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COMPTROLLER OF PUBLIC ACCOUNTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	:	CHAPTER 11
	:	
In re:	:	Case No. 08-10152(JMP)
	:	Jointly Administrated
Quebecor World (USA) Inc., et al.	:	
	:	Honorable James M. Peck

TEXAS COMPTROLLER'S AMENDED RESPONSE TO MOTION OF THE REORGANIZED DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a) AND 107(a) AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 7016 AND 7026 SEEKING ENTRY OF AN ORDER FIXING A DISCOVERY SCHEDULE AND SCOPE OF DISCOVERY

The Texas Comptroller of Public Accounts ("Texas Comptroller" or "Texas"), through the Texas Attorney General's Office, makes this Amended Response to the Motion Of The Reorganized Debtors Pursuant To 11 U.S.C. §§ 105(A) And 107(A) And Federal Rules Of Bankruptcy Procedure 7016 And 7026 Seeking Entry Of An Order Fixing A Discovery Schedule And Scope Of Discovery (the "Motion").

I. Initial Statement

1. This Response is submitted on behalf of the Texas Comptroller. The Court should focus specifically on Texas and the status of its case and its discovery in these

proceedings in making any orders respecting the course of these proceedings applicable to Texas.

2. The Debtors' presentation in their Motion is not an accurate depiction of the state of discovery in these proceedings with respect to Texas. Indeed, the Motion contains numerous misrepresentations, mischaracterizations, material omissions and blanket, conclusory assertions unsupported by any evidence to prove their broad and unfounded claims.

II. Procedural Background

3. On January 21, 2008, the Debtors filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

4. 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," Docket No. 1219).

5. The Sales Tax Motion was supported by the Declaration of Duyen Tran (Docket No. 1219-1).

6. 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 "Sales Tax Order," Docket No. 1289).

7. Pursuant to Paragraph 2(b) of the Procedures Order, the Texas Comptroller reserved all rights to object on all issues regarding the determination of the amount of the taxes that are owed to Texas.

8. On July 30, 2009, the Court entered that certain Stipulation Between Debtors And The Texas Comptroller Of Public Accounts addressing and resolving certain issues respecting the confirmation of the Debtors' plan of reorganization, effective as of June 28, 2009 (the "Confirmation Stipulation") (Docket no. 1853).

9. On July 2, 2009, the Court entered its order confirming the Debtors' Third Amended Joint Plan of Reorganization, as modified. The Plan's effective date occurred on July 21, 2009.

10. On July 2, 2010, Quad/Graphics completed its acquisition of the Debtors.

11. On October 10, 2010, the Texas Comptroller filed the Motion of the Texas Comptroller of Public Accounts Motion to Determine the Debtors' Sales Tax Liabilities Pursuant to the Court's Sales Tax Order (Docket No. 4161).

12. On December 6, 2010, the Court entered the Stipulation And Consent Order Establishing Preliminary Schedule For Discovery, Briefing And Evidentiary Hearing On Determination Of Sales Tax Claims Of Texas Comptroller Of Public Accounts And State Of Arizona Ex Rel. Arizona Department Of Revenue (the "Scheduling Order") (Docket No. 4333).

13. On January 28, 2011, the Debtors filed their Reorganized Debtors' (I) Supplemental Response And Objection To Motion Of The Texas Comptroller Of Public Accounts To Determine The Debtors' Sales Tax Liabilities Pursuant To The Court's Procedures Order And (II) Omnibus Objection To Certain Sales Tax Claims Of The Texas Comptroller Of Public Accounts (the "Debtors' Response") (Docket No. 4410).

14. On June 28, 2011, the Court held a status conference in connection with these proceedings.

15. On January 13, 2012, the Court entered the Stipulated Order of Protection in connection with these proceedings (the "Protective Order") (Docket No. 4801).

16. On February 10, 2012, the Debtors' filed their Motion of the Reorganized Debtors Pursuant To 11 U.S.C. §§ 105(a) and 107(a) and Federal Rules of Bankruptcy Procedure 7016 And 7026 Seeking Entry of an Order Fixing a Discovery Schedule and Scope of Discovery (the "Motion") (Docket No. 4819).

17. On February 10, 2012, the Debtors filed the Affidavit of Michael J. Canning in Support of Motion of the Reorganized Debtors Pursuant To 11 U.S.C. §§ 105(a) and 107(a) and Federal Rules Of Bankruptcy Procedure 7016 And 7026 Seeking Entry of an Order Fixing a Discovery Schedule and Scope of Discovery (the "Canning Affidavit") (Docket No. 4819-1).

III. About Quad/Graphics

18. Quad/Graphics ("Quad") completed its acquisition of the Debtors on July 2, 2010, becoming the real party in interest in these proceedings. Quad will be the entity that pays any taxes this Court determines to be owed to Texas as priority or administrative claims.

19. Quad is the second largest printing company in the world. See, Exhibit TX-1, webpage from Quad website.

20. Quad has approximately 24,000 employees working in more than 60 print-production facilities in North America, Latin America and Europe. See, Exhibit TX-2, "Corporate Profile" webpage from Quad website.

21. Quad had $340 million of recurring free cash flow in 2011 (p.26). Quad expects to have in excess of $300 million of recurring free cash flow in 2012 (p.30). See, Exhibit TX-3, Quad/Graphics, Inc. Investor Presentation, March 2012, downloaded from Quad's website.

22. Quad is a large, sophisticated, publicly traded, international business enterprise.

IV. The Texas Tax Claims

23. This proceeding involves four claims filed by the Texas Comptroller arising from sales/use taxes and associated civil penalties owed to Texas. The claims are submitted herewith as Exhibits TX-4. TX-5, TX-6 and TX-7.

24. The Second Amended Priority Proof of Claim for Sales/Use Taxes is for the period January 1, 2001 through January 21, 2008 in the amount of $28,615,028.19. This is the pre-petition sales tax/ use tax claim.

25. The Second Amended Administrative Expense Claim for Sales/Use Taxes is for the post-petition period of January 22, 2008 through July 21, 2009 in the amount of $4,742,416.84. This is the post-petition sales/use tax claim.

26. The Second Amended General Unsecured Claim is for civil penalties resulting from the failure of the Debtors to properly register with the Texas Secretary of State to conduct

business in Texas pursuant to Texas Business Organizations Code § 9.052 which provides that an entity which fails to properly register is liable for a civil penalty in an amount equal to the taxes, penalties and interest it owes as if it had properly registered when first required. This is the pre-petition civil penalties claim. The amount of the claim is $28,615,028.19.

27. The Second Amended Administrative Expense Claim for Civil Penalties is for the post-petition period for civil penalties pursuant to Texas Business Organizations Code § 9.052 in the amount of $4,742,416.84.

28. The total amounts of the claims are in excess of $60 million.

29. The pre-petition sales/use tax claim is based on the Texas Comptroller's best estimate of the amount of taxes owed to Texas. The Texas Comptroller used the same methodology as the Debtors to determine the monthly amount of tax due in their 3-month study (the "Study") prepared by Grant Thornton after disallowing certain "discount factors" used by the Debtors and disallowing other transactions that the Debtors improperly classified as non-taxable transactions in their Study. The Texas Comptroller then extrapolated this monthly tax amount over the relevant periods of its claims as had the Debtors in their Study. The Study was used as the basis for the Sales Tax Motion and the amounts calculated to be owed to the taxing jurisdictions that were the subject of that motion. The Study was the subject of the year-long disclosures and discussions with Texas during the Disclosure Period pursuant to the Sales Tax Motion. In the Study, the Debtors had concluded they owed Texas $2,079,624.86 in taxes, exclusive of interest or penalties, for a 4-year look-back period prior to the bankruptcy filings. After the Disclosure Period, Texas had concluded the Debtors owed $12,140,895.08, exclusive of interest or penalties, for the same 4-year look-back period.

