The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 9, 2006 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
KEVIN AND TAMMY BURNS,	§	CASE NO. 398-39760-SGJ-11
DEBTORS.	§	

MEMORANDUM OPINION AND ORDER DENYING MOTION TO REOPEN CASE AND TO RECONSIDER ALLOWANCE OF CLAIM

CAME ON FOR CONSIDERATION by this court the Motion to Reopen Case and to Reconsider Allowance of Claim and Brief in Support [Docket Entry #178], the Texas Comptroller's Objection to Motion to Reopen Case [Docket Entry #180], and the Amended Response of Tammy Schreckengast in Opposition to the Motion of Kevin Burns to Reopen Case [Docket Entry #206]. The court held a hearing on August 4, 2006, and extensive evidence and arguments were presented. This memorandum opinion encompasses the court's findings of facts and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. Where appropriate, a finding of fact shall be construed as a conclusion of law and

vice versa. The court reserves the right to make further findings of fact and conclusions of law, as it determines necessary.

FACTS

1. Kevin Dana Burns ("Mr. Burns") and Tammy K. Burns, now known as Tammy Schreckengast (the "Former Mrs. Burns"; together, the "Reorganized Debtors") filed a Chapter 11 bankruptcy case on November 17, 1998.

2. At the time of the Chapter 11 filing, Mr. Burns was conducting business as a sole proprietor under the "dba" name of EZ Cash & Leasing Co., and had been engaged in this business for at least two years. EZ Cash & Leasing Co. conducted business as follows: it would purchase appliances from consumers for a two week period and lease them back to such consumers for a two week period. Then the consumer could purchase the appliances back and pay certain leasing fees.

3. Mr. Burns was in a dispute dating back to at least early 1998 with the Texas Comptroller of Public Accounts (the "Comptroller") as to whether EZ Cash & Leasing Co.'s arrangements with its consumers were sale-leaseback transactions (with regard to which the Debtors were required to pay state sales tax) or the transactions were in the nature of secured financing arrangements (which would not be taxable transactions).

4. After the filing of the bankruptcy case, there were at

least two significant issues that needed to be resolved: (a) resolution of a certain class action lawsuit (Adversary Proceeding # 99-3166) filed against Mr. Burns by certain consumers ("Sale-Leaseback Claimants") who had conducted business with Mr. Burns and/or EZ Cash & Leasing Co. (the "Usury Lawsuit"); and (b) resolution of certain sales tax claims asserted in the case by the Comptroller.

5. The Usury Lawsuit was ultimately resolved by a Judgment entered September 29, 2000, following a mediated settlement between Mr. Burns and the Sale-Leaseback Claimants.

6. Then a First Amended Debtor's Plan of Reorganization (the "Plan"), dated June 1, 2000 [Docket Entry #117], was confirmed in the case, pursuant to an Order Confirming First Amended Plan of Reorganization on an Interim Basis ("Interim Confirmation Order"), entered October 13, 2000 [Docket Entry # 167], and a Final Order Confirming First Amended Plan ("Final Confirmation Order"), entered on November 20, 2000 [Docket Entry #170] (all three items being collectively herein referred to as the "Modified Plan").

7. The Plan did not initially resolve the Comptroller's claims.

8. The Plan included the following pertinent terms. It provided for a "Plan Term" of thirty-six (36) months following the Plan Effective Date (which occurred 30 days after

confirmation). It also provided for payment in full of all claims against the Debtors as follows:

(A) Class 1 "Allowed Administrative Claims" were to be paid in cash in full on the date of Final Confirmation of the Plan[1];

(B) Class 2 "Allowed Secured Claims of State Comptroller" were to be paid with 9% interest from the date of Final Confirmation over a period of thirty-six (36) months in equal installments each due on the first day of the month until paid in full;

(C) Class 3 "Allowed Secured Claims of the IRS" were to be paid with 9% interest from the date of Final Confirmation over a period of thirty-six (36) months in equal installments each due on the first day of the month until paid in full;

