UNITED STATES BANRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	
	)	
ERICKSON RETIREMENT	)	
COMMUNITIES, LLC, *et al.*,	)	
	)	
	)	Case No. 09-37010 (SGJ)
	)	
	)	Chapter 11
	)	
Debtors	)	(Jointly Administered)
	)	

TREASURER OF DOUGLAS COUNTY, COLORADO'S RESPONSE TO DEBTORS' SECOND AMENDED MOTION FOR DETERMINATION OF TAX LIABILITY

Sharon K. Jones, Treasurer of Douglas County, Colorado ("Douglas County"), responds to the Debtors' May 28, 2010 Second Amended Motion for Determination of Tax Liability under 11 U.S.C. §§ 105 and 505 (the "Claim Objection") as follows.

INTRODUCTION

The amount of property taxes the Debtors owe is a direct function of the valuation of their taxable property for *ad valorem* property tax purposes. The Debtors challenge Douglas County's valuation of their taxable Colorado real and personal property[1] and seek to have this Court conduct the valuation of their property for Colorado *ad valorem* property tax purposes under the authority of 11 U.S.C. § 505.

Douglas County has asserted both a prepetition claim for *ad valorem* property taxes and an administrative expense claim under 11 U.S.C. § 503(b)(1)(B)(i) for *ad*

[1] All of the Debtors' Colorado property is located in Douglas County.

valorem property taxes incurred by the bankruptcy estate. Both the prepetition claim and the administrative expense claim consist of separate claims for real property taxes and personal property taxes. Douglas County's Claims are secured by statutory liens that are superior to any and all consensual liens. See, C.R.S. (Colorado Revised Statutes) § 39-1-107(2) ("Taxes levied on real and personal property … shall be a perpetual lien thereon, and such lien shall have priority over all other liens until such taxes … shall have been paid in full.").

State law for valuing property for real property taxes is different than state law for valuing property for personal property taxes.

Colorado law on valuing real property for *ad valorem* property taxation is based on appraisals of the subject real property that are conducted every odd numbered year. See, C.R.S. § 39-1-104(10.2)(a), (b). In even numbered years, the county property tax assessor uses the appraisal she conducted during the previous odd numbered year. See, C.R.S. § 39-1-104(10.2)(a).

Colorado law on valuing commercial personal property for *ad valorem* property taxation is based on declarations filed by the taxpayer that list the purchase price and purchase date of the taxpayer's taxable personal property. See, C.R.S. §§ 39-10-103(13), 39-5-107; ARL, Vol. 5, Ch. 4 The taxpayer submits these declarations under penalty of perjury, C.R.S. § 39-5-107(2), and files a sworn declaration every year. See, C.R.S. § 39-5-107(2).

All of Douglas County's claims are secured by statutory superpriority liens on the Colorado property of Debtor Littleton Campus and the proceeds thereof. See, C.R.S. § 39-1-107(2).

In the Claim Objection, the Debtors appear to be attacking both the prepetition claim and the administrative expense claim.

On April 30, 2010, incident to its § 363 purchase of Debtor Littleton Campus's real property assets, Redwood paid the entirety of Douglas County's $1,159,543.54 prepetition claim for real property taxes,[2] and Douglas County has withdrawn its Claim for prepetition real property taxes. However, Douglas County's $56,805.00 prepetition claim for personal property taxes remains unpaid,[3] as do its administrative expense claim of $752,790.00 for real property taxes and $56,805.00 for personal property taxes.[4]

This Court should deny the Claim Objection and allow Douglas County's Claim in the amount stated in its Proofs of Claim; namely allow a $56,805.00 secured claim for prepetition *ad valorem* personal property taxes, plus postpetition interest thereon; Douglas County's $752,790.00 secured administrative expense claim for 2010 *ad valorem* real property taxes incurred by the bankruptcy estate, plus postpetition interest accrued after the due date of such taxes; and Douglas County's $56,805.00 secured administrative expense claim for 2010 *ad valorem* personal property taxes incurred by the bankruptcy estate, plus postpetition interest accrued after the due date of such taxes; for a total of $866,400.00, plus postpetition interest as described above.

SUMMARY OF ARGUMENT

1. The Debtors' conduct in allowing Redwood to pay the full amount of prepetition real property taxes stated in Douglas County's Proofs of Claim is inconsistent with the Debtors' position in the Claim Objection (Argument I, starting at p.10).

[2] This figure includes postpetition interest at the state law statutory rate of 12% APR, as required by 11 U.S.C. §§ 506(b) and 511

[3] This figure is the amount stated in the Proofs of Claim and does not include postpetition interest.

[4] These figures for administrative expenses are the amounts stated in the Proofs of Claim and do not include postpetition interest.

2. This Court lacks subject matter jurisdiction to adjudicate the prepetition real property taxes, because Redwood has paid those taxes, and they are no longer part of Douglas County's Claim (Argument II, starting at p. 11).

