Inc.), 737 F.2d 430 (4th Cir. 1984).

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