(D) Class 4 "Allowed Priority Claims of State Comptroller" were to be paid with 9% interest from the date of Final Confirmation over a period of thirty-six (36) months in equal installments each due on the first day of the month until paid in full;

(E) Class 5 "Allowed Priority Claims of the IRS" were to be

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[1] "Final Confirmation" was a defined term under the Plan, defined to mean "that date which is eleven (11) days following the entry of the Order Confirming Plan, during which period of time no Notice of Appeal is filed, or if a Notice of Appeal is filed, during which period of time no Motion for Stay Pending Appeal is granted or supersedeas bond is approved and filed." Note that no Notice of Appeal was filed with regard to the plan confirmation orders in this case.

paid with 9% interest from the date of Final Confirmation over a period of thirty-six (36) months in equal installments each due on the first day of the month until paid in full;

(F) Class 6 “Allowed Sale-Leaseback and Tort Claims were to be paid pro-rata out of $25,000 to be made available on the date of Final Confirmation;

(G) Class 7 “Allowed General Unsecured Claims” were to be paid in full from the date of Final Confirmation over a period of thirty-six (36) months in equal installments each due on the first day of the month until paid in full;

(H) Class 8 “Debtors” were to retain their existing interest in the Debtors’ business under the Plan and would be entitled to receive reasonable compensation for future services rendered by the Debtors to the Debtors’ business.

9. The Plan provided for a Disbursing Agent, Joyce Lindauer, to disburse funds to creditors under the Plan, including from funds in the registry of the court, from proceeds of sales of certain assets of the Debtor, and from funds to be provided by the Debtors from their business operations.

10. The Interim Confirmation Order modified the Plan in certain respects, to, among other things, provide that the “term of the Debtor’s Plan shall extend no less than 36 months and no more than 60 months as necessary to amortize the priority claims of the IRS and the Comptroller with interest over the life of the

Plan." The Interim Confirmation Order also listed the claims that were "known to the Debtors," and such list included a $20,967.12 administrative claim of the Comptroller ("based on returns filed by the Debtors"). The Interim Confirmation Order also listed a $1,027,794.37 "Comptroller Priority Claim" that was "[s]ubject to objection by the Debtors." The Interim Confirmation Order also provided that the Disbursing Agent would disburse to the IRS and Comptroller on a pro rata basis an interim amount of $20,000 per month commencing on September 1, 2000 and continuing on the first day of each and every month until further order of the Court, until payment of these entities in full, along with an 8.5% per annum interest rate. The Interim Confirmation Order contained certain default provisions/remedies as well.

11. Finally, the Final Confirmation Order reiterated that the "term of the Debtors' Plan shall be from 36 months up to no longer than 60 months as necessary to amortize the priority claims of the IRS and the Comptroller with interest over the life of the Plan" and also provided that "[t]his Order shall be in addition to and shall include the terms of the Order Confirming First Amended Plan of Reorganization on An Interim Basis entered by the Court on October 13, 2000."

12. Seven days after the Final Confirmation Order was entered (*i.e.,* on November 27, 2000) Mr. and the Former Mrs.

Burns obtained an Agreed Final Decree of Divorce from one another.

13. There was at least one piece of unfinished business as of the time of the Final Confirmation Order. On June 1, 2000, the Debtors had filed an Objection to Claim #13 of the Texas State Comptroller. The Comptroller had filed a $1,167,734.53 proof of claim in the case and the Objection by the Debtors alleged that the proof of claim was unsupported by the actual amount of sales by the Debtors for the tax years in question.

14. Then, the parties later resolved the proof of claim of the Comptroller. On February 1, 2001, the Court entered an Agreed Order on Objection to Claim No. 13 of Texas Comptroller of Public Accounts. Such agreed order represented that the Debtors and Comptroller had resolved their disputes with respect to the Comptroller's claims and that it was ordered that the "Comptroller shall have an allowed priority tax claim, pursuant to 11 U.S.C. § 507(a)(8)(C), in the amount of $786,351.04 and a general unsecured claim (regarding tax penalties) in the amount of $50,742.88, such amounts to be paid pursuant to the confirmed plan in this case."