3. The price that Redwood paid for all of the Debtors' assets across eight campuses in a § 363 sale is irrelevant to determining the valuation of the Littleton Campus under Colorado *ad valorem* property tax law (Argument III, starting at p. 12):

a. A property's market value as used in the Bankruptcy Code is not necessarily the same as its value for *ad valorem* property tax purposes;

b. The method for valuing property for Colorado *ad valorem* property tax purposes is prescribed in the Colorado Constitution, Colorado statute, and Colorado case law;

A. Real Property Taxes

1. Only arm's length sales made free of duress and under normal economic conditions may be considered by appraisers, whether in the fee appraisal world or in the *ad valorem* property tax world, and a § 363 sale is a sale made under duress;

2. Appraisals are normally based on multiple sales that are then compared to the subject, and not on a single sale;

3. The Debtors have relied on a valuation that used the income approach or discounted cash flow approach, but the Colorado Constitution allows only the sales comparison approach for

apartment buildings, and the bulk of Douglas County's Claim consists of the parcel containing four large apartment buildings;

4. The Debtors are using a bulk sale to value their property, but bulk sales result in lower per-unit prices.

5. The discounted cash flow method that Redwood appears to have used in calculating its negotiating strategy for the § 363 purchase is not allowed in Colorado *ad valorem* property taxation.

B. Personal Property Taxes

1. Douglas County's Claim for personal property taxes was based on the Declaration filed by the Debtors under penalty of perjury

4. The Debtors lack standing to contest the amount of property taxes owed on the two improved parcels, because they are not the record title owners of either of those parcels (Argument IV, starting at p. 21).

5. Under § 505, the Court should abstain from adjudicating the amount of property taxes that the Debtors owe to Douglas County on the improved parcel containing the four large apartment buildings (Argument V, starting at p. 23).

6. Under § 505(a)(2)(A), this Court lacks jurisdiction to determine the legality or amount of the property taxes on both vacant land parcels and the improved parcel containing the single family residence, because those issues were determined prepetition through a state administrative adjudication, and the time to appeal the decision of the state administrative adjudication expired prepetition. (Argument VI, starting at p.34).

If the Court decides not to abstain and to adjudicate allowance of Douglas County's Claim under § 505, Douglas County submits that its valuation of the subject properties is well supported by:

a. the Actual Value Summary, Exhibit A hereto, that the Douglas County Assessor presented before the Douglas County Board of Equalization ("CBOE") with respect to the improved parcel of land containing the four large apartment buildings. This parcel represents the bulk of the value of Douglas County's Claim; and

b. by the Commercial Personal Property Declaration Schedules ("Declarations"), Exhibits B and C hereto, that Debtor Littleton Campus filed with the Douglas County Assessor with respect to the commercial personal property.[5]

The Douglas County Assessor did not prepare an Actual Value Summary for the two vacant land parcels or the improved parcel containing a single family residence, because neither the Debtors nor MSRESS III -- the record title owner of the improved parcels of land until Redwood became the record title owner on May 4, 2010 -- appealed the Douglas County Assessor's determination of value with these parcels.[6]

If the Court decides to hear this property tax valuation case on the merits under the authority of § 505, Douglas County will present full blown appraisals on all of real property that is the subject of its Claim, and the appraiser will testify. In the appraisals,

[5] The Debtors submitted the 2008 Declaration, Exhibit B, in paper form, but submitted the 2009 Declaration, Exhibit C, in electronic form. The individual who filed the 2009 Declaration is Kristin Satterfield, e-mail: Kristin.Satterfield@erickson.com. See, Exhibit C, p. 1. Exhibit C was filed electronically with the Douglas County Assessor's Office on April 20, 2009. See, Exhibit C, p. 1, lower right hand corner. The Douglas County Assessor Personal Property Detail List, the last three pages of Exhibit C was prepared by the staff of the Douglas County Assessor off the information contained in the first three pages of Exhibit C.

[6] For an instant in time at 12:30:10 PM on May 4, 2010, Debtor Littleton Campus was the record title owner. See, Argument IV (standing) at p. 21.

Douglas County reserves the right to use comparable sales that are different from those it presented before the CBOE in the Actual Value Summary on the improved parcel containing the four large apartment buildings. C.R.S. § 39-8-108(1) allows the parties to present such new evidence, because it provides that hearings beyond the CBOE level are *de novo*.[7]

On the commercial personal property, Douglas County's witness will testify to the Declarations, the depreciation schedules promulgated by the Division of Property Taxation of the Colorado Department of Local Affairs ("DPT"), and the computations made by the personal property section of the Office of the Douglas County Assessor.

DOUGLAS COUNTY'S CLAIM

A. Prepetition Claim

1. Real Property Taxes

Douglas County's prepetition claim for real property taxes was paid on April 30, 2010 by Redwood. Therefore, Douglas County has withdrawn Claim Nos. 00067, 00130, 00134, and 00525, which applied to such taxes.

2. Personal Property Taxes

(1) Claim No. 00129: $51,201.00 for 2009 *ad valorem* commercial personal property taxes on Parcel No. P0506116;

(2) Claim No. 00132: $5,604.00 for 2009 *ad valorem* commercial personal property taxes on Parcel No. P0506679.

These claims are a properly allowable Class 2 Secured Tax Claim against Debtor Littleton Campus. See, Fourth Amended Joint Plan of Reorganization, ¶ 4.13.2.

[7] Because of the time and expense needed to prepare such formal appraisals, Douglas County is filing a Motion to Bifurcate.

B. Administrative Expense Claim Under § 503(b)(1)(B)(i)

1. Real Property Taxes

(3) Claim No. 00127: $608,013.00 for 2010 *ad valorem* real property taxes on Parcel No. R0467185;

(4) Claim No. 00131: $81,458.00 for 2010 *ad valorem* real property taxes on Parcel No. R0465124;

(5) Claim No. 00135: $56,741.00 for 2010 *ad valorem* real property taxes on Parcel No. R0465126;

(6) Claim No. 00126: $6,578.00 for 2010 *ad valorem* real property taxes on Parcel No. R0467178.

