IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 12-10010 (KG)
COACH AM GROUP HOLDINGS CORP., et al.,	:	
	:	Jointly Administered
Debtors.	:	
	:	**Ref. Docket No.: 987**

THE WYOMING DEPARTMENT OF TRANSPORTATION'S RESPONSE TO CUSA, LLC'S SUBSTANTIVE OBJECTION TO PROOF OF CLAIM NUMBER 1835 FILED BY THE WYOMING DEPARTMENT OF TRANSPORTATION

The Wyoming Department of Transportation ("WYDOT") hereby files this response (the "Response") in opposition to the Debtors' Substantive Objection to Proof of Claim Number 1835 Filed by the Wyoming Department of Transportation [D.I. 987] (the "Objection"), and in support of its proof of claim numbered 1835 (the "Claim"). In support of this Response, the WYDOT states as follows:

PRELIMINARY STATEMENT[1]

1. The IRP is a cooperative agreement among the states of the United States and Canadian provinces that affords registrants such as CUSA the ability to obtain one plate and cab card for each vehicle in their commercial fleets. Debtors acknowledge that absent the IRP, CUSA and other registrants would be required to comply with "a multiplicity of state laws" resulting in a cumbersome process and a burden on interstate commerce. Having realized the undeniable benefits of the IRP, Debtors are now attempting to evade CUSA's IRP-related obligations. By the Objection, Debtors assert, in the first instance, that the IRP's document retention policy doubles as a statute of limitations and, despite the commencement of the audit

[1] Capitalized terms used in the Preliminary Statement shall have the meanings ascribed to them in the body of the Response.

putting CUSA on notice and requiring it to retain such documents, CUSA has no liability on account of the Claim since the Audit Assessment was made outside of the document retention period. Debtors next contend that, even if the Claim is not time barred, it should nevertheless be construed as a general unsecured "fee" claim instead of a priority "tax" claim. Lastly, Debtors seek a reduction of the claimed amounts. The Objection should be denied for several reasons.

2. The doctrine of *res judicata* bars Debtors from re-litigating the issue of whether CUSA is liable for the amounts asserted through the Audit Assessment. After the Audit Assessment was issued, CUSA initiated the Appeal before the Wyoming Office of Administrative Hearings. Shortly before the scheduled administrative hearing, CUSA withdrew the Appeal. Pursuant to established administrative procedures, the WYDOT entered a final order concerning the Appeal and CUSA's liabilities in respect of the Audit Assessment. Under applicable Wyoming law, that order is entitled to preclusive effect and this Court should exercise its discretion to bar Debtors from re-litigating the Appeal and find that CUSA is liable for the Claim.

3. Even if the Court decides to determine CUSA's tax liability in this matter, the Claim is not time barred. Wyoming has no statute of limitations for assessments under the IRP and the IRP's "record keeping requirement" does not act as one. Further, to the extent that a limitation period is deemed applicable, such period was tolled or otherwise stopped running since the audit, which was complex and subject to delays (some of which the Debtors admit to have caused), was commenced within the document retention period following the relevant registration years. Indeed, if the document retention requirement were interpreted as a statute of limitations as suggested by the Debtors, it would encourage IRP registrants to draw out the audit process by, among other things, being uncooperative with the auditors, delaying responses to

auditor requests, and requesting extensions of time in order to prevent an assessment before the end of the period. Simply stated, Debtors' interpretation would make many IRP audits futile exercises, allowing registrants to escape an adverse assessment by simply drawing out the process.

4. The Claim seeks claim for payment of CUSA's "tax" obligations under the IRP, implicating amounts owed by CUSA based on its vehicles' interstate travel to numerous jurisdictions. Under applicable law, the amounts owed by CUSA satisfy all of the necessary elements to qualify as a tax. Consequently, the Claim should not be reclassified.

5. The requested reductions in the claimed amounts set forth in section C of the Objection should also be denied. As discussed below, a deduction for the Assessed Registration Years based on the WYDOA's alleged improper assessment of 40 vehicles (Objection at ¶¶ 34-38) would be improper since the WYDOA correctly determined that those vehicles were not "used or intended for use" in more than one jursidiction and properly disallowed them as "apportionable vehicles" in accordance with the 1973 Plan. The requested reduction for the 123 vehicles that Debtors allege travelled in more than one jurisdiction (Objection at ¶39) is likewise improper since Debtors failed to provide supporting documentation to the auditors and Wyoming law prohibits consideration of information that was not produced by the registrant for consideration during the audit.

RELEVANT FACTUAL BACKGROUND

6. In December 2006, the Wyoming Department of Audit ("WYDOA") contacted debtor CUSA LLC ("CUSA" or "Debtor") to inform them that WYDOA would be performing a two-part audit relating to the International Fuel Tax Agreement ("IFTA") and the International Registration Plan ("IRP"). On March 12, 2007, the WYDOA sent CUSA a letter (the "March

2007 Letter")[2] indicating the specifics of the audit and informing CUSA that the audit would commence on June 4, 2007. By the March 2007 Letter, the WYDOA also described the documentation that CUSA would need to provide the WYDOA in connection with the audit. On June 4, 2007, the WYDOA and CUSA held the initial audit meeting in Cheyenne, Wyoming.

