UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: HILLSBOROUGH HOLDINGS CORP., *et al.*, Debtors.	Chapter 11 Case No. 8:89-bk-9715-KRM
HILLSBOROUGH HOLDINGS CORP., *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Adv. No. 8:91-ap-313-KRM

PLAINTIFF'S REPLY REGARDING MOTION FOR AN ORDER PURSUANT TO 28 U.S.C. § 1412 AND BANKRUPTCY RULE 7087 (A) TRANSFERRING ADVERSARY PROCEEDING TO THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ALABAMA AND (B) GRANTING RELATED RELIEF

1. In its September 2, 2015 Response [Dkt. No. 454] (the "**Response**") to Plaintiff Hillsborough Holdings Corp.'s ("**Plaintiff**'s") motion for entry of an order transferring the above-captioned adversary proceeding (the "**Adversary Proceeding**") to the Alabama Bankruptcy Court [Dkt. No. 444] (the "**Motion**"),[1] the United States of America (the "**government**") asserts that (a) this Adversary Proceeding can be readily resolved, either because there has already been a "settlement" or because the underlying tax issues have already been determined, and (b) there is therefore no advantage to be gained in transferring the Adversary Proceeding to the Alabama Bankruptcy Court. Neither of these assertions is correct, and both

[1] Capitalized terms used in this Reply, but not defined here, have the meanings ascribed to them in the Motion.

fail to address Plaintiff's point that all of the issues in the Adversary Proceeding, along with all of Plaintiff's other federal tax issues, can be dealt with in the Alabama Bankruptcy Court, without any prejudice to the government's positions in this matter.

I. Substantial Issues Remain Unresolved

2. Substantial issues remain unresolved in this Adversary Proceeding. To begin with, the government ignores the fact that Plaintiff vigorously disputes the existence of any "settlement" here. The government's motion for judgment based on the alleged "settlement" has not even been fully briefed, and an ultimate determination may well require resolving disputed factual issues.

3. For example, among other things, Plaintiff contends that it has always made clear to the government that pre-1995 tax issues had to be resolved in conjunction with post-1995 tax years, years for which the government owes substantial refunds to Plaintiff and its successor. As early as 2007, the government recognized Plaintiff's intention to resolve pre- and post-1995 tax issues together, requesting from Plaintiff "for each of the years 1983 through 2005, . . . all the books, records, files, etc. . . ." Letter from Robert L. Welsh to Donald C. Alexander, dated Jan. 18, 2007, attached hereto as Exhibit A. Similarly, Plaintiff's proposal to the government in November 2007 expressly included treatment of years after 1995. Letter from Donald C. Alexander to Robert L. Welsh, dated Nov. 6, 2007, attached hereto as Exhibit B.

4. Indeed, counsel for Plaintiff advised the government on October 27, 2011, in connection with their negotiations: "[T]his is to confirm that it is Walter's intention to resolve all tax issues, with the IRS and the Justice Department for all open years through 12/31/2010, in a manner consistent with our settlement offer dated October 19th, 2011." Email from Stephen D. Gardner to Robert L. Welsh, dated Oct. 27, 2011, attached hereto as Exhibit C. Counsel for

Plaintiff reiterated this point in a letter two weeks later: "It is our objective to settle all open issues in the years covered by this case and the related issues in the years that are within the jurisdiction of the Internal Revenue Service." Letter from Stephen D. Gardner to Robert L. Welsh, dated Nov. 11, 2011, attached hereto as Exhibit D. The government responded by acknowledging Plaintiff's offer to compromise certain issues "for the years through December 31, 2010, as set out in your email of October 27, 2011," and expressing no disagreement with that approach. Letter from Robert L. Welsh to Stephen D. Gardner, dated Nov. 21, 2011, attached hereto as Exhibit E.

5. The government does not suggest that there has been any settlement with respect to post-1995 tax years, a long-established element of any potential settlement regarding the years at issue in this Adversary Proceeding. Thus, the resolution of the "settlement" issue alone will be no small task.