The administrative expense real property taxes total $752,790.00.

2. Personal Property Taxes

(7) Claim No. 00128: $51,201.00 for 2010 *ad valorem* commercial personal property taxes on Parcel No. P0506116;

(8) Claim No. 00133: $5,604.00 for 2010 *ad valorem* commercial personal property taxes on Parcel No. P0506679.

The administrative expense personal property taxes total $56,805.00.

The administrative expense property taxes in both categories total $809,595.00.

Douglas County's entire $866,000.00 unpaid Claim, both the prepetition claim and the administrative expense claim, is secured by a valid, perfected statutory superpriority lien on, with respect to the real property taxes, the Debtors' Colorado real property and the proceeds thereof; and, with respect to the personal property taxes, the Debtors' Colorado tangible noninventory commercial personal property. C.R.S. § 39-1-

107(1) provides: "[T]he lien of general taxes for the current year ... shall attach to all property, real and personal, at 12 noon on the assessment date." The assessment date for the 2009 property taxes at issue is January 1, 2009. See, C.R.S. § 39-1-105.

Douglas County's claim for 2009 personal property taxes is a prepetition claim, because it relates back to the prepetition statutory January 1, 2009 assessment date.[8] "All taxable property, real and personal, within the State at twelve noon on the first day of January of each year, designated as the official assessment date, shall be listed, appraised, and valued for assessment in the county wherein it is located on the assessment date." C.R.S. § 39-1-105. "Under the Colorado tax code, taxes on real and personal property create a first and perpetual lien. C.R.S. § 39-1-107 (2). This lien attaches to the property as of noon on January 1 of the tax year in question. C.R.S. § 39-1-105." In re Western Pacific Airlines, Inc., 273 F. 3d 1288, 1291 (10th Cir. 2001). See, Morehead v. John Deere Industrial Equipment Co., 572 P. 2d 1207, 1208-10 (Colo.1978) (en banc); Wolf v. Antonoff, 423 P. 2d 840, 842 (Colo.1967) (en banc); City and County of Denver v. Tax Research Bureau, 71 P. 2d 809, 812 (Colo.1937).

Douglas County's computation of the Debtors' property tax liability for 2009 taxes renders choate Douglas County's property tax lien for 2009 taxes; 11 U.S.C. §§ 362 (b) and 546 (b) allow Douglas County to make these computations postpetition. The resulting property tax lien for 2009 property taxes relates back to the January 1, 2009 assessment date. "Colorado case law holds that 'such lien does not become effective nor is its value known until the property is assessed and the taxes levied, at which time the therefore inchoate lien relates back and attaches as of the date authorized for

[8] Likewise, Douglas County's claim for 2008 and 2009 real property taxes was a prepetition claim. However, Redwood paid those taxes on April 30, 2010.

assessment.'" In re Western States Distributors, Inc., 179 B.R. 666, 668 (Bankr.D.Colo.1995) (citations omitted) (quoting Marin, et al. v. Board of Assessment Appeals, et al., 707 P. 2d 348, 354 (Colo.1985)). See, Maryland National Bank v. Mayor and City Council of Baltimore, 723 F. 2d 1138, 1143-44 (4th Cir.1983); In re Thurman, 163 B.R. 95, 98 (Bankr.W.D. Texas1994); In re Summit Ventures, Inc., 135 B.R. 483, 492 (Bankr.D.Vt.1991).

Douglas County's lien is senior to all other liens on the real property of Debtor Littleton Campus and the proceeds thereof and to all other liens on Debtor Littleton Campus's noninventory tangible personal property and the proceeds thereof.. "Taxes levied on real and personal property ... shall be a perpetual lien thereon, and such lien shall have priority over all other liens ...." C.R.S. § 39-1-107(2) (emphasis added). See, In re Western Pacific Airlines, Inc., 273 F.3d 1288, 1291 (10th Cir. 2001) ("Under the Colorado tax code, taxes on real and personal property create a first and perpetual lien."); United States v. Elliott, 209 F.Supp. 374, 375 (D.Colo.1972).

Douglas County is entitled to postpetition interest on its Claim at the state statutory rate of 12% APR. See, C.R.S. § 39-10-104.5; 11 U.S.C. §§ 506(b), 511(a).

I.

THE DEBTORS' CONDUCT IN ALLOWING REDWOOD TO PAY THE FULL AMOUNT OF PREPETITION REAL PROPERTY TAXES STATED IN DOUGLAS COUNTY'S PROOFS OF CLAIM IS INCONSISTENT WITH THE DEBTORS' POSITION IN THE CLAIM OBJECTION

The Debtors challenge Douglas County's valuation for Colorado *ad valorem* property tax purposes and assert that the correct valuation for those purposes is the price that Redwood paid for the Debtors' property under the 11 U.S.C. § 363 sale. That

valuation results in far lower taxes than the taxes claimed in Douglas County's Proofs of Claim.

However, on April 30, 2010, Redwood paid Douglas County the entire $1,159,543.54 it claimed in its Proofs of Claim for prepetition real property taxes, without the substantial reduction in amount advocated in the Claim Objection. The Debtors' allowing Redwood to pay to Douglas County the full amount stated in Douglas County's Proof of Claim relative to prepetition real property taxes is inconsistent with the position the Debtors take in the Claim Objection that the correct amount of taxes is far lower.