7. During the audit process, the WYDOA and CUSA had periodic communications concerning the audit. The WYDOA's "Audit Tracking Log" (the "Audit Log")[3] contains records of the communications between the parties and reflects that the WYDOA, among other things, made multiple requests for information, granted CUSA additional time to provide documentation at various times, and worked cooperatively with CUSA (and more recently the Debtors) to obtain the correct information in order to perform complete, accurate IFTA and IRP audits. Further, the Audit Log shows that the WYDOA had to perform the audit review on a terminal-by-terminal basis throughout the IFTA-related audit in order to obtain information used to apply to and streamline the IRP-related audit. Some specific examples of communications relevant to the Objection and this Response are noted below.

8. On October 28, 2011, counsel for CUSA requested a 90-day extension to gather and submit additional information in connection with its objection to the proposed IRP assessment. That same day, the WYDOA granted the requested extension and asked that CUSA provide the information by January 27, 2012.

9. On November 7, 2011, counsel for CUSA sent a letter to the WYDOA (the "November 2011 Letter")[4] thanking them for the 90 day extension and asking for a recalculation (which would result in additional time to complete), stating:

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[2] A copy of the March 2007 Letter is attached hereto as Exhibit A.

[3] A copy of the Audit Log is attached hereto as Exhibit B.

[4] A copy of the November 2011 Letter is attached hereto as Exhibit C.

> We recognize, of course, that this will result in a re-computation of the mileage percentages and associated fees throughout the audit for all states, but believe the re-calculation will result in a more accurate and fair assessment of CUSA's IRP liabilities.

Ex. C at p. 2.

10. On January 26, 2012, counsel for CUSA sent an email (the "January 2012 Email")[5] to the WYDOT's attorney advising that CUSA would not be providing additional information for which they were given an extension to dispute the proposed IRP assessment with regard to 123 of 143 vehicles. In particular, counsel for CUSA stated:

> As a follow-up to our call, please be advised that CUSA, LLC will not be submitting any additional information, other than this e-mail, with respect to today's agreed upon submission due date. Unfortunately, with the recent bankruptcy filing, CUSA management lacked the resources to provide some additional trip related documentation to further support its position that the audit fee calculations, as they currently stand, are overstated.

Ex. D at p. 1.

11. On February 17, 2012, the WYDOA issued its "Combined Audit Report" (the "Audit Report"),[6] which details both the IFTA and IRP audit findings.

12. On March 16, 2012, the WYDOA issued its "Final Findings Letter" to inform Debtors that the audit was final and the WYDOA was transmitting its findings to the WYDOT. On March 23, 2012, the WYDOT sent its "Deficiency Assessment Notice" (the "Deficiency Notice")[7] to CUSA, informing it of a $493,547.99 deficiency (such deficiency, the "Audit Assessment") for the IRP registration years 2005 and 2006.

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[5] A copy of the January 2012 Email is attached hereto as Exhibit D.

[6] A copy of the Audit Report is attached hereto as Exhibit E. The "2011" date is a typographical error as the Audit Report was issued on February 17, 2012.

[7] A copy of the Deficiency Notice is attached hereto as Exhibit F.

13. On April 16, 2012, Debtors sent the WYDOT a letter (the "April 2012 Letter")[8] registering an appeal (the "Appeal") of the Audit Assessment by CUSA. In the April 2012 Letter, Debtors acknowledged the complexity of the audit and stated:

> It is self-evident that the audit of CUSA's IRP liabilities for Registration Years 2005 and 2006 was an extremely lengthy process. . . . Along the way, the audit was conducted in piecemeal fashion with a great deal of correspondence between the parties and long delays between communications from WYDOA.[9] **Certainly, the audit was made more complicated by the fact that CUSA operated 20 different terminals in 11 different states and, in most instances, maintained separate operational records for each terminal. In addition, CUSA recognizes that – despite its best efforts – it records were not always organized or presented in the fashion the auditors would have preferred**. However, several factors contributing to the delay were beyond CUSA's control.

Ex. G at p. 2 (emphasis added).

14. On August 13, 2012, Debtors filed the Objection. On September 17, 2012, CUSA dismissed the Appeal in an apparent attempt to have this Court determine its tax liability with respect to the Audit Assessment.

15. On September 26, 2012, the WYDOT entered its final order (the "Final Order")[10] stating, among other things, that CUSA received an opportunity for a contested case hearing and that it had officially withdrawn its request for such hearing. The Final Order also provides that the Wyoming Office of Administrative Hearing's *Order Vacating Prehearing Conference, Hearing Date and Recommending Dismissal* was adopted, the Appeal was dismissed, and the Final Order was "hereby entered into the record and is effective immediately." *See* Ex. I, p. 2.

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[8] A copy of the April 2012 Letter is attached hereto as Exhibit G.

[9] The WYDOA disputes any "long delays" in communications on its part, and the Audit Log supports that the WYDOA was in contact with CUSA frequently during the audit process.

[10] A copy of the Final Order is attached hereto as Exhibit H.