30. The period used for the pre-petition claim is January 1, 2001 through January 21, 2008. January 1, 2001 is a reasonable date to commence the claim period because all of the Debtors involved in the Sales Tax Motion were merged into Quebecor World on or before 2001. Submitted herewith as Exhibit TX-8 are excerpts from the Debtors' 1999 annual SEC statement consisting of portions of the Debtors Receivables Purchase Agreement and the Amended and Restated Receivables Purchase Agreement showing that all the Debtors but one were already merged into and operating as Quebecor World prior to 2001. Submitted herewith as Exhibit TX-9 is an excerpt from the Debtors' 2003 annual SEC statement showing that the last remaining Debtor, Retail Printing Corporation, merged into Quebecor as of July 2001. There is no statute of limitations in Texas for unfiled tax returns. Texas Tax Code § 111.205(a)(2).

31. A list of the Debtor entities and the plants they operate is submitted herewith as Exhibit TX-10. There are 27 separate legal entities operating a total of 36 separate plants.

32. Submitted herewith as Exhibit TX-11 is the last, summary page of a spreadsheet presented to the Texas Comptroller by the Debtors showing their calculation of the amount of taxes owed to Texas for the 4-year look back period, exclusive of any penalties or interest.

33. Submitted herewith as Exhibit TX-12 is the last, summary page of the Texas Comptroller's spreadsheet showing its calculation of the amount of taxes due for the 4-year look back period after disallowances for the Debtors' discount factors and transactions that the Debtors improperly classified as non-taxable transactions in their Study.

34. The Texas Comptroller accepted as true certain representations made by the Debtors in connection with their disclosures to the Comptroller. The Comptroller reserves the

right to dispute all such assumptions and recalculate the amount of its claims as investigation and discovery continue and information becomes available.

35. In particular, the Debtors' presented information in summary form with no supporting documentation to verify the representations were in fact true. The Debtors did not provide supporting information or documentation to prove that all the transactions included in their sample period were in fact all the transactions that occurred during that period or that the amounts or descriptions or other details pertaining to the transactions were in fact true and correct, including without limitation, the dollar amount of the transactions, the nature of the transactions, the description of transactions, the items involved in the transactions, the identity of customers, the correct coding and classification represented and the support for classifying certain transactions as non-taxable.

36. Further, the 3-month sample period used by the Debtors is Feb.-Apr. 2008. The 3-months included in the sample period are the first three months immediately following the bankruptcy filing on January 21, 2008, typically the worst months for any company that seeks bankruptcy relief. The 3-month period includes the fewest days of any 3 month period of the year. The 3-month period is not a normal, full calendar quarter. The 3-month period was not randomly selected or selected by any normal or appropriate auditing method. The 3-month sample period was self-selected by the Debtors. The 3-month period follows years of a steady decline in revenues for the Debtors from 2001 through 2009. A single 3-month period is not an adequate sample period.

V. The Tax Nexus Issue

37. In October of 2008, the Debtors filed their Sales Tax Motion in this Court to pay past due sales taxes owed to the Texas Comptroller. The Sales Tax Motion represented that the Debtors owed Texas $2,079,624.86 based on a 4-year look back period, not including any interest or penalties. The Sales Tax Motion did not question whether the Debtors had nexus with Texas. In support of the Debtors' valuation of the tax liability, they applied a 12% nexus factor indicating that 88% of the Debtors had nexus.

38. When the Texas Comptroller disputed the Debtors' calculation of liability and asked the Court to determine the amount due, the Debtors abruptly shifted position and declared for the first time that they had somehow now suddenly discovered that none of the Debtors had nexus with Texas. This sudden change in position is contrary to the Debtors' conduct in spending countless hours and expenses for over a year attempting to work out an agreement with Texas to resolve the past due sales taxes.

39. In *Quill Corp. v. North Dakota*, the U.S. Supreme Court held that a state may not compel a retailer to collect sales tax unless the retailer has a physical presence in the state. 504 U.S. 298, 315315-18 (1992). The Supreme Court acknowledged that the presence of a sales force in the State soliciting sales for an out of state business is enough to establish nexus. *Id*. at 315, citing Cf. *National Geographic Society v. California Bd. Of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

40. Courts have routinely found that the presence of a sales force in the forum state soliciting business for an out of state entity establishes a physical presence in the state sufficient

for establishing tax nexus under both the Due Process and Commerce clauses of the U.S. Constitution.

41. Beginning in 1939, the U.S. Supreme Court found that maintaining a sales force in the forum state was sufficient for nexus. *See Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939). In *Felt*, the out of state retailer granted the exclusive right to solicit sales to two general agents in the forum state on a commission basis. *Id*. at 65. In addition, the retailer paid for an office lease, traveling expenses and a portion of staff salaries for each agent. *Id*. All products were stored and shipped from outside of the forum state and all invoicing and payment was handled by the retailer. *Id*. The Court found that nexus was established and the out of state retailer was required to collect and pay taxes to the state. *Id*. at 66.

42. In 1960, the U.S. Supreme Court held that the presence of only ten independent contractors was sufficient nexus to impose state tax requirements. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). The out of state retailer in *Scripto* contracted with independent contractors in the state for the solicitation of orders, but did not own, lease, or maintain any office in the forum state, nor have any employees present in the forum state. *Id*. at 209. The Court found that nexus was established and the out of state retailer was required to collect and pay taxes to the state. *Id*. at 212-13.

43. Then again in 1987, the U. S. Supreme Court held that the activities of one independent contractor alone located in the forum state was sufficient for nexus. *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 249-51 (1987). The retailer in *Tyler Pipe* contracted with a single independent contractor in the forum state, but did not own, lease, or

maintain any office, nor had any employees in the forum state. *Id*. at 249. The Court found that nexus was established. Id at 251.

44. State courts have also found nexus when a sales force is present in the forum state. In *Alpine Indus., Inc. v. Strayhorn*, the Texas Third Circuit Court of Appeals held that the presence of independent contractors established nexus with the forum state. 2004 WL 1573159 (Tex.App. - Austin, July 15, 2004). The retailer in *Alpine* had "no inventory, real estate, employees, offices, bank accounts, or other assets in Texas." *Id.* at *6. However, the retailer's network of salespersons, even though they were "independent contractors" established a sufficient nexus. *Id*. The Court found that nexus was established and the out of state retailer was required to collect and pay taxes to the state. *Id*.

45. In 2005, the Texas Third Circuit Court of Appeals held that the presence of one single employee in the forum state satisfied nexus. *See, Inova Diagnostics, Inc. v. Strayhorn*, 166 S.W.3d 394 (Tex.App. - Austin 2005). The retailer in *Inova* "employe[d] a single Texas resident who spent seven to ten days per month soliciting orders in the state." *Id.* at 402. The retailer was subject to franchise tax in Texas. *Id.*

46. A physical presence is created by the activities of sales representatives in the forum state regardless of their official employment status. "True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance." *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960). The Supreme Court focuses particularly on the activities in the forum state, as noted in *Tyler Pipe*:

> "The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable

> relationships with Tyler Pipe's customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe…The sales representatives provide Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing; market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington Market.
>
> …
>
> As the Washington Supreme Court determined, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."

Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 249-50 (1987).

47. Quebecor World maintained a sales office located in Texas from before January 1, 2001 to July 21, 2009. The sales representatives that were headquartered in Dallas, Texas solicited sales on behalf of all the Debtor entities which the Debtors now claim have no nexus with Texas. Each individual sales representative had the authority and ability to sell the services of each and every Debtor to any current or prospective customer. See, Exhibit TX-13, a collection of statements from the annual SEC reports of the Debtors for each year from 2001-2009 and including a statement from the Debtors' Disclosure Statement in 2009. Each such document states verbatim or in substantially similar language that: "Each sales representative has the ability to sell into any plant in the Company's global network."

48. The salesmen in Texas solicited business for all the Debtor entities. Whether they acted in the capacity of direct employees, agents, independent contractors or any other form of business relationship, their activities in soliciting business for the out of state Debtor entities were for the purpose of establishing and maintaining a market in Texas on behalf of all the out of state Debtors, clearly establishing nexus between each Debtor and Texas.

