IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	**Chapter 11**
ZACHRY HOLDINGS, INC., et al.[1]	)	**Case No. 24-90377 (MI)**
Debtors.	)	**(Jointly Administered)**

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS' OBJECTION TO CONFIRMATION OF FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF ZACHRY HOLDINGS, INC. AND ITS DEBTOR AFFILIATES [DKT. 1952]

The Texas Comptroller of Public Accounts, Revenue Accounting Division (the "Texas Comptroller") and the Texas Workforce Commission (the "TWC", collectively, the "State Taxing Authorities"), appearing through the Texas Attorney General's Office, object to confirmation of the above-captioned reorganized debtors (collectively, the "Debtors") *Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates* [Dkt. 1952] (the "Plan"), and would respectfully show the following:

1. The State Taxing Authorities bring their objection (the "Objection") for multiple reasons. First, the Debtors' Plan improperly restricts the setoff rights of State Taxing Authorities and other creditors. The Plan seeks to prevent creditors from asserting their appropriate setoff rights as affirmative defenses post-confirmation should the Debtors pursue their wholly preserved, without limitation, causes of action. Second, the Plan includes unclear and improper default language and procedures upon occurrence of a default. Third, the Plan should more clearly disclose

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' proposed claims and noticing agent at www.veritaglobal.net/ZHI. The location of the Debtors' service address in these chapter 11 cases is: P.O. Box 240130, San Antonio, Texas 78224.

the State Taxing Authorities are entitled to post-confirmation interest at their statutorily appropriate interest rates for their allowed claims if they are paid over time and what those interest rates are. Fourth, the final basis for objection is the Plan improperly encumbers appropriate claim resolution and restricts claim amendments post-confirmation, including even those based on estimates or ongoing audits or tax returns yet to be filed by the Debtors. This is improper and this encumberment would prevent the State Taxing Authorities and other creditors from amending their claims post-confirmation without the Debtors' consent and seeking express approval from the Court. For these reasons, the State Taxing Authorities object to the confirmation of the Debtors' Plan.

I. The State Taxing Authorities' Claims

2. On or about May 28, 2024, the TWC filed its priority claim for unemployment taxes against Debtor Zachry Maintenance Services, LLC ("Zachry Maintenance") in Case # 24-90395, which is jointly administered under this Debtor's case number #24-90377. The TWC's claim is in the amount of $2,341,354.77. An audit is ongoing with the TWC involving Zachry Maintenance and the TWC anticipates working with Zachry Maintenance to finalize the claim amount after reviewing the employment status changes that led to the rate increases causing the significant amount of unemployment taxes to be owed.

3. The Texas Comptroller has asserted joint and several franchise tax liability estimated at $2,000.00 against the Debtor Zachry Holdings, Inc. and 16 affiliate Debtors that are jointly administered with this case. The Texas Comptroller's franchise tax priority claims are based on estimated returns for 2024. The Texas Comptroller seeks a single recovery for the final 2024 franchise tax amount, but liability is joint and several among the Debtors and their affiliates.

4. The Debtors objected to the Texas Comptroller's joint and several claims as duplicative across Debtors. Dkt. 1226 (Debtors" Seventh Omnibus Objection to Certain Proofs of Claim). The Debtors and the Texas Comptroller resolved the objection by stipulation at Docket 1475.

5. The Texas Comptroller claims are joint and several among the below listed Debtors:

TAXPAYER NUMBER	ENTITY NAME/DEBTOR NAME	CASE NUMBER
XXXXXXX8142	ZACHRY HOLDINGS, INC.	24-90377
XXXXXXX0778	ZACHRY EPC HOLDINGS, LLC	24-90378
XXXXXXX1347	ZACHRY ENGINEERING CORPORATION	24-90379
XXXXXXX5963	ZACHRY HIGH VOLTAGE SOLUTIONS, LLC	24-90381
XXXXXXX2263	UE PROPERTIES, INC.	24-90382
XXXXXXX4527	ZACHRY CONSTRUCTORS, LLC	24-90384
XXXXXXX5839	ZACHRY INDUSTRIAL, INC.	24-90385
XXXXXXX4329	ZACHRY ENTERPRISE SOLUTIONS, INC.	24-90386
XXXXXXX2552	MOSS POINT PROPERTIES, LLC	24-90387
XXXXXXX1732	ZACHRY NUCLEAR CONSTRUCTION, INC.	24-90388
XXXXXXX8071	ZACHRY NUCLEAR, INC.	24-90389
XXXXXXX0079	ZACHRY NUCLEAR ENGINEERING, INC.	24-90390
XXXXXXX5231	ZACHRY PLANT SERVICES HOLDINGS, INC.	24-90392
XXXXXXX9821	JVIC FABRICATION, LLC	24-90393
XXXXXXX9028	ZACHRY INDUSTRIAL AMERICAS, INC.	24-90394
XXXXXXX4220	ZACHRY MAINTENANCE SERVICES, LLC	24-90395
XXXXXXX2612	MADISON INDUSTRIAL SERVICES TEAM, LLC	24-90397