ARGUMENT

I. THE DOCTRINE OF *RES JUDICATA* BARS THE DEBTORS FROM RE-LITIGATING ISSUES THAT WERE OR SHOULD HAVE BEEN RAISED IN THE APPEAL

16. The doctrine of *res judicata* bars Debtors from re-litigating the issues asserted in the Appeal. Under Wyoming state law, "[t]he doctrine of *res judicata* bars the re-litigation of previously litigated claims or causes of action, as well as claims that could or should have been raised in the prior litigation." *Burke (d/b/a Dave's Drug) v. State of Wyoming, ex rel.*, 219 P.3d 122, 125 ("Dave's Drug") (citing *R.C.R., Inc. v. Deline*, 190 P.3d 140, 153 (Wyo.2008). In determining whether *res judicata* bars a claim, Wyoming courts consider whether: (1) the parties are the same; (2) the subject matter is the same; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them. *Id.*

17. In *Dave's Drug*, the appellant-defendant had withdrawn his request for an administrative hearing on the issue of whether he received Medicaid reimbursements in excess of which he was entitled. *Id.* at 124. The Wyoming Office of Administrative Hearings entered an order recommending that the administrative action be dismissed. *Id.* The Wyoming Department of Health ("DOH") followed this recommendation and dismissed the administrative action. *Id.* The DOH then filed a complaint in Wyoming state court seeking judgment in the amount of the excess payments received. *Id.* The court subsequently granted summary judgment in favor of the DOH holding that *res judicata* barred defendant-appellant from disputing the DOH's claim. *Id.* at 125. The Wyoming Supreme Court affirmed the lower court's ruling noting that the lower court concluded that appellant had waived his right to contest the claim because he

withdrew his request for an administrative hearing, and the DOH's determination that appellant had received the excess payments became final and not subject to challenge. *Id.*

18. Here, CUSA initiated the Appeal in Wyoming in accordance with the audit appeal procedures set forth in the IRP. Shortly before the administrative hearing concerning the Appeal was scheduled to take place, the Debtors apparently decided to change forums and filed the Objection in this Court, and withdrew the Appeal. The WYDOT entered a final decision on the Appeal against CUSA. The factors to determine whether *res judicata* acts to bar Debtors from re-litigated the issues from the Appeal are clearly satisfied and the analysis set forth in *Dave's Drug* is equally applicable to this matter. Accordingly, although this Court is empowered, pursuant to Section 505 of the Bankruptcy Code, to determine CUSA's tax liabilities in respect of the Audit Assessment, the Court should exercise its discretion and find that (i) *res judicata* bars Debtors' attempt to re-litigate the Appeal, and (ii) CUSA is liable for the Claim.

II. THE CLAIM IS NOT TIME BARRED

A. Wyoming State Law Governs the Audit Assessment

19. The 1973 International Registration Plan (the "1973 Plan")[11] governs the Audit Assessment, which relates to the 2005 registration year ("Registration Year 2005") and the 2006 registration year ("Registration Year 2006" and together with Registration Year 2005, the "Assessed Registration Years"), since the 1973 Plan was the effective IRP during those registration years. Section 1702 of the 1973 Plan provides that "[a]ssessments based on audit . . . *shall be made in accordance with the statute of each jurisdiction involved with the audit of a registrant*." 1973 Plan § 1702 (2006) (emphasis added). Moreover, Section 1608 of the 1973

[11] A copy of the 1973 Plan (in the form as revised in 2006) is attached hereto as Exhibit I. The 1973 Plan was revised from time to time prior to being amended in 2008, effective as of July 1, 2008. The 1973 Plan was last revised effective as of July 1, 2006. The 2006 revisions did not change any of the 1973 Plan provisions that are relevant to this Response. As discussed herein, the 1973 Plan governs the audit and Audit Assessment since they relate to Registration Years 2005 and 2006.

Plan provides, in pertinent part, that audit appeals "shall be resolved under the administrative and appellate procedures *of the base jurisdiction*." 1973 Plan § 1608 (emphasis added). Wyoming is the Debtors' "base jurisdiction" under the IRP and the WYDOA performed the audit and issued the Audit Assessment. Consequently, pursuant to the 1973 Plan, Wyoming state law governs the audit, the Audit Assessment and any related appeals.

B. Wyoming Has No Statute of Limitations for IRP Assessments

20. Contrary to Debtors' assertions, Wyoming has no statute of limitations for assessments under the IRP. Debtors argue that because IRP registrants are only required to preserve their records for three years after the end of each registration year, that there is a statute or rule of limitation on the Audit Assessment. (Objection at ¶ 22). Applying this "record keeping requirement" as a "statute of limitation," Debtors argue that the WYDOT's right to issue the Audit Assessment following the audit expired at the end of 2008 for Registration Year 2005, and at the end of 2009 for Registration Year 2006. *Id*. Debtors' assertions are an incorrect interpretation of the 1973 Plan and Wyoming statute, and are contrary to Wyoming case law.

21. Both the 1973 Plan and Wyoming statutes provide record retention requirements that commercial vehicle registrants must follow. Section 1500 of the 1973 Plan provides:

> The base jurisdiction shall require a registrant to preserve the records on which the registrant's application is based for a period of three years after the close of the registration year. The registrant shall be required to make the records available to the base jurisdiction at its request.

1973 Plan § 1500 (2006).

22. Wyoming statute, consistent with the 1973 Plan, provides for the same record keeping requirement:

> Any owner registering a vehicle pursuant to this section shall preserve the records on which the application is based for three (3)

> years following the registration year for which registration was permitted. . . .

WYO. STAT. ANN. § 31-18-201(q) (2011).

23. After having established which records the base jurisdiction may audit, the 1973 Plan provides that no assessment may include any period beyond those record keeping requirements:

> Upon audit, the base jurisdiction shall assess for any deficiency found to be due. **No assessment for deficiency** or claim for credit **may be made for any period for which records are no longer required**.