VI. Bifurcation of Nexus from the Amount of Taxes Owed

49. With respect to the issue of nexus, the Texas discovery is substantially complete and Texas is prepared to proceed expeditiously to a trial and final determination of the issue of the Debtors' nexus to the State of Texas. In this regard, Texas requests the Court to bifurcate the issue of tax nexus from the issue of the amount of taxes owed and establish a trial and scheduling order so that this threshold issue may be determined quickly and efficiently.

50. It is obvious that nexus is a threshold issue. In the absence of nexus, discovery and other efforts directed toward establishing the amount of taxes owed is unnecessary. The Court immediately recognized this at the June Status Conference and inquired of Debtors' counsel whether a procedure should be utilized to reach an expedited resolution of that issue. (See, p. 16, l. 16-20, Transcript of the June Status Conference attached to the Debtors' Motion as Exhibit B, thereto. For simplicity, references to the Transcript will hereafter be referred to simply as "Transcript of the June Status Conference").

51. Debtors' counsel recognized the primary importance of a determination of the nexus issue, saying: "If there's no nexus, then there's no sales tax liability. And there's no need for extensive discovery on calculations on how the tax would be calculated under certain facts or circumstances. It becomes a moot issue." (See, p. 17, l. 10-13, Transcript of the June Status Conference).

52. Pursuant to the Federal Rules of Bankruptcy Procedure, Rule 9014(c), incorporating Bankruptcy Rule 7042 and FRCP Rule 42, and pursuant to FRCP Rule 42(b), the Court may: "For convenience, to avoid prejudice, or to expedite and economize…order a separate trial" of "one or more separate issues" or "claims."

53. *In Commonpoint Mortgage Company*, 283 B.R. 469, 482 (Bankr. W.D. Mich. 2002), the Court states:

> "Rule 7042(b) gives the judge "broad discretion to use the separate trial device 'in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy.' " Susan E. Abitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems and a Solution,* 36 Sw.L.J. 743, 744 (1982) (discussing FED.R.CIV.P. 42(b)). Bifurcation can be particularly useful in the litigation of complex cases where liability and damage issues are easily separable. See id. at 745. See, e.g., *Surf Walk Condominium Ass'n v. Wildman*, 84 B.R. 511, 514 (N.D.Ill.1988) (upholding bankruptcy court's bifurcation of trial into a hearing of liability followed by a hearing on damages and explaining that "[t]he decision whether to bifurcate a trial is necessarily committed to the discretion of the bankruptcy judge")."

54. In *Moss v. Associated Transport, Inc*., 33 F.R.D. 335, 338 (E.D.TN 1963), the Court states:

> "Express provision both for the consolidation of cases and for the separate trial of the issues is made in rule 42(a) and (b), Federal Rules of Civil Procedure. The ordering of a separate trial of the issues is within the sound discretion of the court. *Chicago R. I. & P. R. Co. v. Williams* (C.A.8, 1957), 245 F.2d 397; *Bowie v. Sorrell* (C.A.4, 1953), 209 F.2d 49, 43 A.L.R.2d 781; *Collins v. Metro-Goldwyn Pictures Corp.* (C.A.2, 1939), 106 F.2d 83.
>
> As stated in Moore's Federal Practice, Vol. 5, Sec. 42.03:
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> 'Separate trial may properly be ordered on the issue of the defendant's liability to respond in damages, particularly where plaintiff's proof of damages would involve the testimony of a large number of persons. This procedure has been privately recommended by a number of members of the judiciary as a means of expediting trials and of saving time and expense. We have found no reason why this procedure, which is authorized by rule 42(b), should not be extensively employed.'
>
> It is within the discretion of the court to order a separate trial upon its own motion. *Huffmaster v. United States*, D.C., 186 F.Supp. 120. The precedent of ordering a separate trial on the issue of liability in tort actions has been established in a number of cases where the issues are sufficiently distinct so as to permit a separate trial without injustice. *O'Donnell v. Watson Bros. Transportation Co.*, D.C., 183 F.Supp. 577; *Rickenbacher Transportation v. Pennsylvania Railroad Co*., D.C., 3 F.R.D. 202; *Hosie v. Chicago & Northwestern Railroad Co., C.A.7, 282 F.2d 639,* certiorari denied 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693; *Nettles v. General Accident, Fire & L. Assurance Corp.*, C.A.5, 234 F.2d 243. See also *Annotation: Separate Trial of Issue of Liability and Damages in Tort, 85 A.LR.2d 9.*"

55. In *Reines Distributors, Inc. v. Admiral Corporation*, 257 F. Supp. 619, 620-621 (S.D.N.Y. 1965), the Court states:

> "The pertinent portion of Fed.R.Civ.P. 42(b) states that
>
> 'The court in furtherance of convenience * * * may order a separate trial of * * * any separate issue'.
>
> The purpose of the rule is to prevent delay and expense. See 5 Moore, Federal Practice P42.03 (2d ed. 1964). Generally a single trial tends to lessen delay, expense and inconvenience to all concerned. See e.g. *Drake v. Handman*, 30 F.R.D. 394 (S.D.N.Y. 1962); *Grissom v. Union Pacific R. Co*., 14 F.R.D. 263 (D.Colo. 1953). When there is a possibility, however, of shortening the trial considerably by holding a separate trial on an issue, the court should exercise its discretion, *Collins v. Metro-Goldwyn Pictures Corp.*, 106 f.2d 83, 85 (2d Cir. 1939), and try the issue separately if such a procedure will not prejudice either side. *Rossano v. Blue Plate Foods*, 314 F.2d 174 (5th Cir.), cert. denied, 375 U.S. 866, 84 S.Ct. 139, 11 L.Ed.2d 93 (1963) (agency in negligence action); *Bowie v. Sorrell*, 209 F.2d 49, 43 A.L.R.2d 781 (4th Cir. 1953) (release); *Bernardo v. Bethlehem Steel Co*., 200 F.Supp. 534 (S.D.N.Y. 1961) (whether drydock was a vessel); *Huffmaster v. United States*, 186 F.Supp. 120 (N.D.Calif. 1960) (whether flood was an act of god); *United States v. Mulligan*, 177 F.Supp. 384 (D.Ore. 1959) (validity of mining claim); *Michael Rose Prods. v. Loew's Inc.*, 19 F.R.D. 508 (S.D.N.Y. 1956) (release); *Hall Laboratories v. National Aluminate Corp*., 95 F.Supp. 323 (D.Del. 1951) (prior art). See Miner, *Court Congestion, A New Approach*, 45 A.B.A.J. 1265 (1959).

56. In *Revere Copper and Brass, Inc*., 32, B.R. 577, 581 (Bankr. S.D.N.Y. 1983), the Court states:

> "It is well established that the federal courts "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim...." F.R.Civ.P. 42(b). See *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 246 (9th Cir.1972), cert. denied, 409 U.S. 1110, 93 S.Ct. 914, 34 L.Ed.2d 691 (1973). The separation for trial of the issues of liability and damages often results in economy and efficiency and is frequently utilized in litigation of antitrust issues and negligence suits. Notes of Advisory Committee On Rules, F.R.Civ.P 42(b); *Gutor International AG v. Raymond Parker Co., Inc.*, 493 F.2d 938, 947 (1st Cir.1974); *Rickenbacher Transportation, Inc. v. Pennsylvania Railroad*, 3 F.R.D. 202 (S.D.N.Y.1942). The former bankruptcy rules expressly adopted Federal Rule 42, as do the Bankruptcy Rules which became effective August 1, 1983. See former Bankruptcy Rules 742 and 914; Bankruptcy Rules 7042 and 9014.