II. Plan Improperly Restricts Setoff Rights

6. Article VI(I) on page 33 of the Plan purports to establish a broad, blanket preclusion of the right of setoff against the Debtor unless the Debtors explicitly consent and the State Taxing Authorities as a claim holder seeks relief from the Court to authorize setoff.

7. The Plan specifically states on page 33 of the Plan:

> In no event shall any Holder of Claims be entitled to set off any such Claim against any claim, right, or Cause of Action of the Debtor or Reorganized Debtor (as applicable), unless (i) the Debtors have consented; and (ii) such Holder has Filed a

> motion with the Bankruptcy Court requesting the authority to perform such setoff on or before the Confirmation Date, and notwithstanding any indication in any Proof of Claim or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to section 553 of the Bankruptcy Code or otherwise.

8. The State Taxing Authorities is not aware of any specific setoff right they currently hold against the Debtor, but the State Taxing Authorities should not lose this important right before such setoff right is asserted or discovered. The Debtors has included broad language in Article IV(M) on page 26 of the Plan that allows retention of pre-bankruptcy rights and causes of action by the Reorganized Debtors. This reservation of rights could arguably extend to tax refund claims, or other claims against the state of Texas, which have not yet been asserted. Should the Debtors assert such claims postconfirmation, the State Taxing Authorities are entitled to retain their statutory and common law setoff rights against such claims.

9. Section 553 of the Bankruptcy Code provides that the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such a creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." (Certain limited exceptions set forth in Section 553 are not applicable here.) The Courts have specifically held that the provisions of Section 553 prevail over Bankruptcy Code Sections 524(a)(2) and 1141. *IRS v. Luongo (In re Luongo)*, 259 F.3d 323 (5th Cir. 2001); *In re De Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269 (9th Cir. 1992); *In re Buckenmaier*, 127 B.R. 233 (9th Cir. BAP 1991). Although the Third Circuit in *In re Continental Airlines*, 134 F.3d 536 (3rd Cir. 1998) held that setoff rights may be extinguished by plan confirmation, it did so in a context were the bankruptcy creditor's setoff rights were known before plan confirmation. In this case, the State Taxing Authorities cannot currently assert a right that has not yet manifested, and the Debtors cannot negate that potential right through a bankruptcy Plan.

III. The Plan has inadequate default language.

10. Additionally, the Comptroller objects to the Plan because the Plan contains inadequate remedies in the event of a plan default. Section 1123(a)(5)(G) of the Code states that a plan should provide adequate means for its implementation, including the curing of defaults. Without adequate default remedies, the Debtors' Plan deprives the Comptroller from enforcing its rights as a creditor in nonbankruptcy forums. Default remedy language similar to the following has been approved in many bankruptcy cases in this and other districts and should be added to the plan or confirmation order in this case:

> "A failure by the Reorganized Debtor to make a payment to the Comptroller or Texas Workforce Commission pursuant to the terms of the Plan shall be an Event of Default. If the Reorganized Debtor fails to cure an Event of Default as to payments to the Comptroller or TWC within ten (10) calendar days after service of written notice of default from the Comptroller, the Comptroller may (a) enforce the entire amount of its claim, (b) exercise all rights and remedies under applicable nonbankruptcy law, and (c) seek such relief as may be appropriate in this court. Notice of the default shall be served in writing (including by facsimile transmission or electronic mail) on the Reorganized Debtor as listed below. Reorganized Debtor shall be allowed to cure up to two (2) defaults. Upon a third default, the Comptroller, at its option, may declare the default non-curable and proceed to collect the remainder of the debt.
>
> Debtors or the Reorganized Debtors, to:
>
> Zachry Holdings, Inc.
> P.O. Box 240130
> San Antonio, TX 78224
> Attention: Jay Old
>
> with copies (which shall not constitute notice) to:
>
> White & Case LLP 609 Main Street, Suite 2900
> Houston, Texas 77002
> Attention: Charles R. Koster
> Email: charles.koster@whitecase.com