1973 Plan § 1700 (2006) (emphasis added).

24. In this case, there is no dispute that under both the 1973 Plan and Wyoming statute, CUSA was required to preserve its operational records for three years following each registration year and CUSA was required to make those records available for examination by the WYDOA. (Objection at ¶ 21). There is also no dispute that *when the WYDOA contacted CUSA to initiate the audit in December 2006*, CUSA *was* required to preserve, maintain, and produce its operational records for Registration Years 2005 and 2006. The WYDOA specified the documents that CUSA would need to produce. *See* Ex. A - March 2007 Letter. CUSA did, in fact, retain those records and began making them available, with thirty-four (34) boxes of documents sent in advance of the June 4, 2007, opening audit conference. *See* Ex. E - Audit Report at p. 2.

25. Now, Debtors attempt to turn the "record keeping requirement" into a statute of limitation. Debtors argue that they are no longer required to preserve the records upon which the Audit Assessment is based, and therefore, the WYDOT cannot assess CUSA for unpaid IRP fees from Registration Years 2005 and 2006. (Objection at ¶¶ 18-24). Debtors rely upon the 1973 Plan's language stating, "[n]o assessment for deficiency or claim for credit may be made for any

period for which records are no longer required." *See* 1973 Plan § 1700 (2006). Debtors' reliance is misguided.

26. Whether the WYDOT is permitted to issue the Audit Assessment depends upon whether the assessment is for a period "for which records are no longer required," and requires an interpretation of Wyoming statutes and Section 1700 of the 1973 Plan. The Wyoming Supreme Court provides the following with regard to statutory (or rule) construction:

> We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia.* When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation. . . . Only if we determine the language of a statute is ambiguous will we proceed to the next step, which involves applying general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature. If this Court determines that the language of the statute is not ambiguous, there is no room for further construction. We will apply the language of the statute using its ordinary and obvious meaning.

State v. Hanover Compression, LP, 196 P.3d 781, 784 (Wyo. 2008) (citations omitted).

27. Section 1700 of the 1973 Plan unambiguously provides that "[n]o assessment for deficiency . . . may be made for any period for which records are no longer required." 1973 Plan § 1700 (2006). This provision refers to the record keeping requirement in Section 1500 of the 1973 Plan. By its clear and unambiguous language, Section 1500 requires registrants to "preserve the records on which the registrant's application is based for a period of three years after the close of the registration year." 1973 Plan § 1500 (2006). This record keeping requirement puts all parties on notice of which records may be audited under the IRP. Reading Sections 1500 and 1700 *in pari materia*, a member jurisdiction can only audit a registrant on records that it is "required" to preserve under Section 1500. In this case, based on the December

2006 audit notification, the 1973 Plan required that CUSA preserve records for Registration Years 2005 and 2006, CUSA provided those records for the audit and the WYDOA audited those records. CUSA and the other Debtors are now required to comply with that Audit Assessment.

28. Debtors argue the WYDOT's ability to issue the Audit Assessment expired at the end of 2008 for Registration Year 2005, and at the end of 2009 for Registration Year 2006. Debtors would be correct *if* the WYDOA had waited until after those dates to initiate the audit, because CUSA would not have been required to preserve the records for those registration years at that time. However, the instant that the WYDOA contacted CUSA in 2006 to initiate the audit, CUSA was required to and did in fact provide its 2005 and 2006 records and participated in the audit. Clearly, once the audit began, CUSA was still required to hold onto those records pending the conclusion of the audit.

29. The record keeping requirement is not the equivalent of a statute of limitation. The Wyoming Supreme Court has specifically rejected the notion that time limitations in one rule or statute create a limitation in another statute. *See Union Pac. Res. Co. v. State*, 839 P.2d 356, 370-71 (Wyo. 1992); *Walgreen Co. v. State Bd. of Equalization*, 62 WYO. 288, 310-11 (Wyo. 1946). In the *Walgreen* case, the Court concluded that a three year record retention requirement did not create a general statute of limitations barring the assessments beyond the three year period. *Walgreen*, 62 WYO. at 310-11. The Court applied the same rule in the *Union Pacific* case, stating: "[a]ny agency rules which permit or require a time limit for retention of records and bookkeeping provisions cannot create a broad tax forgiveness time limitation." *Union Pac*., 839 P.2d at 370-71. The Court further added that if any "regulations were to be given this interpretation, *even if specifically indicated* to be the intent, we would be required to deny effectiveness." *Id.* at 371. To accept Debtors' argument that a "record keeping

requirement" acts as a "statute of limitation" preventing the WYDOT from assessing a deficiency in this case is contrary to Wyoming law.

30. Debtors' argument also runs afoul of the Wyoming Supreme Court's often stated rule of law that statutes of limitation will not apply against the State or its agencies unless expressly and specifically intended by the legislature. *See Union Pac.*, 839 P.2d at 368; *Laramie Cnty. Sch. Dist. No. One v. Muir*, 808 P.2d 797, 800-01 (Wyo. 1991).

31. IRP audits may be complex due to statutory or rule interpretation issues, the volume of records an auditor must review, limited audit personnel, and a registrant's recordkeeping failures. Indeed, as noted above, in the April 2012 Letter, CUSA requested a contested case hearing before Wyoming's Office of Administrative Hearings and acknowledged this complexity and the delays caused by both sides:

> Along the way, the audit was conducted in a piecemeal fashion with a great deal of correspondence between the parties and long delays between communications from WYDOA. Certainly the audit was made more complicated by the fact that CUSA operated 20 different terminals in 11 different states and, in most instances, maintained separate operational records for each terminal. In addition, CUSA recognizes that – despite its best efforts – its records were not always organized or presented in the fashion the auditors would have preferred.