> The situation at hand lends itself to separate trials on the issues of liability, i.e. Is there a contract, and damages, i.e., what amount is due under the contract if there is one. The reasons for separate trials include avoidance of confusion resulting from similarity or dissimilarity of claims, avoidance of prejudice, unusual difficulty in proving a particular issue, and the inherent power of the court to regulate the order of proof at trial. See generally Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of Questionable Use of Rule Making Power,* 14 Vand.L.Rev. 831 (1961). The issues presented and the proof needed to prevail on the validity of the contract claim are separate and distinct from that required on a trial on the counterclaim for unpaid charges under the 1980 contract, and bifurcation has the potential for shortening the trial. See *Kushner v. Hendon Const., Inc.,* 81 F.R.D. 93, 99 (M.D.Pa.) aff'd 609 F.2d 502 (3d Cir.1979). The situation is typical of that of determining liability, and then proceeding separately on the issue of damages. See *Gutor International AG v. Raymond Packer Co., Inc.,* 493 F.2d 938 (1st Cir.1974); *Crummett v. Corbin,* 475 F.2d 816 (6th Cir.1973)."

57. In this case, it makes imminent sense to resolve the issue of nexus first before proceeding to the amount of taxes due, as was readily recognized by both the Court and Debtors' counsel at the June Status Conference. Discovery on the issue of the Debtors' nexus with Texas is substantially complete and an expedited schedule can be employed to complete the preparation needed to present the issue in a fair manner to the Court. If the Court determines there is no nexus, or limited nexus, the issue of the amount of taxes owed will either be entirely moot or substantially simplified. The issue of the amount of taxes owed is not yet fully developed and will require substantial additional time, expense and resources to prepare for trial. The issue of the amount of taxes owed is more complex and expensive to develop than the nexus issue and involves substantially more facts, information, documentation, expert testimony and additional effort to fairly try.

58. Accordingly, Texas requests the Court to bifurcate the Texas nexus issue from the amount of taxes owed to Texas assuming nexus is found to exist.

59. In making this request for bifurcation, Texas understands that Arizona may not yet feel prepared to proceed to resolve its nexus issue. Assuming this to be correct, the Court

should consider how this case should proceed as to Arizona. The Court should still proceed to determine the Texas nexus issue. The nexus issue is unique to each State, depending on the Debtors' various contacts, operations and other factors with respect to each State. Proceeding on the Texas nexus issue will not adversely impact the other parties to this proceeding, which the Court may insure by use of its discretion to determine a proper and orderly course to resolve the Texas nexus issue in a fair and efficient manner with due deference to all parties. Determining the Texas nexus issue first will save time, expense and resources and simplify the remaining proceedings, if any, respecting Texas. Indeed, the Court will benefit by proceeding to determine the issue of nexus as to Texas as this will enable the Court to become familiar with the law, facts and issues involved in a determination of nexus.

60. As set forth by the authorities cited above, the Court may order the separate trial of any issue upon request of a party or *sua sponte* on its own motion. A separate trial of the Texas nexus issue is consistent with and supported by applicable law. The Court should order a separate trial of the Texas nexus issue and use the May 10 hearing to determine the timing, scheduling, briefing and other matters needed to complete the preparation, presentation and trial of the nexus issue.

VII. Specific Responses to the Motion

61. The Debtors' Motion is filled with blanket, conclusory statements respecting the state of discovery by Texas in this case but devoid of any evidence, much less any probative evidence, to support their claims.

62. The Debtors' Motion asserts:

a. Texas has undertaken discovery of "unlimited breadth" and "questionable relevance" (p. 3, para. 3);

b. Texas has conducted "burdensome and overbroad third party discovery" (p. 5, para. 7);

c. Texas has engaged in "abusive third-party discovery" (p. 13, para. 33);

d. Texas has requested information from KPMG that is not relevant because the request includes a request for information relating to "income tax, property tax or transaction privilege taxes" (p. 12, para. 31);

e. The Texas discovery requests are "unreasonably burdening" to the Debtors and Quad (the Debtors' successor) (p. 3-4, para. 3);

f. Texas' "unfettered" discovery is "a significant burden" on the Debtors, their customers and professionals (p. 17, para. 41);

g. Texas has or will take discovery that will "compromise" the Debtors' and Quad's businesses, including their relationship with critical customers (p. 4, para. 3)

h. The Texas discovery will require a "burdensome" review of third party documents (p. 13, para. 32);

63. The Affidavit of Mike Canning, sworn to under oath, asserts:

a. Texas' discovery is unreasonable in its "breadth and scope" (p. 3, para. 6);

b. Texas' discovery is of "questionable relevance" (p. 3, para. 6);

c. Texas' discovery is "unreasonably burdening" to the Debtors and Quad (p. 3, para. 6);

d. Texas' discovery is "compromising" Quad's business, including relationships with "critical customers" (p. 3, para. 6);

e. Subsequent to the June Status Conference Texas served "additional" subpoenas on customers (p. 7, para. 18) (emphasis added);

f. The KPMG subpoena served by Texas requested information concerning "income and property taxes" (p.7, para. 19);

g. Texas pursued "aggressive" third party discovery, including the enforcement of "overbroad" subpoenas (p. 7, para. 18);

64. These claims are untrue and unsupported by any evidence, much less any sufficient, probative evidence, to support them or the extraordinary relief the Debtors are requesting in their Motion. The Debtors' characterization of the state of Texas discovery is not accurate. Further, the Debtors' characterization of the June Status Conference is not a fair or complete discussion of that Conference.

A. Debtors' Misrepresentation of Texas' Discovery.

65. The only actual discovery request by Texas submitted by the Debtors' to support the blanket assertions in their Motion is the Subpoena Duces Tecum for the Production of Documents served by Texas on KPMG (Exhibit C to the Debtors' Motion). The Debtors' claim that the KPMG SDT is improper because it requests information relating to "income tax, property tax or transaction privilege taxes" (p. 12, para. 31). Mr. Canning swears under oath that the KPMG subpoena served by Texas requested information concerning "income and property taxes" (p.7, para. 19).

66. Read the Subpoena. Every request is specifically limited to "sales and use" taxes. The Debtors' blanket assertions are not only unsupported by any probative evidence, the only actual example of a specific discovery request by Texas they use to support their blanket claims contradicts their position.

67. Further, specifically with regard to the KPMG subpoena, KPMG served no objection to the subpoena pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure and has never communicated to Texas any concern that the subpoena is in any way burdensome or oppressive. (For sake of simplicity, references to the Federal Rules of Civil Procedure will hereafter be referred to as "FRCP Rule _.) Texas has engaged in an ongoing, good faith discussion with KPMG respecting its compliance with the subpoena, but neither Texas nor KPMG has made any request to any Court to intervene to resolve any unresolved dispute between them respecting the subpoena. Nor, for that matter, have the Debtors.

68. The Debtors have not submitted to the Court any other actual Texas requests to support in any way the unsupported claims they have made about the Texas discovery. Blanket, conclusory claims that discovery is improper, unduly burdensome, overbroad or, for that matter, privileged are patently insufficient to support such claims and are uniformly rejected outright by the Courts. Further, the Debtors carry the burden of proof on such issues. The Debtors must prove each of its blanket claims with specific, probative evidence, including each element required for each such claim.

69. The Debtors' failure to submit any actual Texas discovery requests to the Court to support their blanket claims of impropriety is an omission that is directly contrary to this Court's own local rules. This Court's local rules require a party making any complaint respecting

interrogatories or document requests to file simultaneously with the objection a copy of the interrogatory or document request or answer, specify and quote verbatim each such request and immediately following each specification to set forth the basis of the objection or relief requested. SDNY Local Bankruptcy Rules 7033-1 and 7034-1.

70. In short, there is absolutely no evidence to support the Debtors' assertions in the Motion. The Court should reject the Debtors' blanket claims outright.

B. Status of Texas' Discovery.

71. Notwithstanding, however, Texas will discuss its discovery in more detail so the Court has an accurate understanding of the status of the Texas discovery in these proceedings. Hopefully, this will assist the Court in deciding the appropriate steps to bring these proceedings to a fair conclusion with an emphasis on assuring that the truth, justice and merits of the controversy determine its outcome in as efficient a manner as the circumstances of the case allow.