Redwood paid only the prepetition real property taxes. However, the property valuation that underlies the amount of Douglas County's Claim for 2008 and 2009 prepetition real property taxes is the same property valuation that underlies the amount of Douglas County's administrative expense Claim for 2010 real property taxes. Moreover, the same Declarations filed by the Debtors in 2009 that underlie the amount of Douglas County's Claim 2009 personal property taxes forms the basis for the amount of Douglas County's administrative expense Claim for 2010 personal property taxes.

II.

THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE THE PREPETITION REAL PROPERTY TAXES, BECAUSE REDWOOD HAS PAID THOSE TAXES

Because Redwood has paid the 2008 and 2009 prepetition real property taxes, they are no longer part of Douglas County's Claim, and this Court lacks subject matter jurisdiction to determine them.

With respect to the 2010 real property taxes, under C.R.S. § 39-1-107(2), the Colorado real property and the proceeds thereof remain encumbered with a statutory lien for the 2010 real property taxes until those taxes have been paid in full. Likewise, with respect to the 2009 and 2010 personal property taxes, under C.R.S. § 39-1-107(2), the Colorado personal property and the proceeds thereof remain encumbered with a statutory lien for the 2009 and 2010 personal property taxes until those taxes have been paid in full.

To the extent that the Debtors are the entity that is liable for the various property taxes that are the subject of Douglas County's Claim, the Debtors' argument that the price that Redwood paid for the Debtors' country-wide assets is dispositive of their value for *ad valorem* property tax purposes is germane to the proper amount of Douglas County's Claim. That argument is addressed below under Argument III.

III.

THE PRICE REDWOOD PAID FOR THE DEBTORS' ASSETS IN A § 363 SALE IS IRRELEVANT FOR COLORADO *AD VALOREM* PROPERTY TAX PURPOSES

The Debtors contend that the price that Redwood paid for the Debtors' country-wide assets is dispositive of their value for *ad valorem* property tax purposes and that Redwood's court-approved allocation of that purchase price among the Debtors' eight campuses is dispositive of the value of the assets with respect to each of those various campuses. The Debtors are mistaken.

A property's value as used in the Bankruptcy Code for § 363 sale purposes, relief from stay, adequate protection, or cramdown purposes is not necessarily the same as its value for *ad valorem* property tax purposes. "[T]he valuation for ad valorem taxation

purposes need not equate with the valuation methods for appraisals of … land for other purposes." Fidelity Castle Pines, Ltd. v. State of Colorado, 948 P.2d 26, 29-30 (Colo.App.1997). "The matrix of considerations for ascertaining 'market value' under Minn, Stat. § 273.11 is not the same as under § 506(a), or under the provisions of the Bankruptcy Code that specifically define 'value,' like § 522(a)(2)." In re Northbrook Partners, LLP, 245 B.R. 104, 119 (Bankr.D Minn.2000). See, Building Technologies Corporation v. City of Hannibal, 167 B.R. 853, 858 (Bankr.S.D. Ohio1994)..

The method for valuing property for Colorado *ad valorem* property tax purposes is prescribed in the Colorado Constitution, Colo. Const. Art. X, § 1(b) (real property), Colo. Const. Art. X, § 1(c) (personal property); Colorado statute, C.R.S. § 39-1-1-103(5) (real property), C.RS. § 39-1-103(13) (personal property); and the Assesssor's Reference Library ("ARL"), which is promulgated by the Division of Property Taxation of the Colorado Department of Local Affairs ("DPT"), which is accessible on line at http://www.dola.state.co.us/dpt/publications/arl_index.htm.

The ARL is binding on county assessors and persuasive for the court. See, Huddleston v. Grand County Board of Equalization, 913 P.2d 15 (Colo.1996); Jet Black, LLC v. Routt County Board of County Commissioners, 165 P.3d 744, 740 (Colo. App.2006) ("Although not binding, we defer to statutory interpretations contained in the ARL. However, county assessors are bound by such interpretations.").

A. The Real Property Taxes

The Debtors are essentially relying on a single sale, the § 363 sale of their assets to Redwood. This is erroneous for several reasons:

1. Only arm's length sales made free of duress and under normal economic conditions may considered by appraisers, whether in the fee appraisal world or in the *ad valorem* property tax world.

"We have explained that market value is 'what a willing buyer would pay a willing seller under normal economic conditions.'" Board of Assessment Appeals of the State of Colorado v. Colorado Arlberg Club, 762 P.2d 146, 151 (Colo.1988) (en banc) (emphasis added).

> "Our definition is consistent with the basic definition of market value used by appraisers:
>
> > 'The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under undue duress.'
>
> American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 33 (8th ed 1983); see *also* Comment, *The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*. 124 U.Pa.L.Rev. 1418, 1430 (1976) (market value is defined as the price reaching 'in a fair, arm's length transaction between willing parties.")"

Id. (emphasis added). See, ARL Vol. 3, p. 2.3, 1-89 Rev. 1-10.

Although the § 363 sale to Redwood was approved by this Court, that sale was a distressed sale, because the seller was in bankruptcy. Furthermore, the § 363 sale to Redwood was not made "under normal economic conditions," Colorado Arlberg Club, since § 363 sales are not normal occurrences in the market place.

2. A single sale does not a market make.

For *ad* valorem real property tax valuations, there must be a number of sales that are comparable to the subject property. The appraiser must then make adjustments to the comparable sales to make them similar to the subject.

> "Use of the market approach shall require a representative body of sales ... sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales, including the extent of similarities and dissimilarities among properties that are compared for assessment purposes. In order to obtain a reasonable sample and to reduce sudden price changes or fluctuations, all sales shall be included in the sample that reasonably reflect a true or typical sale price during the period specified in section 39-1-104(10.2)."