6. The government further errs in asserting that, if its "Settlement Motion" is denied, all of the other "aspects of the pre-1995 tax disputes are settled by orders of this Court." *See* Response at 2-3. To the contrary, although Bankruptcy Judge Paskay rendered decisions on certain disputed matters at issue in the Adversary Proceeding, the parties have been unable to agree on a proposed final judgment in the five years since Judge Paskay directed them to do so. *See* Order Vacating Final Judgment [Dkt. No. 403] (June 22, 2010) ("The parties shall submit directly to chambers a proposed final judgment addressing all issues that have been resolved through proceedings before this Court or by agreement of the parties . . . ."). This inability in itself shows that the pre-1995 tax liabilities are not fully resolved. If the previous decisions had fully and finally addressed all open issues in this matter, there would have been no dispute between the parties on the terms of a final judgment and no need for any "settlement."

7. More specifically, as the government appears to concede, Judge Paskay's decisions were not final, and hence, appeal rights continue to exist. *See* Response at 3 (noting that an appeal "will be possible . . . after a final judgment is entered by this Court"). The parties therefore disagree not only on how Judge Paskay's decisions apply to determine Plaintiff's pre-1995 tax liability, but how those decisions will fare on appeal. They also disagree on the calculation of interest on any amounts Plaintiff owes to the government—an obviously key issue given the number of years that have passed.

8. In sum, substantial disputes relating to Plaintiff's pre-1995 tax years still remain to be resolved.

II. The Alabama Bankruptcy Court Is the Most Appropriate Forum

9. With none of the above disputes fully and finally resolved, the government is also wrong in belittling the advantages gained in transferring this Adversary Proceeding to the Alabama Bankruptcy Court. To begin with, the Alabama Bankruptcy Court clearly can resolve all of the parties' pre-1995 disputes, including the "settlement" issue. Given the lack of any final order as to the pre-1995 issues, the Alabama Bankruptcy Court, now presiding over the Chapter 11 Cases of Plaintiff's successor, has the ability under section 505 of the Bankruptcy Code to "determine the amount or legality of [Plaintiff's prepetition] tax[es] . . . ," because the amount or legality of such tax has not been finally adjudicated. *See* 11 U.S.C. § 505(a) ("[T]he court may determine the amount or legality of any tax . . . whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."); *accord In re Mantz*, 343 F.3d 1207, 1212-13 (9th Cir. 2003) (concluding that, absent a final prepetition adjudication that is no longer subject to appeal, a bankruptcy court may determine tax claims, and collecting cases so holding); *In re R-P Packaging, Inc.*, 278 B.R. 281, 287 (Bankr. M.D. Ga. 2002) (same).

10. In addition, *only* the Alabama Bankruptcy Court can determine whether and to what degree the pre-1995 tax and interest liabilities of Plaintiff and its successor (and their affiliates) (collectively, the "**Debtors**") can be offset or otherwise reduced by refunds or other tax benefits to which the Debtors believe they are entitled with respect to post-1995 tax years. Similarly, *only* the Alabama Bankruptcy Court can determine whether any of the Debtors' prepetition tax liabilities are entitled to priority treatment. Those questions, among others, can be answered in the Alabama Bankruptcy Court at the same time that it finally resolves the Debtors' liability for the pre-1995 tax years.

11. Further, the government ignores the overlap in pre-1995 and post-1995 tax issues. That overlap makes it grossly inefficient to have the same issues heard by two courts at the same time, potentially leading to inconsistent results. In particular, the use by certain of Plaintiff's former subsidiaries of the "straight line" method of accounting for interest income with respect to certain loans made to home buyers is at issue for the tax years covered by this Adversary Proceeding, as well as for certain subsequent years. The same is true with respect to the treatment of those entities' discounting of notes received for loans designed to achieve a market return on the loans, given the below-market stated interest the loans carried. These issues need to be resolved for both the pre-1995 and post-1995 periods.

12. In any case, the government would not be prejudiced by any transfer, given its ability to raise both the "settlement" and the underlying pre-1995 tax issues in the Alabama Bankruptcy Court. Thus, a single forum exists where *all* tax issues can be efficiently and effectively resolved, and that forum is the Alabama Bankruptcy Court.