72. To begin, the Court should be advised that Texas has not served any new requests for any discovery subsequent to the June Status Conference. All of the Texas discovery requests had been served prior to the June Status Conference. This is in direct contradiction to Counsel's sworn statement that Texas had served additional subpoenas on customers of the Debtors "subsequent" to the June Status Conference.

73. There was no discussion and certainly no agreement at the June Status Conference that Texas' outstanding discovery requests would or should be affected by the discussions had at that Conference. Indeed, such a result would be outlandish, especially since all discovery

pursuant to Texas' outstanding discovery requests has now been completed, with the exception of a few significant items that have been obstructed by the Debtors, as will be discussed below.

74. The five depositions taken by Texas were completed prior to the June Status Conference.

- John Hubbard, Senior Vice President of Sales, headquartered in Dallas, Texas from before January 1, 2001 and continuously thereafter past June 21, 2009, deposition taken May 5, 2011, requiring 6 hours of testimony.
- Phil Shotland, Sales Executive and "Top Performer" in sales for the Debtors, headquartered in Dallas, Texas from before January 1, 2001 and continuously thereafter past June 21, 2009, deposition taken May 6, 2011, requiring 2:40 hours of testimony.
- Gary Patz, [Information Redacted], deposition taken May 6, 2011, requiring 55 minutes of testimony.
- Chris McRay,[Information Redacted], deposition taken May 25, 2011, requiring 21 minutes of testimony.
- Russell Caver, [Information Redacted], deposition taken May 25, 2011, requiring 1:32 hours of testimony.

75. The five depositions taken by Texas required a total of only 11:26 hours of testimony. In this short period of time, Texas was able to obtain directly relevant, highly probative evidence to prove nexus for the entire relevant period from January 1, 2001 through July 21, 2009.

76. Furthermore, at the deposition of Mr. Hubbard, Texas learned for the first time that after it completed its acquisition of the Debtors, Quad intentionally destroyed all the Quebecor sales and marketing materials, including specifically the materials used in Texas. This deliberate action was taken while this case was pending, with Quad's full knowledge of the disputed issue of nexus in this case and with the Debtors' and their counsels' full knowledge of the direct relevance and importance of the Quebecor sales and marketing materials to the nexus issue in this case. In fact, this destruction of evidence occurred after Debtors' Counsel had already expressly agreed in writing to provide such materials to Texas in response to certain document requests contained in the First Requests for Production of Documents served by Texas on the Debtors on January 7, 2011. See, Debtors' letter agreement dated April 19, 2011 submitted herewith as Exhibit TX-14, specifically page 4, Requests 19-21. This act of intentional destruction of relevant evidence raises serious questions of spoliation of evidence. See, *Zubalake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubalake v. UBS Warburg LLC,* 229 F.R.D. 422 (S.D.N.Y. 2004).

77. With respect to the Debtors' complaint about the number of depositions to be allowed, while the Rules prescribe a limit of 10 depositions without a further Court order or agreement of the parties, the Rules allow 7 hours of testimony for each deposition. Thus, viewed in a temporal sense, the Rules allow 70 hours of testimony. Texas' desire to obtain permission to take more than 10 depositions is driven by the nature of this case – one being the number of short depositions needed to complete the authentication of the documents it has obtained – not by a desire to take numerous lengthy depositions.

78. Notwithstanding, however, the Debtors' shift in position from a 12% no nexus factor to no nexus whatsoever with respect to 27 separate legal entities and 36 separate plants

vastly expands the discovery needed with respect to nexus. This expansion is entirely of the Debtors own making and they should not be heard to complain about the bed they have made for themselves. In addition, the Debtors' (and Quad's) intentional destruction of the Quebecor sales and marketing materials makes third parties the only source now available to obtain such information.

79. Further, the constantly shifting sand upon which the Debtors make their contentions about the amount of taxes owed, and the enormous size and magnitude of the Debtors' business operations, makes discovery of this issue challenging.

80. Texas desires to take as few depositions as is necessary but enough to fairly present the case. The Court need not enter any order that merely repeats what the rules already provide. The Court should address the merits of the issue and provide its guidance respecting the proper number, and perhaps more importantly, the amount of time allowed for deposition testimony notwithstanding the number of witnesses deposed. Texas can accomplish much of what it needs respecting the nexus issue with relatively little time with a number of witnesses, although the particular circumstances of this case probably require more than 10 witnesses to be deposed taking into account the need to depose the witnesses identified or to be identified by the Debtors on the nexus issue.

81. Further, since the Debtors have yet to disclose their intended witnesses or experts, it is premature to determine the appropriate number of depositions, much less set an arbitrary limit on depositions. The issue is premature due to the Debtors' failure to respond timely and appropriately to requests to them that have been outstanding for more than a year now. Not

knowing the Debtors' witnesses and intended documentary evidence makes it impossible for Texas to predict the number of depositions or, indeed, what further discovery may be warranted.

82. The Debtors' Motion blows entirely out of proportion and inaccurately represents Texas' position on the number of depositions to be allowed. Although the Debtors' flash a single email to the Court, they fail to show the Court other emails that put the issue in a more accurate light. Submitted herewith as Exhibits TX-15 and TX-16 are additional emails respecting the deposition issue. Counsel for Texas first raised the issue early in the case and made a request of the Debtors to agree to 10 additional depositions for planning purposes at least. See Exhibit TX-15. This is an email sent prior to the email attached by the Debtors to their Motion. It is an entirely proper request for consideration of the Debtors and, in fact, required before approaching the Court with the issue. Exhibit TX-16 is an email sent shortly after the email attached by the Debtors to the Motion. In that email thread, Texas makes clear it is not relying on any technical interpretation of the Rules in making its request, just requesting the Debtors consideration and discussion of the issue, and again repeating that 10 additional depositions may be needed. The email also includes Debtors' counsel agreement to discuss the issue in good faith, although Debtors' counsel has never followed up on that promise. Rather, the Debtors' have presented one email in isolation to portray an inaccurate and prejudicial view of the matter to the Court and to entice the Court to make a peremptory ruling on the issue without any good faith discussion with Texas respecting the issue.

C. Third Party Discovery.

83. With respect to the Debtors' blanket claims that the Texas subpoenas to customers are somehow improper, the truth is that cooperative efforts with all the customers who received

Texas subpoenas were underway prior to the June Status Conference. The collection of documents requested from customers by Texas was completed months ago. The documents collected are directly relevant, highly probative evidence to prove nexus for the entire relevant period from January 1, 2001 through July 21, 2009. And, as mentioned above, due to Quad's deliberate destruction of all Quebecor sales and marketing materials, the only source for such information are third parties.

84. The Court should note that all of the subpoenas served on third parties, including both customers and accountants, are Subpoenas Duces Tecum for the Production of Documents only. They do not require the appearance at a deposition and, in fact, do not require any appearance at all, just the production of documents. This form of discovery is the easiest, quickest, cheapest, least burdensome method of obtaining information. For that reason, among others perhaps, FRCP Rule 45, and no other applicable rule of discovery, sets any limit on the number of such subpoenas that can be served by a party.

85. The Court should also note that the Debtors approach to nexus discovery – enforcing an arbitrary, specific limited time period in which to confine discovery – is not appropriate or the most efficient, effective and productive manner to conduct discovery of the nexus issue or, for that matter, the issue of the amount of taxes owed. With respect to nexus, as Texas has done, discovery should be focused on those particular witnesses, whether they be customers or company personnel, that can give probative evidence of nexus spanning the entire period or a significant period of time relevant to the Texas claims. In addition, specific witnesses that can make a significant contribution to the nexus issue should be allowed. This is especially true for the Texas sales personnel that have been located in the Debtors' Texas sales office during the entire relevant time period. Texas has already identified and deposed two such

salesmen, both of whom were employed by the Debtors prior to the commencement of the January 1, 2001 beginning date of the relevant time period and both of whom worked continuously for the Debtors through the ending date of the relevant time period of July 21, 2009. This is also true of customers whose relationship with the Debtors spans the entire or significant periods of time within the relevant time period. [Information Redacted.]