C.R.S. § 39-1-103(8)(a)(I) (emphasis added). See, Board of Assessment Appeals v. Sampson, 105 P.3d 198, 203 (Colo.2005) **(**"Relevant to analysis of sales of comparable properties in the market is the consideration of the property's specific attributes. *** [A]ppraisals must reflect due consideration of the comparability of such sales, including the extent of the similarities and dissimilarities among properties compared for assessment purposes.")**;** ARL, Vol. 3, Chap. 2..

3. The evidence relied on by the Debtors uses the wrong appraisal method.

Most of Douglas County's Claim is attributable to the parcel containing four large apartment buildings (Claim Nos. 00067 and 00127, both for Parcel No. R0467185).

Redwood undoubtedly based its calculation of the amount it was willing to pay for the Debtors' assets on a discounted cash flow analysis. However, in the *ad valorem* property tax world, the Colorado Constitution prohibits use of the discounted cash flow method or the income method for apartment buildings. Only the sales comparison method (sometimes called the market approach) may be used for *ad valorem* property tax valuation of residential property. See, Colorado Constitution, Art. X, § 20(8); C.R.S. § 39-1-103(5)(a) ("The actual value of residential real property shall be determined solely by consideration of the market approach to appraisal."). Colorado statute regards

apartment buildings as residential property. See, C.R.S. § 39-1-102(14.3), (14.4).[9] See, Affidavit of Larry Shouse, Exhibit D hereto, ¶ 3.

The sales comparison approach prescribed by Colorado statute for *ad valorem* property tax valuation is different from the sales comparison approach used in fee appraisals outside the *ad valorem* property taxation world. For *ad valorem* property tax valuations, the subject property is valued as of the valuation date, which is June 30 of the year prior to the tax year in question (the valuation date is sometimes called the appraisal date[10]). In the case of 2009 taxes, the valuation date is June 30, 2008. See, C.R.S. § 39-1-104(10.2)(a). The only sales that are considered are the sales of comparable properties that occurred during the "base period" (sometimes called the "study period"), which is the 18 months prior to the valuation date.[11] Id. Sales that occur after the valuation date cannot be considered. If no comparable sales can be found within the 18-month base period, sales in the 6 months prior to the start of the base period can be considered, with such successive extensions able to go back as far as 6 years prior to the valuation date. Id. See, Affidavit of Larry Shouse, ¶ 4.

The most use that is allowed of the income method for *ad valorem* valuation of apartment buildings is computation of a gross rent multiplier, which may be used only as a test of reasonableness, but not as a direct computation of value. For the property at issue here, the gross rent multiplier looks at the gross rents received during the base period ending on June 30, 2008 and compares that gross rent multiplier to the gross rent multiplier during the same base period for the comparable sales analyzed under the sales

[9] This fact works to the Debtors' advantage, inasmuch as the apartment buildings are taxed at the 7.96% residential rate, rather than the 29% commercial rate.
[10] The appraisal date is not to be confused with the assessment date, which is January 1 of the tax year in question, See, C.R.S. § 39-1-105.
[11] At the county assessor's option, the base period can be 24 months, rather than 18 months.

comparison method. The gross rent multiplier serves as a check on whether the comparable sales really are comparable. "A gross rent multiplier may be considered as a unit of comparison within the market approach to appraisal." C.R.S. § 39-1-103(5)(a). See, Affidavit of Larry Shouse, ¶ 7.

But Colorado *ad valorem* property tax valuation does not allow rents to be used as part of a discounted cash flow analysis, where rents and other income for both the subject and the market are analyzed against expenses, vacancy rates, and collection rates of both the subject and the market, to arrive at annual profits; a capitalization rate is derived from market data; and finally a value is derived for the subject. Id. That methodology is allowed for commercial buildings, but not for apartment buildings. See, Affidavit of Larry Shouse, ¶ 8.

Therefore, the method of valuation that Redwood probably used is legally impermissible under Colorado *ad valorem* property tax law for valuing the bulk of Douglas County's Claim.

4. The Debtors are using a bulk sale value, and bulk sales result in lower per-unit prices.

Redwood purchased all of the Debtors' assets throughout the United States on eight different campuses under a single § 363 purchase. Compared to the sale of only one campus, this is a multiple-campus sale, commonly referred to in appraisals as a "bulk sale" or "portfolio sale." See, Affidavit of Larry Shouse, ¶ 11 Bulk sales almost always fetch a lower per-unit price than nonbulk sales. See, Affidavit of Larry Shouse, ¶ 12.

Bulk sales are disfavored for Colorado *ad valorem* property tax valuation. See in the vacant land context, Resolution Trust Corporation v. BCC of Arapahoe County, 904 P.2d 1363, 1364-65 (Colo.App.1995); El Paso County Board of Equalization v.

Craddock, 850 P.2d 702, 705 (Colo.1993) (en banc). See also, ARL, Vol. 3, Chap. 4; Affidavit of Larry Shouse, ¶ 13.

5. Even if the parcel containing the apartment buildings could be valued for *ad valorem* purposes using a method other than the sales comparison method, the discounted cash flow method is impermissible for Colorado *ad valorem* property tax valuation

The specific type of income approach that Redwood probably used was the discounted cash flow method, since that is the standard method used in the fee appraisal world in making purchasing and financing decisions. See, Affidavit of Larry Shouse, ¶ 5. However, in Colorado *ad valorem* property tax valuation, the discounted cash flow method may not be used, because the discounted cash flow method looks at probable future income streams that occur outside the base period. See, C.R.S. § 39-1-104(10.2)(d); Padre Resort, Inc. v. Jefferson County Board of County Commissioners, 30 P.3d 813, 815 (Colo.2001) ("Use of the base period is mandatory under § 39-1-104(10.2)(d), and information on conditions existing outside the base period may not be considered"); Carrara Place, Ltd. v. Arapahoe County Board of Equalization, 761 P.2d 197, 204 (Colo.1988). Instead, only the direct income method may be used.