13. Finally, efficient resolution of the Debtors' tax issues is essential to the success of the Debtors' Chapter 11 Cases. As explained in the Motion, those cases are operating on an

accelerated timeframe. Under the schedule proposed to the Alabama Bankruptcy Court, the Debtors only have until January 2016 to confirm a plan of reorganization.[2] To meet that deadline, the Debtors must move quickly. Transfer of the Adversary Proceeding to the Alabama Bankruptcy Court on a "without prejudice" basis will enable the Debtors to move with speed and efficiency in resolving all of their tax disputes with the government on an accelerated basis.

III. The Transfer of the Adversary Proceeding Will Not Inconvenience the Parties

14. The government's sole remaining objection to the Motion is that transfer of the Adversary Proceeding will not serve the convenience of the parties because, it argues, the only relevant witnesses are the accountants and attorneys who negotiated the purported "settlement," and they are not located in Alabama. Response at 3. That argument fails for several reasons. Again, whether or not a settlement was reached is not the only remaining issue respecting the pre-1995 tax years, and thus, other witnesses remain relevant to the proceeding. Second, certain witnesses relevant to *both* the underlying tax issues and the "settlement" issue *are* located in Alabama—specifically, the current employees of Plaintiff's successor who were actively engaged in the parties' "settlement" discussions and who are familiar with both pre- and post-1995 tax issues. Nor is it at all clear why Florida (where Plaintiff has no operations and no longer employs any individuals), as opposed to Alabama, provides the more convenient forum, when the government itself points only to witnesses – who, it claims, are relevant to the "settlement" issue – located in New York and Washington, D.C., not Florida or Alabama.

15. The government does not identify any other factors that would justify finding that transfer of the Adversary Proceeding will be inconvenient for the parties, or that transfer of the Adversary Proceeding will not serve the interest of justice. Perhaps more importantly, the

[2] By agreement with their first lien creditors, the Debtors recently proposed an extension of the deadline in the Debtors' Restructuring Support Agreement for confirmation of a plan from January 13, 2016 to January 25, 2016.

government cannot deny that resolving all of Plaintiff's (and its successor's) tax issues in a single proceeding before the Alabama Bankruptcy Court, which is handling the entirety of the Debtors' Chapter 11 Cases, is optimally efficient and convenient, and thus would certainly serve the interests of justice.

16. In the end, where the transfer of the Adversary Proceeding is without prejudice to any rights of the government respecting the "Final Judgment Motion," the government has little about which to complain. For all these reasons, Plaintiff respectfully requests that this Court grant the relief requested in the Motion by entering the Proposed Order and transferring the Adversary Proceeding to the Alabama Bankruptcy Court.

[Remainder of page intentionally left blank]

Dated: September 9, 2015
Tampa, Florida

/s/ *Scott A. Stichter*

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- and -

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Counsel for the Plaintiff Hillsborough Holdings Corp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing *Plaintiffs' Reply regarding Motion for an Order Pursuant to 28 U.S.C. § 1412 and Bankruptcy Rule 7087 (A) Transferring Adversary Proceeding to the Bankruptcy Court for the Northern District of Alabama and (B) Granting Related Relief* has been furnished by the Court's CM/ECF System to all parties receiving electronic notice, and by U.S. Mail to:

Robert L. Welsh
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 14198
Ben Franklin Station
Washington, D.C. 20044

on this 9th day of September, 2015.

/s/ Scott A. Stichter
Attorney

U.S. Department of Justice

Tax Division

Robert L. Welsh
Telephone: (202) 514-6068
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Street address.
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RLWelsh:Hilsboro:Alexander1
5-17M-10107
CMN 9168138

January 18, 2007

Donald C. Alexander
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1546

Re: Hillsborough Holdings Corporation, et al.
Case Nos. 89-9715-8P1 through 89-9746-8P1
and No. 90-11997-9P1 (USBC M.D. Fla.)

Dear Mr. Alexander:

As we discussed at our meeting of January 9, 2007 and as you mentioned in your letter of January 11, 2007, for the government, both the Department of Justice and the Internal Revenue Service, to consider any proposed settlement of this case and more specifically the "interest" and "discount" issues," we will need additional information.