15. On October 9, 2001, the Debtors filed a Motion to Close Case [Docket Entry #174]. In response to said motion, this bankruptcy court entered an Order Granting Motion to Close Case [Docket Entry #177], on October 26, 2001. On February 12, 2002,

this bankruptcy case was administratively closed by the bankruptcy clerk.

16. The evidence at the August 4, 2006 hearing disclosed some events that occurred between the February 1, 2001 settlement of the Comptroller's claims in the case and the Debtors' moving to close their case that this court considers highly relevant to the pending Motion to Reopen the Case. Specifically, Mr. Burns testified that in or around July 2001, Mr. Burns learned from an acquaintance of his and fellow businessman, Dan Young, who has or had a business similar to EZ Cash & Leasing Co., which business was called Cash Time Leasing LC, that it was the position of the Comptroller, in connection with an audit that the Comptroller did of Cash Time Leasing LC, that the types of transactions that Cash Time Leasing LC was conducting were not, in fact, taxable sale-leaseback transactions but were, rather, nontaxable financing transactions. Apparently, Dan Young faxed to Mr. Burns a letter Mr. Young had received dated July 30, 2001 from an auditor in the Comptroller's office that indicated the auditor had researched Cash Time Leasing LC's business activities and had found some internal research at the Comptroller's office suggesting that Cash Time Leasing LC's business activities were not taxable. Dan Young faxed to Mr. Burns the July 30, 2001 letter from the auditor at the Comptroller's office he had received.

17. The evidence presented was not clear that Cash Time

Leasing LC's business transactions were identical to EZ Cash & Leasing Co.'s (Mr. Young was unclear on cross-examination regarding some of the contract terms he has or had with his customers), but Mr. Burns and Mr. Young seemed to believe they carried on business in a virtually identical fashion.

18. Mr. Burns testified that he called his bankruptcy lawyers, soon after receiving this information from Dan Young (*i.e.,* impliedly soon after July 30, 2001), for advice on what to do with regard to the Comptroller. The evidence indicated that Mr. Burns had long disputed the notion that he owed sales tax to the Comptroller. For example, a Dispute Resolution Report from the Comptroller's office was introduced into evidence, dated April 1, 1998, in which Mr. Burns (according to the dispute resolution officer who had authored the report) had indicated Mr. Burns had indicated he would request a hearing on the tax assessment imposed on his business–although he never had. Additionally, a letter dated September 15, 1999 from Mr. Burns' bankruptcy lawyer to one of the Assistant Attorneys General of Texas was introduced into evidence in which Mr. Burns' lawyer indicated he was paying a check for sales taxes allegedly owed to the Comptroller in "protest of payment" and only because an Examiner appointed by the bankruptcy court during the bankruptcy case had directed it to be done and because it would stop the accrual of interest and penalties.

19. Mr. Burns further testified that his bankruptcy attorneys advised him that he should contact someone at the Comptroller's office with regard to this July 30, 2001 letter and explore whether he might be entitled to a tax refund for his business.

20. The evidence was that Mr. Burns soon hired a lawyer, Judy Cunningham in Austin (in approximately fall of 2001), who was an expert with regard to Texas Comptroller tax issues, and she began to work on attempting to obtain a tax refund.

21. The evidence also was that an internal memo was soon discovered dated January 31, 2000 (the so-called "Soto Memo") that appeared on an internal website at the Comptroller's office. Mr. Burns testified 2 to 3 times that he had never actually seen the memo, so it was unclear whether it first came to his attention from his conversations with Dan Young or through his later conversations with Judy Cunningham. In any event, Mr. Burns and his counsel believe the Soto Memo is very significant.