Ex. G - April 16 Letter at p. 2.

32. Debtors' interpretation of the record keeping requirement would place a total three year statute of limitations on the WYDOA's preparation of an audit, the WYDOT's review process, the IRP member jurisdiction review process, and the WYDOT's assessment process. It would encourage IRP registrants to draw out the audit process, to be uncooperative with the auditors, to respond slowly to all auditor requests and to request extensions of time every step of the way to evade the ultimate assessment at the end of three years. This Court must assume that the Wyoming Legislature and the IRP drafters did not intend futile audit procedures, and that

statutes and rules should not be interpreted in a manner producing absurd results. *Corkill v. Knowles*, 955 P.2d 438, 444 (Wyo. 1998). Debtors' interpretation would make the IRP audit a futile exercise, allowing registrants to escape an adverse assessment by simply drawing out the process. The Wyoming Legislature certainly did not intend for this absurd result when authorizing the WYDOT to enter into the IRP.

33. Based on a plain reading of Wyoming statute, the 1973 Plan and Wyoming case law, the 1973 Plan's three year "record keeping requirement" does not equate to a three year statute of limitation within which the WYDOT is required to operate. The "record keeping requirement" places the IRP registrants on notice as to the records that are subject to audit review–nothing more and nothing less. Accordingly, the WYDOT asks this Court to find that it is not barred from issuing and enforcing the Audit Assessment.[12]

C. Even If the Court Determines That 1973 Plan's Document Retention Provisions Act as a Time Limitation on General Assessments, the Limitation Period Has Not Run or Has Otherwise Been Equitably Tolled

1. The Limitation Period Has Not Run

34. To the extent deemed applicable, the record keeping requirement should have been tolled as of the audit commencement date[13] and did not begin to run until the date on which the WYDOT issued the Audit Assessment. In an analogous situation involving sales taxes, Wyoming statute provides that, "in the case of an assessment created by an audit," the statute of limitations for commencing actions to recover delinquent taxes does not begin to run until *after*

[12] Debtors also cite to California and Nevada state laws (Objection at ¶ 23) to argue that those states have enacted "statute of limitations" that bar collections of those amounts attributable to those states. For the reasons discussed, those states' statutory provisions are not applicable to the Audit Assessment. Regardless, the WYDOT understands that Debtors' interpretation of those statutes is flawed and collection of the amounts attributed to California and Nevada is not time barred.

[13] "[T]he timely filing of a complaint is sufficient to commence an action and toll the statute of limitations." *Smith v. WGBH-TV*, No. 77-2902-MA, 1980 U.S. Dist. LEXIS 14266, at *5 (D. Mass. Oct. 21, 1980) (citations omitted); *Bomar v. Keyes*, 162 F.2d 136, 141 (2d Cir. 1947) ("We are content therefore to follow the Tenth Circuit, in holding that the filing of the complaint tolls the statute.")

the date the assessment letter is sent. *See* WYO. STAT. ANN. § 39-15-110 (2011). Thus, even if the Court determines that the 1973 Plan's document retention provisions contain a time limitation, the period has not run and the Claim is not time barred.

2. The Limitation Period Should be Equitably Tolled

35. The facts and equities dictate that the limitation period (if deemed applicable) should be tolled under the doctrine of equitable tolling. *Walker v. Astrue*, 593 F.3d 274, 279 (3d Cir. 2010 (holding that "the tolling of filing deadlines is appropriate where 'principles of equity would make the rigid application of a limitation period unfair.'") (internal citation omitted). The WYDOA diligently performed the IFTA and IRP audits, the audits were indisputably complex and extensive, and CUSA made several requests for extensions and/or recalculations. Debtors themselves have acknowledged the complexity of the audits and that CUSA was unable to provide requested documentation at various times. Specifically, they have admitted that:

- "the audit was made more complicated by the fact that CUSA operated 20 different terminals in 11 different states and, in most instances, maintained separate operational records for each terminal" Ex. G - April 2012 Letter at p. 2.

- "CUSA recognizes that – despite its best efforts – it records were not always organized or presented in the fashion the auditors would have preferred." *Id.*

- " . . . with the recent bankruptcy filing, CUSA management lacked the resources to provide some additional trip related documentation to further support its position that the audit fee calculations, as they currently stand, are overstated" Ex. D - January 12 Email at p. 1.

36. Moreover, the IRP-related audit was completed following the IFTA-related audit, which enabled the WYDOA to gather information to be utilized for both audits in one process rather than performing two separate and distinct audits. That process provided a definitive benefit to CUSA; had the WYDOA performed the audits in two separate requests, i.e. with a gap

in periods, then the work and costs related to going through an audit potentially would have doubled for CUSA. Under these circumstances, it would be inequitable to permit CUSA to evade its liabilities, especially when the audit was indisputably commenced within the record keeping requirement time period and CUSA realized a material benefit from the audit process used by the WYDOA. Accordingly, if deemed applicable, the limitation period should be equitably tolled and the Claim should not be time barred.