The discounted cash flow method is a yield capitalization method that calculates the present value of anticipated future cash flow. In contrast, the direct income method – which is allowed in Colorado for property tax valuations -- looks into the past, not the future, and utilizes base period income and expense data, capitalized at base period market capitalization rates, to establish actual value. See, Affidavit of Larry Shouse, ¶¶ 9, 10.

B. The Personal Property Taxes

The method for establishing the amount of personal property taxes is set entirely by statute and relies exclusively on the depreciated cost method, and not on the price paid for comparable personal property sales or the sale of the subject personal property.

1. Douglas County's Claim for Personal Property Taxes Was Based on the Declarations Filed By the Debtors

For personal property in Colorado, the assessed value for *ad valorem* property taxation is determined only under the cost approach See, C.R.S. § 39-1-103(13); ARL, Vol. 5, Chap. 4.

Douglas County's Claim for 2008 and 2009 personal property taxes is based on the Declarations, Exhibits B and C hereto, that the Debtors filed with Douglas County. For each item of personal property owned by the Debtor, the Declarations provide a description of the item, the original installed cost of the item, and the year the Debtor acquired the item. The ARL, Vol. 5, § 3.5, required the Debtors to set forth the original installed cost of each item of personal property.

The figures that the Debtors provided in the Declarations allowed Douglas County to compute the value on which Colorado imposes personal property taxes, using the depreciated installed cost method.

The Debtors prepared the Declarations from their books and records. Colorado statute required the Debtors to file the Declarations.

> "All taxable personal property shall be listed on a form of schedule approved by the [State Property Tax] administrator and prepared and furnished by the [county] assessor. Such schedule shall be so designed to show the owner's name, address, social security number or federal employer identification number, and the location and general description of the owner's taxable personal property, divided into the various subclasses, and shall provide sufficient space for the furnishing of such information, derived from the books of account, records, or Colorado income tax returns of the owner of such property, as may be required by the assessor to determine the actual value of such property."

C.R.S. § 39-5-107(1) (emphasis added).

The Debtors filed the Declarations under penalty of perjury. See, C.R.S. § 39-5-107(2).

In order to compute the depreciated value of the item, Douglas County is required to use the Colorado Division of Property Taxation's ("DPT's") depreciation schedule for that type of property.

The depreciation schedules exist in two forms: (a) a computer program that is installed in all county assessor offices in Colorado; and (b) a manual version, which is set forth in ARL, Vol. 5, Chapter 4, Personal Property Tables, 2-89, Rev. 3-05.

The personal property taxes owed are a simple arithmetic computation off the assessed value, which is a statutory percentage of the depreciated actual value that is derived from the Declarations and the DPT's depreciation schedules. The actual value is multiplied by 29% to get the assessed value. The assessed value is then multiplied by the tax rate to get the taxes owed.

DPT's depreciation schedules are entitled to judicial deference, because Colorado property tax statutes are subject to different reasonable interpretations, and prescribing appraisal methods falls within DPT's expertise. See, Huddleston, 913 P.2d at 17; Manor Vail Condo. Ass'n v. Board of Equalization, 956 P.2d 654, 659 (Colo.App.1998); Smith

v. Farmers Ins. Exch., 9 P.3d 335, 340 (Colo.2000). DPT's depreciation schedules were computed from information from Marshall & Swift and the U.S. Internal Revenue Service. Marshall & Swift is a statistical analysis service which, among other things, computes industry averages for depreciation of various types of personal property used by businesses. Marshall & Swift's statistical analysis tables are widely used and relied on the personal property appraisal profession and by personal property appraisers in both the private and public sectors.

For the 2010 personal property taxes, if the Debtors do not file a Declaration, Douglas County will make an extrapolation, based on the best information available.

IV.

THE DEBTORS LACK STANDING TO CONTEST THE 2010 REAL PROPERTY TAXES OWED ON THE IMPROVED PARCELS, BECAUSE THEY ARE NOT THE RECORD TITLE OWNER OF THE REAL PROPERTY THAT IS SUBJECT TO THOSE 2010 PROPERTY TAXES

As shown above in Argument I, the issue of the 2008 and 2009 real property taxes is not before the Court, because Redwood has paid those taxes. However, the issue of the 2010 real property taxes is before the Court under Douglas County's real property administrative expense Proofs of Claim and the Claim Objection.

Douglas County's has filed property tax Proofs of Claim for four different parcels of real estate, two of which are improved (the "Improved Parcels") and two of which are vacant (the "Vacant Land Parcels").

Improved Parcel, Account No. R0467185, consists of 47.97 acres and includes 4 three-story retirement residence apartment buildings, a clubhouse, a parking structure,

and equipment shed. See, Douglas County Assessor Property Profile, Account No. R0467185, Exhibit E hereto.

Improved Parcel, Account No. R0467178, consists of 54.66 acres and includes a single family residence. See, Douglas County Assessor Property Profile, Account No. R0467178, Exhibit F hereto.

