IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
LABORATORY PARTNERS, INC., et al.,	)	Case No. 13-12769 (PJW) (Jointly Administered)
Debtors.	)	**Hearing Date: July 9, 2014, at 2:00 pm** **Objection Deadline: June 30, 2014, at 4:00 pm**

UNITED STATES' OBJECTION TO
DEBTORS' JOINT CHAPTER 11 PLAN

The United States, on behalf of its Secretary of Health and Human Services ("HHS"), files this Objection to Debtors' Joint Chapter 11 Plan ("Plan") [D.I. 484]. In support of its objection, the United States avers as follows:

1. On October 25, 2013, the Debtors filed voluntary Chapter 11 petitions.

2. On May 21, 2014, the Debtors filed the Plan.

3. The Debtors are health care providers that participate in the Medicare Program and are parties to Medicare Enrollment Agreements ("Agreements").

4. The Debtors have indicated that they intend to assume, but not assign, the Agreements. The United States objects to the Plan to the extent the Debtors fail to comply with Medicare law and implementing Medicare regulations and policies with respect to the Agreements. Specifically, the United States has concerns about the Plan structure that creates the LPI Plan Trust and provides for the LPI Trustee, not the Debtors, to file Medicare claims and to receive Medicare payments. It is not clear whether the Plan purports to give the LPI Plan

Trustee the authority to file Debtors' Medicare claims and Medicare appeals and, if so, whether this is consistent with Medicare law.

5. The United States objects to Article IX of the Plan to the extent that it provides for the retention of exclusive jurisdiction over matters involving CMS. The Medicare Statute and its regulations exclusively govern the payment of Medicare reimbursement claims, which precludes court review of reimbursement determinations until the provider complies with the necessary jurisdictional prerequisites. Federal courts lack jurisdiction to review those reimbursement determinations until the Secretary has issued a final administrative decision after exhaustion of all administrative remedies. 42 U.S.C. § 405(h) (as incorporated by 42 U.S.C. § 1395ii); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 15 (2000); In re University Med. Center, 973 F.2d at 1073 (noting that, even in bankruptcy, a claim which "arises under" the Medicare Act cannot be reviewed by a court until administrative remedies are exhausted), *quoting* Sullivan v. Hiser (In re St. Mary Hosp.), 123 B.R. 14, 17 (E.D. Pa. 1991). Thus, this Court lacks jurisdiction to determine the amount of Medicare payments due or overpayments. *See* 28 U.S.C. 1334(b). "Retention of jurisdiction provisions will be given effect, assuming there is bankruptcy court jurisdiction. But neither the bankruptcy court nor the parties can write their own jurisdictional ticket. Subject matter jurisdiction "cannot be conferred by consent" of the parties. Coffin v. Malvern Fed. Sav. Bank, 90 F.3d 851, 854 (3d Cir. 1996). Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization." Resorts International, Inc., v. Price Waterhouse & Co., LLP, 372 F.3d 154, 161 (3d Cir. 2004).

6. The United States objects to the Plan to the extent it fails to preserve the setoff and recoupment rights of CMS. Confirmation of a plan does not extinguish setoff claims when

they are timely asserted. United States v. Continental Airlines (In re Continental Airlines), 134 F.3d 536, 542 (3d Cir. 1998), cert. denied, 525 U.S. 929 (1998). Like other creditors, the United States has the common law right to setoff mutual debts. "The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." United States v. Munsey Trust Co. of Washington, D.C., 332 U.S. 234 (1947) (citing Gratiot v. United States, 40 U.S. (15 Pet) 336, 370, 10 L.Ed. 759 (1841)); see also Amoco Prod. Co. v. Fry, 118 F.3d 812, 817 (D.C. Cir. 1997). This right – "which is inherent in the federal government – is broad and 'exists independent of any statutory grant of authority to the executive branch.'" Marre v. United States, 117 F.3d 297, 302 (5th Cir. 1997) (quoting United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986)). Hence, the United States can setoff mutual prepetition debts and claims as well as postpetition debts and claims. Zions First Nat'l Bank, N.A. v. Christiansen Bros. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995); Palm Beach County Bd. Of Pub. Instruction (In re Alfar Dairy, Inc.), 458 F.2d 1258, 1262 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); Mohawk Indus., Inc. v. United States (In re Mohawk Indus., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987). The Plan makes no provision for these rights. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, United States v. Maxwell, 157 F.3d 1099, 1102 (7th Cir. 1998). "[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code," id. at 1103, that alters this principle. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances."

Niagra Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.), 41 B.R. 941, 944 (N.D.N.Y. 1984); see also New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952 (2d Cir. 1978) ("The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust."). Compelling circumstances generally entail criminal conduct or fraud by the creditor. In re Whimsy, Inc., 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the government's setoff rights. Failure to do so violates section 1129(a)(1) ("The court shall confirm a plan only if ... the plan complies with the applicable provisions of this title").

WHEREFORE, for the reasons set forth above, the United States respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

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Dated: June 30, 2014

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AFFIDAVIT OF SERVICE

I, Cynthia J. Kemske, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on June 30, 2014 a copy of the **UNITED STATES' OBJECTION TO DEBTORS' JOINT CHAPTER 11 PLAN** served electronically,unless otherwise indicated, upon:

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