III. THE CLAIM IS FOR THE ASSESSMENT OF A TAX AND IS THUS ENTITLED TO PRIORITY

37. The WYDOT's Audit Assessment for a "highway use tax" deficiency is a priority tax claim under 11 U.S.C. § 507(a)(8). As in other jurisdictions, Wyoming requires that commercial vehicle owners register and license their vehicles. WYO. STAT. ANN. § 31-18-201 (2011). As a prerequisite to that registration and license, commercial vehicles must pay county fees, state fees and an "equalized highway use tax." WYO. STAT. ANN. § 31-18-401(a)(i)-(iii) (2011). Wyoming law requires that those funds "shall be distributed to the state highway fund." WYO. STAT. ANN. § 31-18-201(d)(3) (2011).

38. Similar to other jurisdictions, commercial vehicles are taxed upon their gross vehicle weight in Wyoming. WYO. STAT. ANN. § 31-18-401(a)(iii) (2011). Wyoming statute provides the following for calculating that tax:

> (iii) Except as otherwise provided in W.S. 31-18-201(d)(iii), an equalized **highway use tax** collected by the department in lieu of the county registration fee imposed by paragraph (a)(i) of this section for commercial vehicles or fleets proportionally registered under W.S. 31-18-201(b)(i) and described in W.S. 31-18-201(d)(ii) pursuant to the following table:

VEHICLE OR COMBINATION GROSS VEHICLE WEIGHT IN POUNDS	EQUALIZED HIGHWAY USE TAX
26,000 - or less	$ 80.00
26,001 - 28,000	100.00
28,001 - 30,000	150.00

30,001 - 32,000	200.00
32,001 - 34,000	250.00
34,001 - 36,000	300.00
36,001 - 38,000	350.00
38,001 - 40,000	400.00
40,001 - 42,000	450.00
42,001 - 44,000	500.00
44,001 - 46,000	550.00
46,001 - 48,000	600.00
48,001 - 50,000	650.00
50,001 - 52,000	700.00
52,001 - 54,000	750.00
54,001 - 56,000	800.00
56,001 - 58,000	850.00
58,001 - 60,000	900.00
60,001 - 62,000	950.00
62,001 - 64,000	1,000.00
64,001 - 66,000	1,050.00
66,001 - 68,000	1,100.00
68,001 - 70,000	1,150.00
70,001 - 72,000	1,200.00
72,001 - 74,000	1,250.00
74,001 - 76,000	1,300.00
76,001 - 78,000	1,350.00
78,001 - 80,000	1,400.00

> For weights over eighty thousand (80,000) pounds, **the tax** under this paragraph shall be one thousand four hundred dollars ($1,400.00) plus fifty dollars ($50.00) for each additional two thousand (2,000) pounds or fraction thereof.

WYO. STAT. ANN. § 31-18-401(a)(iii) (2011)(emphasis added).

39. The 1973 Plan recognizes Wyoming's and other states' highway use taxes, in its definition of "apportionable fee," using the terms "fee" and "tax" interchangeably:

> Apportionable Fee means any periodic recurring **fee or tax** required for registering Vehicles, such as registration, license, or **weight fees**.

1973 Plan § 202 (2006) (emphasis added). Debtors' emphasis on the use of the term "fee" rather than "tax" in the statute is misplaced because the Supreme Court has noted that every time it has examined whether a payment constitutes a tax, it "looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question." *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 220 (1996). The Bankruptcy

Code does not define the term "tax" so the Court must determine what exactions are entitled to priority treatment under section 507(a)(8).

40. The Third Circuit has adopted the *Lorber-Suburban* test to determine whether an obligation represents a fee or a tax. *Reconstituted Comm. of Unsecured Creditors of the United Healthcare Sys. v. State of N.J. DOL (In re United Healthcare Sys.)*, 396 F.3d 247, 255-56 (3d Cir. 2005). The six factors are: (1) if the payment is an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (2) imposed by, or under authority of the legislature; (3) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (4) under the police or taxing power of the state; (5) whether the obligation is universally applicable to similarly situated entities; and (6) whether granting priority status to the government will disadvantage private creditors with like claims. *In re United Healthcare*, 396 F.3d at 253; *In re Suburban Motor Freight, Inc.*, 998 F.2d 338, 341 (6th Cir. 1993); *In re Lorber Industries of California, Inc.*, 675 F.2d 1062, 1066 (9th Cir. 1982).

41. In *Trs. of the Trism Liquidating Trust v. IRS (In re Trism, Inc.)*, the Eight Circuit B.A.P. applied the same test adopted by the Third Circuit and found an annual payment for the use of heavy trucks on state highways to be a tax entitled to priority status. 311 B.R. 509, 514, 516 (8th Cir. B.A.P. 2004). The *Trism* Court rejected the Trustee's argument that the payments were voluntary because only those who choose to own and operate heavy trucks for the minimum number of miles are required to pay. *Id.* at 514-15. Because the payment burden was imposed on every vehicle that fit the parameters, the court held the payments were involuntary. *Id.* at 515. The *Trism* Court also noted that there will be no resulting prejudice to private creditors with like claims if these payments were deemed a tax because there are no "like" claims held by private creditors. *Id.*

42. Debtors rely upon *In re Burlington Motor Holdings, Inc*., 235 B.R. 741 (Bankr. D. Del. 1999), in support of their position that vehicle registration fees are not a "tax" entitled to priority treatment under 11 U.S.C. § 507(a)(8). However, *Burlington* was decided before the Third Circuit adopted the six-factor *Lorber-Suburban* test in *United Healthcare* in 2005. The *Burlington* Court only applied the first four factors originally set out in *Lorber* and did not consider the two additional factors now required by the Third Circuit. *Burlington*, 235 B.R. at 746. The *Burlington* Court emphasized only the first factor in determining that post-petition payments of IRP fees were voluntary and thus not administrative expenses under 503(b)(1)(B), despite vehicle registration being a mandatory requirement of the Code of Federal Regulations. *Id.*