22. The Soto Memo, which was introduced into evidence at the August 4, 2006 hearing, is a memo prepared by someone named Tom Soto in the "Tax Policy" department of the Comptroller's office, apparently in response to an auditor who had an inquiry of him regarding a business model extremely similar to that of EZ Cash & Leasing Co. The Soto Memo indicated that a business who entered into transactions with customers who purportedly sold and

leased back appliances from the business on a 2-week basis (and paid certain fees in connection with same) should not pay taxes on these sale-leaseback transactions because they were really more like financing arrangements. Apparently this Soto Memo is what the auditor who sent Dan Young the July 30, 2001 letter was relying on in deciding that Dan Young's business was not subject to sales tax.

23. Judy Cunningham filed a claim for sales tax refunds on Mr. Burns' behalf on November 26, 2001 (exactly 30 days after the Order Granting Motion to Close Case [Docket Entry #177], had been entered on October 26, 2001). Judy Cunningham's claim for sales tax refunds relied on the Soto Memo as a justification for the refund. Mr. Burns and Judy Cunningham each testified that the possibility of filing something in the bankruptcy court had been discussed in Fall of 2001 with Mr. Burns' bankruptcy attorneys (since the bankruptcy case was still open) but neither one of them were quite sure why this was not the recommended course of action. Thus, the bankruptcy case was closed, with this request for tax refund pending, and neither the bankruptcy court nor parties in interest in the case had any reason to know about it.

24. The testimony of Judy Cunningham described many months, turning into years, of proceedings in Austin, Texas devoted to trying to obtain a tax refund on Mr. Burns' behalf. There were various meetings before Comptroller's staff and filings and

hearings before an administrative law judge, finally culminating in a Comptroller's Decision dated September 1, 2005, ("2005 State ALJ Decision") in which Chief Administrative Law Judge Eleanor H. Kim denied that Mr. Burns was entitled to any refund. Her main reason cited for her holding was that the tax refund issues were the subject of a final, nonappealable bankruptcy court order (*i.e.,* the Agreed Order allowing the Comptroller's claim entered February 1, 2001 in the bankruptcy case). However, in response to arguments that false representations/nondisclosures were essentially committed by the Comptroller in the bankruptcy case, by not mentioning the position of the Comptroller stated in the Soto Memo, Judge Kim stated:

> In [the Soto Memo], the agency determined that the inquirer's specific facts presented a financing arrangement. All taxability letters contain the standard disclaimer that the opinion is based on the facts presented and that any additional or different facts may change the opinion provided.[2] Given that Claimant treated his sale-leaseback transactions as taxable by collecting sales tax on rental charges, and never challenged the taxability of his transactions, the agency personnel involved in the bankruptcy proceeding had no reason to question the taxability of Claimant's transactions. . . . [T]he burden was on the Claimant to raise that issue and to challenge it. Claimant did not do so.

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[2] The court notes that, in fact, a separate policy memo was introduced into evidence at the August 4, 2006 hearing (the so-called Zamora Memo, *i.e.*, a September 14, 1999 letter prepared by a person in the Comptroller's tax policy division named Gilbert Zamora), which also seems to describe sale-leaseback transactions similar to those in which EZ Cash & Leasing Co. engaged, and the Zamora Memo describes the transactions as taxable.

25. Shortly after the 2005 State ALJ Decision, Mr. Burns moved for a rehearing of that decision, but a rehearing was denied in October 2005. Approximately seven months later, Mr. Burns moved to reopen his bankruptcy case.

26. In the Motion to Reopen the bankruptcy case, Mr. Burns argues that the Comptroller changed its policy (as evidenced by the Soto Memo) with regard to the taxability of transactions such as the ones that EZ Cash & Leasing Co. during the course of his bankruptcy case (*i.e.,* after his bankruptcy was filed but before the Comptroller filed its proof of claim in the Burns' case), that Mr. Burns and the bankruptcy court had no way of knowing about the change in policy at the time the proof of claim was agreed to and allowed, and Mr. Burns relied on the Comptroller's representations that EZ Cash & Leasing Co.'s transactions were taxable. Mr. Burns argues that 11 U.S.C. § 350(b) gives this bankruptcy court discretion to reopen his case "to accord relief to the debtor, or for other cause" with there being no time limit on this discretion. *See also* Fed. R. Bankr. P. 5010. Mr. Burns also argues that 11 U.S.C. § 502(j), once the case is reopened, permits the bankruptcy court to reconsider a claim that has been allowed or disallowed "for cause"–once again, with there being no time limitation on such a reconsideration of a claim. *See also* Fed. R. Bankr. P. 3008. Finally, Mr. Burns argues that there has been a fraud upon the court and that there is no time limit in