86. It is not accurate to report that the subpoenas to the customers are in any way unduly burdensome to the Debtors or in any way disruptive to the Debtors or Quad's relationships with its customers. The Debtors certainly have presented no evidence of such. The Debtors have merely made blanket, conclusory statements asserting such, which are per se insufficient to support the Debtors' burden of proof to prove with competent evidence their claims.

87. Moreover, although the Debtors' do not have standing to object to any potential burden on the witness, they do have standing pursuant to Rule 45(c)(2)(B) to assert any objections personal to their interests that they believe are implicated. *Albany Molecular Research, Inc. v. Schloemer,* 274 F.R.D. 22, 25 ("…a party to the underlying action may move to quash the subpoena where the subpoena directly implicates the party's privilege or rights"). *See Chiperas v. Rubin,* 1998 WL 765126, *2, 1998 U.S. Dist. Lexis 23578, *4–5 (D.D.C.1998); *Doe v. Verizon Online,* 2010 WL 2035332, *2, 2010 U.S. Dist. Lexis 50594, *4–5 (D.D.C.2010).").

88. Despite receiving timely Notice of Issuance of each and every SDT served by Texas upon each witness, the Debtors never served any objections to any SDT, nor did they ever communicate by phone, email or letter any objections to the SDT's they now raise in their current Motion.

89. In fact, the Debtors specifically agreed to the production of documents by American Airlines so long as Texas agreed to hold such documents in confidence pending a final Protective Order. See, Exhibit TX-17, an email exchange ***after the June Status Conference*** among Texas, the Debtors and American Airlines. The Debtors did not raise any issue respecting the breadth of the subpoena, the time period involved in the subpoena or any undue burden associated with the subpoena. The Debtors certainly did not assert that the discovery was improper in any way because of any purported final, binding agreement to constrict discovery to some artificially imposed, self-selected time period chosen by the Debtors. The Debtors certainly did not assert that the discovery was somehow retroactively barred because of the discussions at the June Status Conference.

D. Accountant Discovery

90. With respect to the subpoenas to the accountants, most importantly (and interestingly), Grant Thornton itself, with the evident approval of the Debtors (or certainly the negligence of the Debtors), had already produced approximately 83,000 bates stamped pages of documents represented to be a full, complete production of all documents possessed by Grant Thornton responsive to the Texas SDT prior to the June Status Conference. The Grant Thornton documents consist of the documents relating to the 2006 Tax Mitigation Project, which was undertaken and performed for the Debtors by Grant Thornton.

91. The Debtors received proper and timely Notice of Issuance of the Grant Thornton Subpoena on May 12, 2011. A true and correct copy of the Notice of Issuance of the Grant Thornton Subpoena to the Debtors is submitted herewith as Exhibit TX-18.

92. The Debtors did not serve any timely objection to the Grant Thornton subpoena pursuant to FRCP Rule 45, nor communicate to Texas by phone, email or letter any concerns they had respecting the Grant Thornton subpoena at that time. Again, the Debtors do have standing to assert a timely objection personal to their interests that they believe are implicated.

93. Nevertheless, the Debtors did not assert any timely objections to the Grant Thornton subpoena. The failure to timely assert an objection constitutes a waiver of objection to a subpoena. *Deal v. Lutheran Hospitals & Homes*, 127 F.R.D. 166 (D.Alaska 1989).

94. Texas counsel worked cooperatively with counsel for Grant Thornton, Ms. Beatrix Bernauer, to accomplish the production of the documents. On June 3, 2011, Ms. Beatrix communicated by email to Texas counsel that Grant Thornton would be in a position to produce its documents by June 17, 2011 with the caveat that the Debtors may wish to conduct a privilege review in which event the Debtors would prepare a privilege log and, presumably, such documents would be withheld from production. A true and correct copy of the email from Ms. Beatrix is submitted herewith as Exhibit TX-19. The precise language used by Ms. Beatrix in her email on June 3, 2011 is:

> "We anticipate being able to produce the documents we discussed on or before Friday June 17th. I do not know the volume yet which could impact the timing. In addition, Quebecor may request to review the documents for privilege prior to the production. If so and if any documents are identified as privileged by the client, then they will prepare a privilege."

95. Following her email, Grant Thornton did produce over 83,000 bates stamped pages of documents on June 16, 2011. The June 16, 2011 cover letter from Grant Thornton transmitting the document production is submitted herewith as Exhibit TX-20. The documents produced included Excel spreadsheets and other documents that obviously existed in their

original electronic native format. It is well settled law that such documents should be produced in their original native form. The cases make clear that electronic files like Excel files should be produced in native format. See, *Covad Communications Company v. Revonet Incorporated*, 260 FRD 5 (D.D.C. 2009):

> "The cases interpreting Federal Rule of Civil Procedure 34 conclude that it is therefore improper to take an electronically searchable document and either destroy or degrade the document's ability to be searched. See, e.g., *Dahl v. Bain Capital Partners, Inc*., No. 07-CV-12388, 2009 WL 1748526, at * 3 (D.Mass. June 22, 2009) (requiring production of spreadsheets in native format); *In re Classicstar Mare Lease Litig*., No. 07-CV-353, 2009 WL 260954, at *3 (E.D.Ky. Feb. 2, 2009) (production may not degrade searchability); *Goodbys Creek, LLC v. Arch Ins. Co.,* No. 07-CV-947, 2008 WL 4279693, at *3 (M.D.Fla. Sept. 15, 2008) (same; conversion of e-mails from native to PDF not acceptable); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning,* 586 F.Supp.2d 1250, 1264 (D.Kan.2008) (same); *L.H. v. Schwarzenegger*, No. 06-CV-2042, 2008 WL 2073958, at *3 (E.D.Cal. May 14, 2008) (same); *United States v. O'Keefe*, 537 F.Supp.2d 14, 23 (D.D.C.2008) (applying principle in criminal case).
>
> Understandably, taking an electronic document such as a spreadsheet, printing it, cutting it up, and telling one's opponent to paste it back together again, when the electronic document can be produced with a keystroke is madness in the world in which we live."

96. Accordingly, Texas requested that the spreadsheets and other electronic documents be produced in native format, to which Grant Thornton agreed and subsequently produced. When added to the Texas Summation system and combined with the documents previously produced by Grant Thornton so as to make the actual spreadsheets and other electronic documents accessible, the entire production consists of in excess of 130,000 bates stamped pages.

97. The Grant Thornton documents concerning the 2006 Tax Mitigation Project are highly relevant, indeed essential, to this case. [Information Redacted.]

98. In a glaring omission, and an obviously embarrassing and damaging one to the Debtors' present position, is the Debtors' failure to draw the Court's attention to the fact that Debtors' counsel himself expressly represented at the June Status Conference that the Debtors would produce the 2006 Tax Mitigation Project documents. At page 11, lines 4-16 of the June Status Conference Transcript, Debtors' counsel says:

> "Now, when I said earlier we think that this is the appropriate time period generally, there are some areas where the debtors can go back and would intend to go back prior to the July of '07. So, for example, there have been a number of questions that relate to books and documents and information that relate to the, let's characterize them, in the discovery request as the tax compliance program, which was a program that the debtors initiated actually pre-petition in 2006, in respect of their sales tax obligations. And so to the extent that those are records in fact that are readily available to the debtors, we would intend to make production in that regard for that period from 2006 forward through the end of the discovery period that Texas and Arizona have requested."