You have expressed a desire to resolve those issues for the years 1983 through 2005. Therefore, for each of the years 1983 through 2005, please provide all the books, records, files etc. that reflect a complete transaction beginning with the original sale of a new home to an individual through and including the sale after repossession. The documentation should include at least the original sale documents including the notes and mortgages as well as correspondence between the taxpayer and the original purchaser (including any Truth and Lending Statements); documents, books and records that evidence the transfer of the note and/or mortgage from Homes to Mid-State; documents that evidence transfers from Mid-State to any Trust; those books and records that evidence the manner in which any and all the interest and principal payments were recorded and reported by the taxpayer to the government and also to the original purchaser; notices and correspondence to the original purchaser concerning default on the note; documents concerning the repossession including those exhibiting the manner of repossession (i.e., suit to foreclose, deed in lieu of foreclosure); the manner in which the repossession was booked by Homes and/or Mid-State, including any transfers between Homes and Mid-State and the interest and principal reported to the original purchaser as a result of the repossession; all records that evidence how the interest and discount were treated by Homes and/or Mid-State over the life of the transaction (from sale to repossession and resale); those documents that reflect the sale of the repossessed property to a subsequent purchaser, including the determination of the interest and

discounts; all documents that show how the returns or allowances amount was computed and the basis of the property sold; and, documents that show how the amount of the bad debt was computed and the basis of the property after repossession.

The examples should not only include an example of sale, repossession, and resale, but an example for the situation where the note for the sale of a home is paid off early.

The above request relates to each year and a separate transaction analysis is necessary for a repossession that was handled by Homes as a return or allowance or in some other way or by Mid-State as a bad debt deduction or in some other way. Please provide copies of original records for use in each example. Please also explain why the "discount" was treated in some cases as a "bad debt," in other cases as a "return or allowance" and in other cases as other adjustments or reductions to income and perhaps in other cases in other ways.

Thank your for your cooperation. This information will undoubtably help in our resolving this matter.

ROBERT L. WELSH
Trial Attorney, Civil Trial Section
Southern Region

cc:

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(By email)

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November 6, 2007

VIA E-MAIL AND REGULAR MAIL

Robert L. Welsh, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, DC 20044

Re: Walter Industries, Inc. v. United States
Settlement Offer

Dear Mr. Welsh:

At a meeting on July 31, 2007, the above-named taxpayer made an oral offer of settlement relating to all pending issues for the tax years beginning with the August 31, 1983 tax year and ending with the December 31, 2001 tax year.[1] This series of years includes several years currently subject to the jurisdiction of the Bankruptcy Court and several years pending before the IRS examination division. You agreed that the offer was a serious one which should receive full consideration by the Government.

After this meeting, it was our understanding that you and Mr. James Kearney of the IRS Office of Chief Counsel would provide your response to our settlement offer by August 31, 2007. You responded to our oral offer with a letter dated October 11, 2007. In this letter you discussed the pending issues, addressing issues pending before the Bankruptcy Court and issues pending before the Internal Revenue Service in years after the years subject to the jurisdiction of the Bankruptcy Court. On the principal issue in the case, your letter indicated a lack of understanding of our alternative positions. We responded to your letter by letter dated October 16, 2007. On Thursday, October 25, 2007, you, Mr. Kearney, and we discussed your October 11, 2007, letter and our response, in a conference call. In this call you and Mr. Kearney indicated that you would look into the points we made in our October 16, 2007 letter, but that, because of other pending work, would not be able to get back to us until at least the week of November 19, 2007.

The Taxpayer has been attempting to resolve all pending issues in this very old case for many years, and has been particularly focused on settling the case since May, 2006, when the

[1] Because the settlement offer presented on July 31, 2007 also covered years within the jurisdiction of the IRS, a copy of this offer is being sent to Mr. James F. Kearney.

Protest for the 2000-2001 tax years was filed. Over the past 18 months a significant amount of information, both factual and technical, has been provided to you and Mr. Kearney. Yet it does not appear that any progress has been made toward our goal of having substantive discussions aimed at resolving this case at issue for more than twenty years.