Fed. R. Civ. P. 60(b) or anywhere else that affect a court's inherent power to set aside a judgment procured by fraud on the court. Mr. Burns has made the argument that Mr. Browning, as an officer of the court, committed some sort of intrinsic or extrinsic fraud by not disclosing to Mr. Burns and the bankruptcy court the Soto Memo. Mr. Burns argues that, if nothing else, this court can exercise its equitable powers under 11 U.S.C. § 105 to address the alleged inequities of this situation. The court notes that Mr. Browning himself took the witness stand and swore under oath he did not know about the Soto Memo until around June 2002 after Judy Cunningham got involved on Mr. Burns' behalf. Moreover, he was not convinced that the Soto Memo involved the exact same facts as the transactions involved with EZ Cash & Leasing Co.

27. For the record, the Former Mrs. Burns has expressed no opposition to the reopening of the case, so long as the confirmed plan is not revoked and so long as she has the right to argue that she has the right to a share of any recovery that Mr. Burns could ultimately realize in relitigating the claim of the Comptroller in the bankruptcy court, if he is allowed to do so.

CONCLUSIONS OF LAW

Based on these facts, the court concludes as follows:

A. Mr. Burns' motion and arguments before this court suggest that the starting place in this court's analysis is 11

U.S.C. § 350(b) and the case law construing the "for cause" language therein. Part and parcel to that, he argues primarily that a fraud upon the bankruptcy court occurred and this is the "cause" to reopen the case and rectify the fraud.

B. This court first disagrees that Section 350(b) of the Bankruptcy Code is the starting point. A bankruptcy court must always start out with examining its own federal subject matter jurisdiction to adjudicate a dispute pursuant to 28 U.S.C. § 1334(b). This is an especially pertinent inquiry in a situation in which a chapter 11 case has been closed after confirmation and consummation of a reorganization plan. Bankruptcy jurisprudence has made clear in post-confirmation contexts that, after confirmation, a Chapter 11 debtor is technically no longer a "debtor" but is an emancipated, reorganized debtor, and is no longer a ward of the bankruptcy court. This means that he cannot forever come running back to the bankruptcy court for relief.

C. The bankruptcy court's post-confirmation subject matter jurisdiction has been defined by the Fifth Circuit in among other cases, the case of *Craig's Stores of Texas, Inc. v. Bank of Louisiana (In re Craig's Stores of Texas, Inc.)*, 226 F.3d 388, 389 (5th Cir. 2001) ("[B]ankruptcy court jurisdiction does not last forever."). The Fifth Circuit opined there: The debtor's emergence from bankruptcy protection is of critical significance

in determining whether a bankruptcy court has post-confirmation jurisdiction. *Id*. at 390. "After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or the execution of the plan." *Id*. The bankruptcy court's jurisdiction is no longer the "expansive" jurisdiction required to facilitate administration of the estate because there is no estate left to administer or reorganize. *Id*.

D. Also pertinent, in *In re Case*, 937 F.2d 1014 (5th Cir. 1991), the Fifth Circuit held that a post-confirmation dispute concerning a promissory note that was central to the settlement of a creditor's claim in a plan, and was central to how the creditor was to be treated under the plan, was a core proceeding. In *In re Craig Stores,* the Fifth Circuit distinguished the factual situation from *In re Case,* noting that "[u]nlike the dispute in *Case*, the post-confirmation dispute at issue in this appeal has nothing to do with any obligation created by the debtor's reorganization plan." *In re Craig's Stores of Texas, Inc.*, 226 F.3d at 391. *See also In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1060, 1064 (5th Cir. 1997) (the bankruptcy court in *Nat'l Gypsum* found that it had concurrent jurisdiction, rather than exclusive jurisdiction, of a dispute raised by an adversary proceeding brought by the reorganized debtor and the creditors trust created under the plan because the plaintiffs "sought to