99. Given the history of the discovery of the Tax Mitigation Project documents from Grant Thornton, Texas was quite surprised to receive a letter from Debtors' counsel dated July 27, 2011 objecting to the production of documents concerning the Tax Mitigation Project and claiming, among other things, that the documents were "created in anticipation of litigation." The letter from Debtors' counsel dated July 27, 2011 is submitted herewith as Exhibit TX-21.

100. The letter arrived some 10 weeks after Debtors' counsel received the Notice of Issuance of the Subpoena to Grant Thornton. The Debtors never served a timely objection to the SDT pursuant to FRCP Rule 45(c)(2)(B). The letter arrived over 7 weeks after Ms. Beatrix had sent her email stating that the Debtors may conduct a privilege review. The letter arrived over 5 weeks after Grant Thornton had produced the documents represented to be all the documents relating to the Tax Mitigation Project. The letter arrived 4 weeks after Debtors' counsel

represented to this Court and all parties that the Debtors agreed that these specific documents in particular would be produced.

101. Debtors' counsel apparently "awoke" sometime after all the preceding history had taken place and realized how important and relevant the documents were. In a belated attempt to hide these highly relevant documents and to thwart the pursuit for the truth, Debtors' counsel has effectively stalled and delayed the progress of this case by way of a single letter asserting a claim of immunity that is not likely to survive a ruling by the Court.

102. The Court should not, of course, engage in any advisory rulings concerning the claim of work product immunity, and any rulings should be made only after a proper presentation of the issues with all parties having an opportunity to present their cases, but it is worth noting that, given the facts immediately at hand, it is doubtful at best that anyone could sustain their burden of proof to show with credible, admissible evidence that the production of the Grant Thornton documents was an inadvertent production of documents under the standards required by Federal Rule of Evidence 502(b). Paragraph 4(e) of the Protective Order in this case specifically incorporates FRE Rule 502(b).

103. It is also worth noting that the Debtors' claim to have "anticipated" litigation as early as 2006 flies directly in the face of the Debtors' often invoked refrain, although in itself highly implausible, that the Debtors (and Quad) simply do not have the ability to produce documents responsive to time period relevant to the claims asserted by Texas in this case. The very premise at the June Status Conference upon which the Debtors based their proposal for limiting the time periods ***for which they*** would be required to provide responsive information was that their record keeping and document retention methods were so inadequate as to preclude

them from being able to provide evidence outside the proposed, limited time frames. At page 10, lines 7-18, Debtors' counsel states:

> "And most importantly, your honor, or very importantly, the debtors books and records, and the way they maintain the books these books and records, makes it difficult if not impossible for the debtors to go back prior to July 1st of 2007 in any kind of a reasonable compressed timeframe. And that's simply a function of the way the debtors maintain their books and records. They don't have centralized processes and electronic recovery available prior to July of 2007, with respect to many of the areas that are most important and responsive to what Texas and Arizona are requesting of the debtors, such as billing records and invoices and shipping and the like."

104. This representation by Debtors' counsel was made after spending "…a lot of time with legal, operational, tax and financial personnel…" after "…day-long meetings in Wisconsin…" and "…numerous telephonic all-afternoon sessions…" See, Transcript of the June Status Conference, p. 7, lines 10-23.

105. The problem is that if the Debtors truly "anticipated" litigation in 2006, then they had a duty under the spoliation of evidence doctrine to affirmatively preserve and keep available all relevant evidence pertaining to the anticipated litigation, which the Debtors have asserted to be ***this very case***. By their own assertion, their duty to preserve relevant evidence to these proceedings began back in 2006. Hence, the belated assertion of the anticipation of litigation as early as 2006 gives rise to the question why the Debtors (and Quad) now repeatedly claim they do not have access to documents relevant to this proceeding. What happened to their duty to preserve relevant evidence? See, *Zubalake v. UBS Warburg LLC,* 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubalake v. UBS Warburg LLC,* 229 F.R.D. 422 (S.D.N.Y. 2004).

106. Nevertheless, by this act of obstruction, Texas will be required to expend the time and resources to prosecute a motion to compel production to overrule their claims of immunity.

Only then will the Texas experts gain access to the information and only then will depositions of the accountants be able to be conducted productively and efficiently.

107. Counsel's letter also stopped the Ernst & Young document production dead in its tracks. Texas had been working cooperatively with Mr. Peter Cahill from Ernst & Young who had informed Texas counsel that the Ernst & Young documents had been gathered and were ready to produce. No documents have ever been produced due to Debtors counsels' assertion of work product immunity as to all documents of Ernst & Young.

108. Ernst & Young prepared the 3-month study that was the very basis of the Debtors' Sales Tax Motion and the calculation of the $2 million dollar amount owed to Texas. [Information Redacted.] The Ernst & Young study was also the basis on which the Debtors induced over 400 local governmental entities and 15 states to settle their claims. It is axiomatic that one cannot use a privilege as both a shield and a sword, making selective disclosure of information favorable to one's own case while denying access to the rest of the information. It is difficult to understand how the Debtors' can in good faith claim that all documents in the possession of Ernst & Young are immune from discovery.

109. Nevertheless, the proceedings again have been disrupted with a motion to compel required to gain access to the information and only then the ability to follow-up with productive and efficient depositions of the relevant accountants.

110. Texas conferred with Debtors' counsel about the accountant subpoenas and the Debtors' claims of immunity. The Debtors requested the opportunity to prepare privilege logs for all three accounting firms – Grant Thornton, Ernst & Young and KPMG. This process, including the receipt of a disk designating those certain Grant Thornton documents for which no

claim of immunity would be pursued, the Debtors' decision not to assert any immunity claim as to KPMG, the subsequent receipt of documents from KPMG and the follow-up with KPMG respecting documents Texas believes should be in their possession or control, was not substantially completed until January, 2012. The Debtors' have not renewed efforts to meet and confer since the privilege logs and other matters have been accomplished despite requests from Texas to do so. Rather, the Debtors have asserted that their current Motion will make the issues moot.

111. In any case, the accountant SDT's have not been in any way improper, burdensome or improper. Rather, the Debtors' have employed obstructionist and dilatory tactics to impede the progress of these proceedings. Time will be needed at the upcoming hearing to discuss how best to proceed with the timing and the procedures to be used to resolve these issues.

E. Debtors' Responses to Discovery.

112. The remaining significant item of pre-existing, outstanding discovery that needs follow-up is obtaining an honest and good faith compliance from the Debtors answering and responding to the Texas written discovery requests, which requests have been outstanding for over a year. The Debtors' complain that Texas has served 24 interrogatories (including sub-parts). In fact, Texas has served a total of 25 interrogatories including all subparts, which is the number allowed by FRCP Rule 33(a)(1). The Debtors' complain that Texas has served 67 requests for production of documents, but FRCP Rule 34 sets no limit on the number of requests for production that may be served. The requests are entirely proper.

113. Moreover, Texas and the Debtors met and conferred on the First Interrogatories and Requests for Production of Texas and the Debtors unilaterally made affirmative agreements

to provide additional answers to interrogatories and to produce documents, as set forth in their Letter Agreement, Exhibit TX-14. The Debtors have never followed up their agreements and have never provided the agreed upon answers or documents, with the exception of the production of certain documents relating only to certain limited requests for production.

114. The Debtors did not answer at all or produce any documents in response to the Second Set of Texas Requests, merely objecting to each request. The Debtors' Answers and Responses to the Texas Second Set of Requests are submitted herewith as Exhibits TX-22 and TX-23. These contain both the requests and the objections. There are only three interrogatories that are designed specifically to copy the initial disclosures required by FRCP Rule 26(a)(1)(A). These requests are per se unobjectionable and must be answered. Yet, the Debtors have simply ignored the requests, interposing baseless objections.

115. It is disingenuous of the Debtors to complain of the Texas written discovery requests no matter how many in number they may be. They certainly have not been burdensome to the Debtors because they have simply ignored them, making blanket objections to every single request, and ignored their own written agreement to provide additional responses and ignored the second requests again making blanket objections to every request, including bad faith objections to the three interrogatories that simply track the language of the initial disclosures required by FRCP Rule 26..