We understand that both you and Mr. Kearney have large caseloads and are very busy. For this reason, we understand, you have not had time to fully analyze the points we have made relating to a potential resolution of this case.

Therefore, and to avoid further confusion with respect to our position, we have determined that it is appropriate to submit a formal settlement offer. We respectfully request that it be formally considered by the Department of Justice and Commissioner of Internal Revenue under the established procedures of those agencies.

As we have indicated on several occasions, we are very interested in substantive meetings to determine if we will be able to resolve the pending issues without further litigation. If your ultimate response is that the Government does not accept our offer in its current form and terms, we request a meeting with you, Mr. Kearns, Chief of the Civil Trial Section, Southern Region, Mr. Kearney, and other responsible officials at the Department of Justice and Internal Revenue service to understand what the Government believes an appropriate settlement to be, and to hold further discussions with the aim of reaching an overall agreement.

Our offer of settlement is as follows:

1. Straight-line issue:

The Government would concede this issue for all taxable years from the August 31, 1983 taxable year through the December 31, 2001, taxable year, except for those situations where the aggregate amount of interest and principal payable under the contract exceed $250,000. The taxpayer would concede this issue for such situations.

2. Discount issue:

The Government would concede this issue for the taxable years ending August 31, 1983, August 31, 1984, August 31, 1985, and August 31, 1986, because if the Government's position for these taxable years were to prevail, the installment method would then apply, producing substantially the same results as those in the Taxpayer's tax returns for those years. For taxable years ending August 31, 1987 through December 31, 2001, the Taxpayer would concede 35% of the amounts at issue, except for sales of repossessed homes in taxable years ending May 31, 2000, December 31, 2000, and December 31, 2001. The Government would concede this issue as to the sales of repossessed homes for taxable years ending May 31, 2000, December 31, 2000, and December 31, 2001, because of the applicability of section 475 to such transactions.

AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

3. Certain expenses in connection with the LBO:

The parties would agree to the treatment specified in the attached grids.

4. Professional fees incurred during the course of the bankruptcy proceedings:

The parties would agree to the treatment specified in the attached grids.

5. Deductibility of capitalized LBO costs:

The Taxpayer would concede that $1,939,181 is not deductible in the tax year ending May 31, 1995. The Government would concede the balance ($8,887,551) of this issue.

6. Coal royalties:

The Government would concede this issue.

7. DISC issue:

The Taxpayer would concede this issue.

Thank you for your consideration of this formal settlement offer, and we look forward to hearing from you and meeting with you as soon as possible.

Very truly yours,

Donald C. Alexander

cc: James F. Kearney
Joseph J. Troy
William H. Weldon
Cynthia B. Eisch
James E. Connor
Stephen Gardner
Clint E. Massengill

Gardner, Stephen

From: Gardner, Stephen
Sent: Thursday, October 27, 2011 12:28 PM
To: Welsh, Robert L. (TAX)
Cc: Hurley, Michael; 'james.e.connor@us.pwc.com'; Eisch, Cindy
Subject: Walter Industries, Inc v. United States

Dear Bob, this is to confirm that it is Walter's intention to resolve all tax issues, with the IRS and the Justice Department for all open years through 12/31/2010, in a manner consistent with our settlement offer dated October 19th, 2011. As you know the years 5/31/2000 through 12/31/2005 are currently in IRS Appeals, and the offer contained in our letter is consistent with the proposed resolution of those years with Appeals. The years 12/31/2006 through 12/31/2008 are currently under audit and the years 12/31/2009 and 12/31/2010 have not yet been examined. It is Walter's intention to resolve those five years in a manner consistent with our settlement offer; and Walter would propose doing so through a closing agreement to be entered into between Walter and the IRS. Steve

Stephen D. Gardner
Cooley LLP • 1114 Avenue of the Americas
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Direct: (212) 479-6130 • Fax: (212) 479-6275
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Klein, Eileen

From:	Klein, Eileen on behalf of Gardner, Stephen
Sent:	Friday, November 11, 2011 11:25 AM
To:	'robert.l.welsh@usdoj.gov'
Cc:	'michael.hurley@walterenergy.com'; 'cindy.eisch@walterenergy.com'; 'james.e.connor@us.pwc.com'; Gardner, Stephen
Subject:	Letter from Stephen D. Gardner
Attachments:	NYCANON-46-C23_EXCHANGE_11112011-111416.pdf

Please see the attached. Thank you.