ascertain whether its Confirmation Order and the reorganization plan precluded" prepetition claims of an insurer). In *Nat'l Gypsum*, the insurer filed, in lieu of an answer, a motion seeking abstention in favor of arbitration, a stay pending arbitration, and, alternatively, to dismiss for lack of subject matter jurisdiction. *Id*. Denying the insurer's motion, the bankruptcy court held that the dispute was a core proceeding. *Id.* The bankruptcy court found that, while it ordinarily would have abstained in favor of the nonbankruptcy forum (in this case, arbitration) given the passage of time after substantial consummation of the plan, since there was no arbitration proceeding ongoing, the bankruptcy court was the most efficient forum to determine the issues raised in the complaint and refused to abstain. *Id.* at 1060-61. The insurer appealed asserting, *inter alia*, that the court erred in finding that the issues raised in the adversary proceeding were core. *Id*. at 1062. Recognizing that "actions to enforce the discharge injunction are core proceedings because they call on a bankruptcy court to construe and enforce its own orders," the Fifth Circuit found that the reorganized debtor's action to enforce the discharge injunction and construe the scope and effect of the confirmed plan is a core proceeding arising under the Bankruptcy Code. *Id*. at 1063-64.

E. The basic thrust of each of the Fifth Circuit opinions

cited above is that if a post-confirmation dispute involves *implementation or execution of a confirmed plan or construction of a confirmed plan*, then the bankruptcy court can exercise jurisdiction. In *In re Case*, the dispute was central to implementation of the plan. In *Nat'l Gypsum*, the dispute concerned enforcement and construction of the bankruptcy court's own orders. By contrast, in *Craig's Stores*, the dispute was simply a postconfirmation dispute regarding postconfirmation actions under a contract assumed pursuant to the plan. *In re Craig's Stores of Texas, Inc.*, 226 F.3d at 389-90. Unlike *In re Case* and *Nat'l Gypsum*, resolution of a postconfirmation dispute regarding postconfirmation actions of the parties had no bearing on "interpretation or execution of the debtor's plan and therefore [did] not fall within the bankruptcy court's post-confirmation jurisdiction." *Id.* at 391.

F. Here, the court believes it would be improper for it to exercise post-confirmation subject matter jurisdiction and reconsider the Comptroller's claim. Here, the evidence was that the Burns' plan was to be completed in between 36 to 60 months with all creditors required to be paid in full. The testimony was that Mr. Burns now thinks all creditors have been paid in full (except for the Comptroller and IRS' claims—whose claims Mr. Burns views as disputed). If all creditors have not been paid in full, Mr. Burns testified he will pay any unpaid creditors if and

when he gets any refund from the Comptroller. However, Mr. Burns said he thought that he would be the primary if not sole beneficiary of any order disallowing or reducing the Comptroller's claim by this court. Notably, the plan distribution agent was not at the hearing to testify and confirm or deny whether the Plan has been fully implemented as required or whether there would be any other beneficiary of Mr. Burns' efforts in the bankruptcy court at this time. In any event, the court does not see how reconsideration of the Comptroller's claim or even wholesale disallowance of it would bear on the *interpretation or execution or construction of a 5+ year old confirmed plan*. No matter what the result, all creditors were required to be paid in cash in full by now, and presumably have been (there being no concrete evidence to the contrary). Even if all creditors have not, for some reason, been paid in cash in full by now, they were required to be, whether the Comptroller had an $800,000 claim or a zero claim. Moreover, the Comptroller was required to be paid in cash in full (with interest, over no more than 60 months), whether its claim is $800,000 or something else. Thus, this court believes it must follow the strict admonishments of the Fifth Circuit and not exercise jurisdiction over this dispute. The court cannot see how this very tardy

dispute over the amount of the Comptroller's claim[3] genuinely bears on implementation or execution or construction of a long ago confirmed plan.