-and-

White & Case LLP
111 South Wacker Drive Chicago, IL 60606 Attention: Bojan Guzina, Andrew F. O'Neill, William A. Guerrieri, Adam T. Swingle
Email: bojan.guzina@whitecase.com;
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IV. The Plan is unclear as to how the State Taxing Authorities will be paid.

11. The Comptroller also objects to the Plan in that it does not clearly explain how the State Taxing Authorities will be paid, whether over time or in full upon the Effective Date. The State Taxing Authorities objects in particular with regard to interest rates if payments are made over the life of the Plan rather than through payment in full on the Effective Date. If the Debtors ultimately determine it will pay the State Taxing Authorities over time as allowed under the Code, the Confirmation Order or Amended Plan should clarify the interest rates on the payments that will be made to the Comptroller and TWC. 11 U.S.C. § 511 states that the rate of interest on tax claims is determined under applicable nonbankruptcy law as of the calendar month in which the plan is confirmed. A hearing on confirmation in this case is currently scheduled for February 2025. Therefore, pursuant to § 111.060 of the Texas Tax Code, the appropriate rate of interest to be paid on the TWC and Comptroller's priority tax claims is 8.5%.[2]

A. Proposed Language Resolving the Movants' Objections based on Setoff

12. In similar cases to this with similar plan language issues, the State Taxing Authorities has proposed language of the kind stated below:

> Notwithstanding anything herein to the contrary, the setoff or recoupment rights of governmental units shall not be affected by confirmation of this Plan to the extent

[2]Texas Tax Code § 111.060(b) states that 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. The prime rate on January 1, 2025 was 7.5%.

> that such rights relate to (1) a tax refund claim asserted after the Petition Date by any of the Debtors, (2) a tax return amended after the Petition Date by any of the Debtors. Any setoff or recoupment right of a governmental unit as of the Petition Date shall not be affected by confirmation if a proof of claim or motion filed by a governmental unit has asserted such right.

13. The State Taxing Authorities request similar language be included in the Debtors' amended plan or confirmation order to preserve all rights and relief to which the State Taxing Authorities are entitled to under bankruptcy and nonbankruptcy applicable law.

V. The Plan Improperly Restricts Claims Amendment Post-Confirmation

14. The Plan states on page 41 in Article VII(G):

> G. Amendments to Proofs of Claim. On or after the Effective Date, except as provided in the Plan or the Confirmation Order, a Claim or Proof of Claim may not be Filed or amended without the prior authorization of the Bankruptcy Court or the Reorganized Debtors, and any such new or amended Claim or Proof of Claim Filed after the Effective Date shall be deemed Disallowed in full and expunged without any further action or notice to the Bankruptcy Court; provided, however, the filing of an unauthorized amendment shall not affect the underlying Claim or Proof of Claim. Nothing in this paragraph shall impair any claimant's ability to seek leave from the Bankruptcy Court to amend a Claim or Proof of Claim.

15. The Plan improperly encumbers appropriate claim resolution and restricts claim amendments post-confirmation without Debtors or Court approval, including even those based on estimates or ongoing audits or tax returns yet to be filed by the Debtors or an instance in which a claim amount might even be lower than originally stated. This is improper and this encumberment would prevent the State Taxing Authorities and other creditors from amending their claims post-confirmation without the Debtors' consent or seeking express approval from the Court. The State Taxing Authorities request the Court deny confirmation unless the Debtors amend the language in the Plan to remove this impediment to the State Taxing Authorities.

WHEREFORE, the State Taxing Authorities pray the Court deny confirmation of the Plan for the reasons stated above unless proper language in the Plan is amended or proper language and

treatment is included in the Debtors' Confirmation Order to appropriately resolve the objections contained in this Objection and grant such other relief to which the State Taxing Authorities are entitled.

Date: February 19, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 20, 2025, a true copy of the foregoing was served by the method and on the following parties as indicated:

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