43. Courts have taken the view that similar payments satisfy all of the necessary elements to qualify as a tax under the Bankruptcy Code. In *In re Arrow Transp. Co. of Delaware*, 229 B.R. 456 (D. Or. 1999), the court held that payments under Oregon's highway use tax system constituted taxes. 229 B.R. at 460. The *Arrow* Court found that focus on the "voluntariness" of the payment is inappropriate with regard to highway use taxes because such taxes are "by definition, based upon a transaction which is voluntarily incurred." *Id.*

44. Similarly, the "highway use tax" in Wyoming (and in the other jurisdictions) is part of an overall scheme of collecting taxes based on vehicle weight and mileage traveled. This tax places an involuntary burden upon those who choose to drive in the various jurisdictions in order to provide for highway construction, operation, preservation and maintenance. *In re Arrow*, 229 B.R. at 460; *see also In re Park*, 212 B.R. 430, 433 (Bankr. D. Mass. 1997) ("The Supreme Court has held that taxes are 'those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or

of undertakings authorized by it.'") (quoting *City of New York v. Feiring*, 313 U.S. 283, 285 (1941)). While CUSA could have chosen not to travel in various states, once it did so, the various states legislatively imposed an involuntary tax burden for that travel. *In re Arrow*, 229 B.R. at 460. Having met the requirements of a tax under the *Lorber-Suburban* test as analyzed in *Arrow* and *Trism*, the Claim is entitled to priority status under 11 U.S.C. § 507(a)(8).

IV. THE CLAIM SHOULD NOT BE REDUCED

A. Certain Vehicles Were Not Apportionable Pursuant to the 1973 Plan

45. Debtors argue that the WYDOA improperly assessed 100% fees for 40 vehicles that were "used or intended for use in two or more member jurisdictions," which resulted in an overstated deficiency assessment for the audit period. (Objection at ¶¶ 34-38). Debtors assert that as a result of the improper assessment, the Audit Assessment overstated the amount owed by $55,687 in 2005, and by $19,818 in 2006. (*Id.* at ¶ 38).

46. Whether the WYDOA properly assessed the vehicles at issue is a question of law. The 1973 Plan discusses the scope of the documents reviewed in the audit:

> "Audit" means a physical examination of a registrant's operational records including source documentation to verify fleet distance and accuracy of a registrant's record keeping system for that fleet. **The examination will be of the records maintained for a fleet during the respective preceding year.** This does not preclude an audit of multiple fleets for multiple years. **The purpose of the audit is to determine the proper total distance traveled and the percentage of distance traveled in each jurisdiction.** These percentages equate to the proper registration fees owed by the registrant for a particular fleet or the registration fees owed to the registrant for a particular fleet.

1973 Plan § 262 (2006) (emphasis added).

47. Accordingly, under the 1973 Plan, the WYDOA was charged with reviewing "In-Jurisdiction Distance" during the "preceding year" documents for Registration Years 2005 and 2006, both of these are defined terms:

> "In-Jurisdiction Distance" means the **total distance** operated by a fleet of apportioned vehicles in a jurisdiction **during the preceding year**. In those cases where the registrant operated a fleet of apportioned vehicles in jurisdictions that require no apportionment and grant reciprocity, the base jurisdiction may add such distance to the in-jurisdiction distance.
>
> "Preceding Year" means the period of twelve consecutive months immediately prior to July 1st of the year immediately preceding the commencement of the registration or license year for which apportioned registration is sought.

1973 Plan §§ 222 & 238 (2006) (emphasis added).

48. Therefore, under the 1973 Plan, the WYDOA was charged with reviewing the preceding year's mileage records to determine "the proper total distance traveled and the percentage of distance traveled in each jurisdiction." 1973 Plan § 262 (2006). This is exactly what the auditors did when they looked at whether CUSA's vehicles were "Apportionable Vehicles" (which is the issue of this objection) under the 1973 Plan. In fact, the WYDOA gave CUSA the "benefit of the doubt" and extended the 12 month time period to an 18 month time period. *See e.g.*, Ex. E - Audit Report at p. 3.

49. To determine whether a vehicle was properly "apportioned," the 1973 Plan requires that those vehicles be "used or intended for use:"

> "Apportionable Vehicle" means **any vehicle**, except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and Government-owned vehicles, **used or intended for use in two or more member jurisdictions** that allocate or proportionally

> register vehicles and is used for the transportation of persons for hire or designed, used or maintained primarily for the transportation of property and:

1973 Plan § 204 (2006) (emphasis added).

50. Based upon the above, the WYDOA reviewed the preceding years' operational records and determined these subject vehicles did not travel in two or more member jurisdictions. Accordingly, those 40 vehicles were not "used or intended for use" and denied "apportionable vehicle" status.

51. In support of Debtors' argument that the subject vehicles were "apportionable vehicles," Debtors cite the 2008 IRP (the "2008 Plan"), effective as of July 1, 2008, revision Official Commentary, which provides:

> The intent of the Registrant or Applicant to operate a Vehicle in two or more Member Jurisdictions is to be considered as an objective fact, determined from all the circumstances of the particular case. The fact that a Vehicle is not used in more than one Jurisdiction for the entirety of a Registration Year and for six additional months gives rise to a presumption that the Registrant did not intend to use the Vehicle in more than one Member Jurisdiction. Such a presumption may be overcome, however, by other circumstances presented by the Registrant.