Vacant Land Parcel, Account No. R0465126, consists of 12.58 acres. See, Douglas County Assessor Property Profile, Account No. R0465126, Exhibit G hereto.

Vacant Land Parcel, Account No. R0465124, consists of 18.06 acres. See, Douglas County Assessor Property Profile, Account No. R0465124, Exhibit H hereto.

According to the recorded deeds, only the Vacant Land Parcels were owned by the Debtors prior to Redwood's taking title to all of the Colorado property on May 4, 2010. Prior to May 4, 2010, the record title owner of the Improved Parcels was MSRESS III Denver Campus LLC ("MSRESS III"), pursuant to a quit claim deed, Exhibit I hereto, recorded on October 17, 2006 at Reception Number 2006089468 in the real estate records of the Douglas County Clerk and Recorder. (MSRESS III is a limited partnership operated by Morgan Stanley Bank.)

Debtor Littleton Campus owned the Improved Parcels for only an instant in time at 12:13:10 PM on May 4, 2010: the deed from Debtor Littleton Campus to Redwood bears the very next reception number of the deed from MSRESS III to Debtor Littleton Campus. See, quitclaim deed from MSRESS III to Debtor Littleton Campus, Douglas County Clerk and Recorder Reception No. 2010027244, recorded at 12:13:10 PM on May 4, 2010, Exhibit J hereto[12]; special warranty deed from Debtor Littleton Campus to

[12] The Exhibit includes the deed itself, without the attachments to the deed, which consist of various pleadings in this bankruptcy case and the exhibits thereto.

Redwood, Douglas County Clerk and Recorder Reception No. 2010027245, recorded at 12:13:10 PM on May 4, 2010, Exhibit K hereto[13].

Therefore, the only entity with standing to contest the property taxes owed on the Improved Parcels is either MSRESS III or Redwood.

Because none of the Debtors is liable for property taxes on the Improved Parcels, the Debtors lack standing to challenge the portion of Douglas County's Claim that relates to the Improved Parcels. See, Little v. KPMG, LLP, 575 F.3d 533. 540 (5thCir.2009); Ford v. Nylcare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, 332 (5thCir.2001); Coastal Habitat Alliance v. Patterson, 601 F.Supp.2d 868, 877 (W.D.Tex.2009). "Generally, the one who bears the financial burden of a tax is a party aggrieved and thus has standing to challenge an assessment. A purchaser of real property has standing to seek abatement of taxes assessed in the year of the purchase." Hughey v. Jefferson County Board of Commissioners, 921 P.2d 76, 78 (Colo.App.1996).

V.

UNDER 11 U.S.C. § 505, THE COURT SHOULD ABSTAIN FROM ADJUDICATING THE AMOUNT OF PREPETITION TAXES THAT THE DEBTORS OWE TO DOUGLAS COUNTY ON THE IMPROVED PARCELS AND FROM ADJUDICATING THE AMOUNT OF ANY OF THE 2010 TAXES

As shown above in Argument I, the issue of the 2008 and 2009 real property taxes is not before the Court, because Redwood has paid those taxes. However, the issue of the 2010 real property taxes is before the Court under Douglas County's real property administrative expense Proofs of Claim and the Claim Objection, as are the issues of the 2009 prepetition personal property taxes and the 2010 postpetition personal property

[13] The Exhibit includes the deed itself, without the attachments to the deed, which consist of various pleadings in this bankruptcy case and the exhibits thereto.

taxes. This Court should abstain from adjudicating the legality and amount of all of these taxes and should require the Debtors to contest these taxes outside of bankruptcy, before state administrative and judicial tribunals.

A bankruptcy court should abstain from determining the amount of taxes the debtor owes except "where bankruptcy issues predominate and the Code's objectives will be potentially impaired." Hinslely v. Harris County, State of Texas v. F.D.I.C (In the Matter of George R. Hinsley), 69 Fed.Appx. 658, * 2 (5thCir.2003).

Here, allowing the legality and amount of Douglas County's *ad valorem* property tax Claim to be determined in state administrative and judicial proceedings will not have a material adverse effect on the administration of this bankruptcy case, because the § 363 sale of almost all of the Debtor's assets to Redwood has been already been concluded and approved by this Court, the Fourth Amended Joint Plan of Reorganization has already been confirmed, and sufficient monies are to be escrowed to pay the full amount of Douglas County's Claim, as stated in its Proofs of Claim.

Under 28 U.S.C. § 1334(c)(1), this Court may abstain from hearing this Claim Objection. Under 11 U.S.C. § 505(a)(1), this Court is not required to redetermine Debtors' tax liability. The plain language of § 505(a)(1) gives bankruptcy courts "purely discretionary" authority to redetermine a debtor's tax liability. In re Metromedia Fiber Network Inc., 299 B.R. 251, 281 (Bankr.S.D.N.Y 2003). See, In re Galvano, 116 B.R. 367, 372 (Bankr.E.D.N.Y. 1990) (the court's authority to determine a debtor's tax liability is discretionary); Williams v. Internal Revenue Service, 190 B.R. 225, 227 (Bankr.W.D. Penn. 1995) (the court is not required to determine the amount of a tax).