G. However, in the interest of judicial economy, this court will analyze the appropriateness of exercising its power under Section 350(b) to reopen Mr. and Mrs. Burns' case "for cause," in the event that some appellate court determines this court did have subject matter jurisdiction, pursuant to 28 U.S.C. § 1334, to reopen this case and reconsider the Comptroller's claim under 11 U.S.C. § 502(j).

H. Once again, the discussion in *In re Case* is significant to the inquiry before this court, because *In re Case* also involved a motion pursuant to 11 U.S.C. § 350(b) to reopen a case. The motivation for the motion to reopen in *In re Case* was to ask the court to exercise jurisdiction over a postconfirmation dispute that had arisen concerning the enforceability of a promissory note issued pursuant to a plan, in which the debtor alleged, among other things, fraudulent inducement on the part of the creditor (*i.e.,* that the creditor had, in fact, orally agreed to different consideration other than monetary payment of the note). Mr. Case was a Mississippi attorney who had filed for Chapter 11 protection. As part of the plan negotiations, he

[3] It should be noted that the Comptroller has some level of priority claim no matter what; the testimony was that only part of its claim related to sale-leaseback transaction taxes.

settled the claim of Citizens Bank and Trust Co. (the "Bank") by executing a $75,000.00 promissory note. *In re Case*, 937 F.2d at 1017. In January of 1988, Mr. Case became delinquent in his payments under the note. The Bank sued Mr. Case in state court and also sought to reopen the bankruptcy case. Mr. Case's defense to defaulting on the note was that the Bank had agreed to take payment in kind for the note (*i.e.,* they agreed Mr. Case could perform legal services for the Bank to pay off the note). The bankruptcy court reopened the proceeding and ultimately found for the Bank. *Id*.

I. The Fifth Circuit noted that the phrase "or other cause" in section 350(b) is a broad term that gives the bankruptcy court discretion to reopen a closed estate when cause is shown. *In re Case*, 937 F.2d at 1018. "This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings. The longer the time between the closing of the estate and the motion to reopen, however, the more compelling the reason for reopening the estate should be." *Id.* In *In re Case*, there was a seven month lag between the closing of the case and its reopening. Under the circumstances, the Fifth Circuit, agreeing with the District Court's conclusions, found that the motion to reopen was "a timely response to a challenge to an integral part of the reorganization plan and that it was necessary to reopen the case

to determine if the express provisions of the note and the plan should be altered." *Id*. The Fifth Circuit found that the reasons were sufficiently compelling and the bankruptcy court did not abuse its discretion in reopening the case. *Id*. at. 1018-19.

J. While Article 13 of the Burns Plan provides for retention of jurisdiction for the allowance or disallowance of claims, Paragraph 4 of the confirmation order specifically provides that the Comptroller's priority claim of $1,027,794.37 was subject to objection by the debtors. Accordingly, unlike in *In re Case*, confirmation of the Burns Plan did not rest upon the settlement of the Comptroller's claim. Indeed, the Comptroller's claim was specifically left for post-confirmation resolution.[4] Moreover, there is no seven month lag on the part of Mr. Burns bringing the present action, but a lag of nearly four and a half years since the case was closed in February of 2002. This court may have had jurisdiction in 2001, when Mr. Burns asserted he discovered the Comptroller's policy (i.e., the Soto Memo) regarding taxability of his so-called "sale-leaseback" transactions, to re-determine claims, yet Mr. Burns forewent timely relief before this court at a time when the case was still open in favor of pursuing state court remedies. Mr. Burns could have sought this court's relief mere months after the entry of

[4] And was so resolved by agreed order entered on February 1, 2001.

the agreed order resolving the Comptroller's claim, but instead waited years before coming back to this court.