2008 Plan, Art. II - Definitions, Official Commentary.

52. Debtors interpret this Official Commentary provision of the 2008 Plan, which is not the IRP that is applicable to the Assessed Registration Years, to also review the actual travel within the Registration Year to determine whether a vehicle was "used or intended for use." (Objection at ¶ 36). However, as stated above, the purpose of the audit is to examine the records maintained for a fleet during the respective "preceding year" to determine the proper total distance traveled and the percentage of distance traveled in each jurisdiction. *See* 1973 Plan § 262 (2006).

53. Using that "preceding year" information, the WYDOA correctly determined that the subject vehicles were not "used or intended for use" and properly disallowed them as "apportionable vehicles." Accordingly, the WYDOT asks that this Court uphold the Audit Assessment and deny Debtors' proposed adjustments set forth in Section C(a) of the Objection.

B. Debtors Failed to Provide Documentation to the WYDOA Concerning Vehicles That Debtors Allege Travelled in Two member Jurisdictions

54. Debtors argue that Wyoming improperly assessed 100% fees for at least 123 vehicles that had at least one out of state movement. (Objection at ¶ 39). However, it is unclear which mileage records that Debtors refer to, or how those alleged mileage records prove Debtors' assertions. The WYDOT believes that Debtors refer to documents that were never provided to the WYDOA auditors. In fact, CUSA was given an additional ninety (90) days to provide documents to prove this alleged out of state movement and, at the end of that period, the Debtors informed the WYDOA that CUSA could not provide that documentation. *See* Ex. D - January 2012 Email at p. 1.

55. Because the WYDOA auditors did not receive additional documentation with regard to these 143 vehicles, the auditors were required to assess CUSA for 100% fees as provided in the Audit Procedures Manual:

> 603. Request for Operational Records
>
> (a) During the preliminary phase of the Audit, the auditor will have made a request for IVDR's and distance summaries that support the apportioned registration application as filed. Operational Records must be adequate and complete for each Vehicle of the Fleet being audited. **If the Operational Records are not made available, or if the records made available are inadequate for Audit purposes, an assessment of liability may be imposed in**

> **accordance with Article X of the Plan. If an estimate of the Registrant's true liability cannot be determined, the Registrant may be assessed 100% of the original Apportionable Fees for the Base Jurisdiction.** . . .

IRP Audit Procedures Manual § 603 (2011) (emphasis added).

56. Further, to the extent Debtors seek to provide that additional information for the first time before a reviewing Court, the Wyoming Supreme Court rejects the consideration of additional information that was not presented during the course of the audit. In *Wyoming Department of Revenue v. Qwest Corporation*, 263 P.3d 622 (Wyo. 2011), the Wyoming Supreme Court specifically stated that it is improper for a taxpayer to produce this type of additional information for the first time at a contested case hearing when that information should have been provided to auditors during an audit:

> Here, the [Department of Revenue/Department of Audit] sought specific information from Qwest, including the amounts of actual sales tax collected on the CALC charges by month and by county. **Qwest did not provide that information at the time of the audit. Following the hearing, Qwest revealed the requested information did exist and it wanted to use the information to support its claim that it was entitled to a refund. By allowing the late produced information to be admitted into evidence in the contested case proceeding, the [State Board of Equalization] denigrated the entire assessment and audit process.** The reasons espoused in *Airtouch* [*Commun., Inc. v. Dep't of Revenue*, 76 P.3d 342 (Wyo. 2003)] and *RT Commun*[*., Inc. v. State Bd. of Equalization*, 11 P.3d 915, 927 (Wyo. 2000)] support prohibiting a sales taxpayer from bringing late information to the [State Board of Equalization].

Wyo. Dep't of Revenue v. Qwest Corp., 263 P.3d 622, 630-31 (Wyo. 2011) (emphasis added). *See also Wyo. Dep't of Revenue v. Guthrie*, 115 P.3d 1086, 1098 (Wyo. 2005) (stating "[t]here are three possible results from an audit: taxpayer's tax liability stays the same; the tax liability is reduced, or the tax liability is increased. . . . [Taxpayers] can[not] blame the Department for any increased tax liability caused by the reporting practices chosen by [them] that resulted in a self-

reported taxable value that [they] could not adequately verify upon request by the Department."); *RT Commc'ns., Inc. v. State Bd. of Equalization*, 11 P.3d 915, 927 (Wyo. 2000) (stating that a taxpayer cannot complain about the DOR's valuation when it failed to timely provide information).

57. Debtors seek to have this Court review documents that allege 123 of its vehicles had at least one out of state movement in an attempt to reduce the Audit Assessment. (Objection at ¶ 39). As discussed in *Qwest*, Wyoming law prohibits a reviewing Court from considering information that auditors did not consider, and could not have considered, during the course of the audit. Consequently, this Court should deny Debtors' attempt to reduce the Claim by $66,556 based on submissions and information that it admittedly did not provide to the WYDOA during the audit.

[Remainder of page intentionally left blank]

CONCLUSION

58. For the reasons set forth above, the Objection should be denied and the Court should find CUSA is liable for the Claim in the full amount set forth therein.

Dated: October 15, 2012
Wilmington, Delaware

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[14] Pursuant to Wyoming statute, each attorney that represents a Wyoming state agency has to be appointed as a Special Assistant Attorney General during the representation.