

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: § Chapter 11
EBHI Holdings, Inc., *et al.*,¹ §
§ Case No. 09-12099 (MFW)
§
Debtors § Jointly Administered

**TEXAS COMPTROLLER OF PUBLIC ACCOUNTS’ OBJECTION TO FIRST
AMENDED JOINT PLAN OF LIQUIDATION OF EBHI HOLDINGS, INC., et al**

The Texas Comptroller of Public Accounts ("Comptroller"), appearing through the Texas Attorney General’s Office, objects to the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc. dated January 26, 2010 (“Plan”)[Docket No. 1269], as follows:

1. The Plan does not comply with the applicable provisions of Title 11 of the United States Code (“Bankruptcy Code”) as required by 11 U.S.C. § 1129(a)(1). Therefore, confirmation should be denied.

PRIORITY TAX CLAIMS

2. The Comptroller timely filed a proof of claim for sales tax, penalty and interest accrued pre-petition in the amount of \$60,342.44 [Claim No. 703]. The claim is entitled to priority under § 507(a)(8)(C) of the Bankruptcy Code. Counsel for Debtors and the Comptroller have executed a letter agreement which, upon approval of the Court, allows the Comptroller’s priority tax

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: EBHI Holdings, Inc., a Delaware corporation (2352); Amargosa, Inc., a Delaware corporation (9737); Gobi Fulfillment Services, Inc., a Delaware corporation (0882); Arabian Diversified Sales, LLC, a Delaware limited liability company (1567); Gibson Services, LLC, an Ohio limited liability company (disregarded); Karakum International Development, LLC, a Delaware limited liability company (1571); Simpson Information Technology, LLC, a Delaware limited liability company (disregarded); Sandy Financial Services Acceptance Corporation, a Delaware corporation (7532); and Sonoran Acceptance Corporation, a Delaware corporation (7253). The mailing address for Eddie Bauer Holdings, Inc is 10401 N.E. 8th Street, Suite 500, Bellevue, WA 98004.



claim.

3. Section 2.4 of the Plan provides for payment Priority Tax Claims, at the sole option of Debtors, in one of three ways. The Comptroller objects because the options in Section 2.4 do not comply with § 1129(a)(9)(C) of the Bankruptcy Code. Section 1129(a)(9)(C) mandates priority tax claims be paid their present value via regular installments to be completed within five (5) years from the order of relief. Therefore, to the extent the Comptroller's priority tax claim is not paid in full on the Effective Date, the Plan should provide for payment, with interest at the rate of 4.25%², via monthly installments to be completed before June 17, 2014. Unless the Plan clearly provides for payment of the Comptroller's allowed priority tax claim in accordance with the mandatory provisions of § 1129(a)(9)(C), confirmation should be denied.

ADMINISTRATIVE EXPENSES

4. The Comptroller timely filed a proof of claim for sales tax, penalty and interest accrued post-petition in the amount of \$1,924.61 [Claim No. 697]. The claim is an administrative expense under § 503(b)(1)(B) and must be paid in cash on the effective date, as mandated by § 1129(a)(9)(A) of the Bankruptcy Code. Counsel for Debtors and the Comptroller have executed a letter agreement which, upon approval of the Court, allows the Comptroller's administrative expense claim.

5. The Comptroller objects to Section 2.5.2 of the Plan to the extent it requires governmental units, such as the Comptroller, to request payment of administrative expenses within

² Pursuant to § 511 of the Bankruptcy Code, the proper rate of interest to enable a creditor to receive the present value of a tax claim shall be determined under applicable nonbankruptcy law. Texas Tax Code § 111.060(b) states, "The rate of interest to be charged to the taxpayer is the prime rate plus one percent, as published in *The Wall Street Journal* on the first day of each calendar year that is not a Saturday, Sunday, or legal holiday." The prime rate on January 1, 2010 was 3.25%.

a specified period of time. Section 503(b)(1)(D) of the Bankruptcy Code clearly states that “a governmental unit shall not be required to file a request for the payment of an expense described in” § 503(b)(1)(B). To the extent the Comptroller’s allowed administrative claim remains unpaid as of the Effective Date, it should be paid in full at that time according to the mandatory provisions of § 1129(a)(9)(A).

DEFAULT

6. The Comptroller objects because the Plan fails to specify remedies which will be available to creditors in the event the Debtors and/or Liquidating Trustee defaults under the Plan. Because of the broad retention of jurisdiction provisions in Article 12 of the Plan, creditors’ remedies in the event of post-confirmation defaults are unclear. Bankruptcy Courts are increasingly insisting that debtors not remain as semi-permanent wards of the Bankruptcy Court, which is the case if the only available remedy for plan defaults occurring after confirmation is to return to the Bankruptcy Court. Instead, the use of state law remedies is encouraged to deal with plan defaults. In In re BankEast Corp., 132 B.R. 665 (Bankr. D. N.H. 1991), Judge James E. Yacos re-wrote the retained jurisdiction provisions of a plan after counsel refused to follow his earlier instructions to do so themselves. Judge Yacos limited post-confirmation jurisdiction to matters necessary to wind up and close the bankruptcy case. In In re BankEast Corp., 142 B.R. 12 (Bankr. D. N.H. 1992), Judge Yacos applied his own plan language to refuse to hear post-confirmation disputes that belonged in state court. While taking note of a trend broadly construing post-confirmation jurisdiction, another court held that post-confirmation jurisdiction is limited to only those matters pending at the time of confirmation. In re J.M. Fields, Inc., 26 Bankr. 852, 854 (Bankr. S.D. N.Y. 1983).

7. Pursuant to § 1123(a)(5)(G) of the Bankruptcy Code, the Plan should provide clear and adequate means for curing or waiving any default. Default remedy language similar to the following has been approved in many bankruptcy cases:

A failure by the Debtors and/or Liquidating Trustee to make a payment to the Comptroller pursuant to the terms of the Plan shall be an Event of Default. If the Debtors and/or Liquidating Trustee fail to cure an Event of Default as to the Comptroller within ten (10) calendar days after service of a written notice of default from the Comptroller, then the Comptroller may (a) enforce the entire amount of its claim(s), (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. Debtors and/or Liquidating Trustee will be allowed to cure no more than two Events of Default with the Comptroller. A third Event of Default cannot be cured.

Pursuant to 11 U.S.C. § 1123(a)(5)(G), which requires that a plan provide adequate means for the plan's implementation, such as "curing or waiving of any default", language similar to the above should be included in the Plan. Otherwise, confirmation should be denied.

WHEREFORE, the Comptroller requests that confirmation of the Plan be denied unless the defects discussed above are cured. The Comptroller requests such other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 10, 2010 a true copy of the foregoing was served by the method and to the following parties as indicated:

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