116. Indeed, in their typical yet disingenuous way, the Debtors did answer one specific interrogatory in the First Set served by Texas by glaringly omitting to reveal the presence of the Dallas, Texas sales office and the presence of the Texas based sales representatives headquartered in Texas. Interrogatory Nos. 8 and 9 of the Texas First Set of Interrogatories

asked for the identities of each person responsible for implementing or managing the activities of the Debtors' sales forces generating business in Texas (No. 8) and to describe the activities of the Debtors' sales forces in generating business in Texas (No. 9). In response to Interrogatory No. 9, the Debtors identified several out of state Executives, but never mentioned the Texas sales force including John Hubbard, Sr. Vice President in charge of the Texas sales office and responsible for sales in Texas. The Debtors did not mention any other of the Texas sales personnel headquartered in Dallas, Texas, which the Debtors' themselves have referred to as a "major" sales office. This is not a minor omission of immaterial facts. The Debtors did not even answer Interrogatory No. 9, simply objecting and ignoring the request. The Debtors' did agree to provide additional answers to both these Interrogatories in their Letter Agreement, Exhibit TX-14, but have never done so.

F. June 28, 2011 Status Conference.

117. At no time during the June Status Conference, or before the June Status Conference, or after the June Status Conference, with the exception of the Debtors' current Motion, did the Debtors suggest that Texas was not entitled to obtain the discovery it already had outstanding. Indeed, the Debtors actions prior to the current Motion prove otherwise.

118. Further, the discussion at the June Status Conference was not focused on third party discovery, but on what the Debtors themselves could or would produce. The entire discussion at the June Status Conference was premised on the opening remarks of Debtors' counsel about the limitations, inadequacies and inabilities of the Debtors to produce their own records, however implausible that proposition might be. The temporal limitations discussed were to be applicable to information produced by the Debtors, not a general limitation on

discovery from other sources. Not only was this the gist of the discussion at the June Status Conference, but this was the precise presentation made by the Debtors to Texas in their discussion with Texas prior to the June Status Conference. The Debtors' attempt to re-write history and assert that the intent was to limit all discovery, all third party discovery, all information, even information from easily accessible public sources like the Debtors own annual SEC statements, and that this was to apply retroactively is simply disingenuous.

119. The Debtors' assertion that the parties agreed to limit discovery of the amount of taxes owed to only the 3-month period is especially unbelievable. Debtors' counsel himself announced at the Status Conference that the Debtors themselves would produce discovery and documents relating to the Tax Mitigation Project which involves an elaborate evaluation of a much longer and more relevant period of time than just the 3-month period and makes calculations of the Debtors' tax exposure as of 2006. It is simply unbelievable for the Debtors to assert that Texas agreed to limit discovery of this issue to only the 3-month period when the Debtors themselves affirmed there would be discovery of the Tax Mitigation Project. At the time of the June Status Conference, as described more fully above, Texas already had received Grant Thornton's production of over 80,000 bates stamped pages of the Tax Mitigation Project. Indeed, contrary to the Debtors' assertion that Texas is somehow violating the letter or intent of the June Status Conference, it is the Debtors themselves who are in direct violation by obstructing the discovery of the Tax Mitigation Project documents which they expressly said they would produce.

120. The assertion that Texas agreed that all discovery of nexus would be limited to the suggested 10-month period is not correct. Texas pointed out we already had discovery from the Texas salesmen covering the entire relevant time period. There is an abundant amount of readily

obtainable information on the nexus issue covering the entire relevant time period. Discovery from third parties is essential given the Debtors' destruction of relevant evidence on the nexus issue and the Debtors' refusal to respond reasonably to the Texas discovery requests that they have received. Indeed, Texas has given up on the idea that the Debtors will ever cooperate in good faith discovery.

121. The proposition that the time periods discussed at the June Status Conference represent final agreements set in stone is not accurate. Texas made very clear that it would be willing to give a try at accepting an initial disclosure from the Debtors for those time periods, evaluate that information and determine how to proceed ***with respect to discovery from the Debtors*** after receiving whatever it was the Debtors' were going to provide. After all, Texas had received nothing useful from the Debtors by way of discovery at that point in time anyway. And, we still have not received even what the Debtors said they would provide at the June Status Conference, now almost a year later. Moreover, the Debtors have even obstructed discovery of information they said at the June Status Conference that they would provide.

G. Debtor's Proposed Discovery Limitations.

122. Further, good cause, to the extent needed, exists to reject what amounts to a new proposal by the Debtors in the current Motion. As time passes, cases evolve and circumstances change. What may have seemed reasonable a year ago does not apply today.

123. There is no reason or good cause or any acceptable grounds for placing artificial time limits on discovery, especially third party discovery. The Debtors purported inability to produce documents and information because they have substandard and inadequate record-keeping and record retention systems in place is not in any way a justifiable basis upon which to grant the extraordinary relief they are requesting.

124. Quad is the second largest printing company in the world. It is a large, highly sophisticated, publicly traded international business enterprise. They are generating hundreds of millions of dollars of unrestricted free cash flow each year. They can afford to pay, and are no doubt paying handsomely, at least five attorneys from two of the largest law firms in the country to fight one lone Assistant Attorney General from Texas. They are not under undue burden or strain, nor are they truly unable to respond properly with documents and other information.

125. The Debtors' assertion in their Motion that it took six months to finalize the Protective Order because Texas "…took the position that it should be able to use documents and information…" "…for purposes of investigation and pursuing claims in other actions, including actions unrelated to the Debtors and the Chapter 11 Cases" is not correct. See, p. 11, para. 26 of the Motion.

126. There was a point in time when Texas became concerned that the language of the Protective Order might be able to be used by a third party taxpayer to interfere with Texas' ability to perform its duties to audit or otherwise deal with that third party if that taxpayer had produced information in connection with this case. The issue came up, Texas proposed language to address the issue and the issue was resolved in Texas' favor by including the language now set forth in paragraph 14 of the Protective Order. The issue was not one of major controversy or

time consuming in any significant way. Texas did not "take the position" that it should or would use confidential information to pursue employees or customers of Quad.

127. The real cause of the delay in resolving the Protective Order is primarily the fault of the Debtors. The Court entered the Scheduling Order in December 2010 setting a discovery deadline of May 27. 2011. The Debtors, knowing the confidentiality issue was important to them, and despite repeated requests from the States to present an initial draft, did not present their first draft until June 3, 2011. That's six months of delay due solely to the Debtors. Another two months of time was consumed by the Debtors to negotiate what Texas understands is a fairly simple two or three page side letter agreement with Arizona to address Arizona's concerns respecting its state law duties after Texas had approved the form of the Protective Order.

128. Further, the absence of a Protective Order had not impeded discovery until the Debtors' unilaterally took the position there would be no discovery without a final order. Prior to that time, discovery between Texas and the Debtors was routinely conducted under an interim agreement of confidentiality pending approval of a final protective order. Once the Debtors decided to stop conducting discovery pursuant to interim agreements, Texas was required to respond in like kind.

129. As a practical matter, the Debtors' concerns about confidentiality have always been blown way out of proportion in connection with this case. Texas is a taxing authority, not a competitor or business participant. Texas has no interest in using the information in any way other than to perform its duties. With or without a protective order, Texas has not shared any information whether designated confidential or not with anyone other than Arizona and its own personnel involved in this case.

VIII. Conclusion

130. The Court should bifurcate the issue of nexus from the issue of the amount of taxes owed with respect to Texas. This will simplify the case and enable it to move forward in and efficient and productive manner. The May hearing should be used to discuss and settle a scheduling order that will carry the nexus issue to conclusion. The issue of the amount of taxes owed should be deferred pending a ruling on the nexus issue.

Wherefore, the Texas Comptroller respectfully requests the Court to deny the Debtors' Motion and enter orders consistent with this Response and for such other relief to which the Comptroller may show itself entitled.

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