Eileen Klein
Cooley LLP
Legal Secretary
Assistant to Stephen D. Gardner, Kathleen Pakenham, Eric Larson and David Fleischer
Phone: 212/479-6182
Email: eklein@cooley.com • www.cooley.com The Grace Building
1114 Avenue of the Americas
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P Please consider the environment before printing this e-mail.

-----Original Message-----
From: Ecopy
Sent: Friday, November 11, 2011 11:14 AM
To: Klein, Eileen
Subject: Scanned document from Ecopy (ecopy@cooley.com)

Cooley LLP

Stephen D. Gardner
T: +1 212 479 6130
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VIA EMAIL ROBERT.L.WELSH@USDOJ.GOV
AND FIRST-CLASS MAIL

November 11, 2011

Robert L. Welsh, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, DC 20044

RE: Hillsborough Holding Corp. et al., Debtors
Case Nos. 89-9715-8P1 through
89-9746-8P1 and No. 90-11997-9P1

Hillsborough Holding Corp. et al. v.
United States of America
Adversary Proceeding No. 91-313 (Bankr. M.D. Fla.)

Dear Mr. Welsh:

Thank you for your letter dated November 9, 2011, in which you acknowledged receipt of our offer to resolve various issues relating to the above-named taxpayer.

At the bottom of page two of your letter, you state that "[w]e understand that your compromise offer is made on an issue by issue basis." At the top of page three, you requested we advise you in writing if the foregoing does not comport with our understanding.

Your statement of the various terms of our offer is consistent with our understanding. However, we note that, on page 1 of our letter (copy attached), we stated that "By this letter, the Taxpayer is making a formal offer to the Department of Justice to settle all issues pending in the above case."

Cooley LLP

Through this language we intended that the offer be considered as an overall offer. It is our objective to settle all open issues in the years covered by this case and the related issues in the years that are within the jurisdiction of the Internal Revenue Service.

Very truly yours,



Stephen D. Gardner

SDG:ek
Enclosure

cc: Michael R. Hurley
Cynthia B. Eisch
James E. Connor

U.S. Department of Justice

Tax Division

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RLWelsh:Hilsboro\Offer LtrOC
5-17M-10107
CMN 9168138

November 21, 2011

BY EMAIL AND U.S. MAIL

Stephen D. Gardner, Esquire
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1114 Avenue of the Americas
New York, NY 10036-7798

Re: Hillsborough Holding Corp. et al., Debtors
Case Nos. 89-9715-8P1 through
89-9746-8P1 and No. 90-11997-9P1

Hillsborough Holding Corp. et al. v.
United States of America
Adversary Proceeding No. 91-313 (Bankr. M.D. Fla.)

Dear Mr. Gardner:

This is in reference to your letter of November 16, 2011 which responded to our letter to you of November 9, 2011, which set forth our understanding of your offer of October 19, 2011, to compromise seven (7) issues for the years before the bankruptcy court (August 31, 1983 through March 2, 1995) and for the years through December 31, 2010, as set out in your email of October 27, 2011. In your November 16, 2011, letter you clarify and condition your offer as follows: You do not agree to settle the Coal Royalty and DISC issues as separate issues on an issue by issue basis unless they are both settled; that is, your offer does apply to them separately and if one is not settled then the offer as to the other does not apply. Further, your offer requires that the Straight-line, Discount, Bankruptcy expense and other LBO issues must all be settled or you do not agree to settle any of those issues. All other aspects of your offer of October 19, 2011 remain unchanged.

Please advise us in writing whether the foregoing comports with your understanding.

Sincerely yours,

ROBERT L. WELSH
Trial Attorney, Civil Trial Section
Southern Region

cc:

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Your ref: CC:JAX:TL-N-4148-92/WFBarry