K. If, *arguendo*, this dispute with the Comptroller is central to the administration of the plan now, it was certainly central to its administration in 2001, when the case was still open. Revisiting the time line, the plan was confirmed on an interim basis on October 13, 2000. A final confirmation order was entered on November 20, 2000. In July 2001 or shortly thereafter, the Debtor or its counsel discovered the Soto Memo. Then, on October 9, 2001, the Debtors filed a motion to close the case asserting payments had been made on all allowed and administrative claims and that distributions had commenced to the priority and unsecured claims such that the plan had been substantially consummated. Importantly, these representations in the motion to close the case were made *after* the alleged Summer of 2001 discovery of the Comptroller's policy memo regarding taxability of so-called "sale-leaseback" transactions. The case was closed by order of the Court on October 26, 2001 with the specific finding that the case was fully administered. The Debtors averred (and judicially admitted) in the motion to close the case that the plan was substantially consummated and the court found that the case had been fully administered. Moreover, not only is there no estate to administer, but resolution of the Comptroller's claim, unlike the Bank's claim in *In re Case*, was

specifically excepted from the plan confirmation.

L. Accordingly, this dispute regarding resolution of the Comptroller's claim does not only not bear upon construction of the plan, enforcement of an agreement embodied in the plan, or the administration of the estate, but the motion to reopen comes years after the closing of the case and years after the Soto Memo was discovered. The court believes it would be a gross abuse of discretion to allow this case to be reopened under these circumstances, where the Soto Memo is essentially alleged to be a "smoking gun"–yet was discovered 5 years ago (before the closing of the bankruptcy case) and is just now being brought to the attention of the bankruptcy court.

M. The court might have been persuaded to make a different determination and reopen this case and reconsider the claim of the Comptroller, if the evidence had pointed in the direction of a fraud upon the court. However, the court believes the more credible testimony was that: (a) Mr. Browning of the Texas Attorney General's Office (who was representing the Comptroller) did not know about the Soto Memo during the bankruptcy case; (b) the Soto Memo was not necessarily dispositive of Mr. Burns' situation anyway—since there is no clear evidence that the situation described in the Soto memo was identical in every way to Mr. Burns' situation; (c) there was a contrary Zamora Memo suggesting that there was a different policy expressed regarding

the taxability of these type sale-leaseback transactions that predated the Soto Memo by a mere four and a half months, suggesting that there was either conflicting views on how the Burns' situation should be treated during the relevant time periods, or alternatively suggesting that there was not a "one size fits all" approach to businesses similar to Mr. Burns.

N. In any event, the court notes that in the world of bankruptcy, compromises of claims are proposed and approved all the time for the reason that there are legal arguments both pro and con for a debtor, and based on litigation risks, and expense and delay of litigation and other factors. Thus, significant claims are allowed or compromised, regardless of whether they are 100% sustainable. Here, the court notes that the Comptroller took an approximately $300,000 haircut off of what it originally sought from Mr. Burns. There is no evidence reflecting that the compromise in this case was anything other than a normal give-and-take compromise that is typical of bankruptcy.

O. In any event, if Mr. Burns thought he had been genuinely defrauded by the Comptroller or his counsel, this court thinks he would and should have brought it to the bankruptcy court's attention in mid 2001. Not only did he decline to do that, but he moved to close the case.

CONCLUSION

This court simply believes it is too late now for Mr. Burns

to come running back to the bankruptcy court for relief. The court does not believe it can exercise subject matter jurisdiction, pursuant to 28 U.S.C. § 1334(b), at this procedural juncture. Even if this court believed it had subject matter jurisdiction, it would not feel compelled to reopen this case after 5+ years "for cause" when Mr. Burns had as much information about the merits or weaknesses with regard to the Comptroller's claim as Mr. Burns has right now (*i.e.,* he has known about the Soto Memo for 5+ years). Finally, the court does not believe there is any credible evidence of any type of fraud on the court or fraud by an officer of this court.

ORDER

Based on the foregoing, Mr. Burns' motion to reopen case and to reconsider allowance of claim is herein denied.

###END OF MEMORANDUM OPINION AND ORDER###