If the Court were to undertake redetermining values and Debtors' tax liabilities, it would have to interpret and apply Colorado real and personal property tax law, as well as

the property tax laws of every other jurisdiction involved in the other pending Motions for Determination of Tax Liability. See, Building Technologies Corporation v. City of Hannibal, 167 B.R. 853, 858 (Bankr.S.D. Ohio 1994) (in deciding § 505 cases, bankruptcy courts must give full faith and credit to the law of the state upon which the tax is based.). Many bankruptcy courts have abstained from redetermining values in similar circumstances. E.g., In re Metromedia Fiber Network, Inc., 299 B.R. 251, 283-84 (Bankr.S.D.N.Y. 2003); In re Cody, 281 B.R. 182, 194 (S.D.N.Y. 2002); In re Building Technologies Corp., 167 B.R. 853, 859 (Bankr.S.D.Ohio1994); In re St. John's Nursing Home, Inc., 154 B.R. 117, 125-26 (Bankr.D.Mass.1993).

The large-scale redetermination of property values sought by Debtors would improperly interfere with the state and local tax assessment systems of the jurisdictions involved. As stated in In re Metromedia Fiber Network, Inc., "any uniform valuation of the debtors' taxable property determined by this Court is bound to be at variance with state or local methodologies mandated by local law or practice, and with assessment valuation by the defendants of other taxpayer properties within their respective jurisdictions, producing disparate and discriminatory results." In re Metromedia Fiber Network, Inc., 299 B.R. at 283. Although, at first blush, it may seem reasonable to ensure that Debtors' property tax values are similar from jurisdiction to jurisdiction, such uniformity is not required and, in the end, cannot be achieved. "Nothing in the Constitution or the Bankruptcy Code entitles a debtor to uniform property tax determinations in differing tax jurisdictions, and nothing in federal law entitles the federal courts to impose uniform taxation schemes or methodologies on state and local

governments." Id. State and local law dictate personal property tax values and these laws may not, and probably will not, result in uniform valuations.

In deciding whether to determine or redetermine tax liability under § 505, bankruptcy courts consider the following factors: (1) the complexity of the tax issues to be decided, (2) the need to administer the bankruptcy case in an orderly and efficient manner, (3) the burden on the Court's docket, (4) the length of time required for trial and decision, (5) the asset and liability structure of the debtor, and (6) the prejudice to the debtor and potential prejudice to the taxing authority. See, In re Galvano, 116 B.R. at 372. Applied to this case, these factors support abstention.

The valuation law with which bankruptcy courts are most familiar (such as §§ 506(a) and 522(a)(2)) is generally different from the valuation law applied in taxation cases. See, Building Technologies Corporation v. City of Hannibal, 167 B.R. 853, 858 (Bankr.S.D. Ohio 1994); In re Northbrook Partners, LLP, 245 B.R. 104, 119 (Bankr.D. Minn. 2000) (contrasting ad valorem taxation from methods of valuation used in bankruptcy administration). Here, this Court would have to apply the state tax laws of many different jurisdictions. Although these laws may be similar, they are not the same. See, In re Metromedia Fiber Network, Inc., 299 B.R. at 283 ("Even if, as the debtors assert, all of the defendant tax jurisdictions purport to utilize a concept of market value in the assessment process, the methodologies used are bound to differ."). Reviewing, analyzing, and applying numerous state tax laws raises complex issues for this Court. The Court would need to spend time reviewing and understanding Colorado tax law, as well as the tax laws of other jurisdictions. See, In re Northbrook Partners, 245 B.R. at 119-20 ("It would be a substantial burden on this forum to conduct a lengthy trial and to

prepare a decision that would require familiarity with a foreign body of law, probably never to be used again. It would divert resources away from the disputes that are the central mission of the bankruptcy courts, to disputes that already have their presumptive forum under law.").

A. The Debtors Elected to Pursue their State Law Remedies Postpetition on the 2009 Property Taxes the Improved Parcel Containing the Four Large Apartment Buildings, Only to Seek to Abandon their State Law Remedies Now

The Debtors appear to contend that they, rather than MSRESS III or Redwood, owe the property taxes on the Improved Parcels, notwithstanding the fact that MSRESS III was the record title owner of the Improved Parcels until 12:30:10 PM on May 4, 2010, and Redwood has been the record title owner since 12:30:10 PM on May 4, 2010. Otherwise, the Debtors would lack standing to file the Claim Objection. See, Argument IV on standing.

On May 38, 2009, MSRESS III filed a protest under C.R.S. § 39-5-122(2) with the Douglas County Assessor with respect to the 2009 Douglas County real property taxes on the Improved Parcel containing the four large apartment buildings. See, Affidavit of Larry Shouse, ¶ 19. The Assessor valued the Improved Parcel containing the four large apartment buildings at $83,955,000; MSRESS III contended that the value was $70,000,000. See, Notice of Valuation, Exhibit L hereto.

On August 21, 2009, the Assessor denied the protest. See, Notice of Determination, Exhibit M.

Under C.R.S. § 39-5-122(3), MSRESS III timely appealed the Assessor's denial of its protest of the Improved Parcel containing the four large apartment buildings to the CBOE. However, MSRESS II did not appeal the denial of its protest of the Improved

Parcel containing the single family residence, which was also titled in the name of MSRESS III.

On September 24, 2009, the CBOE set a hearing for October 28, 2009 for the Improved Parcel containing the four large apartment buildings. See, CBOE letter to MSRESS III, Exhibit N hereto.

At the CBOE hearing, MSRESS III had the right to introduce exhibits, call witnesses, including expert witnesses, and cross examine the County's witnesses. See, C.R.S. § 39-8-107(1); and See, Douglas County Board of Equalization Rules for Conduct of Hearings, Exhibit O hereto.

On October 19, 2009, the Debtors filed their petition in bankruptcy.

On November 3, 2009, the CBOE reduced the valuation of the Improved Parcel containing the four large apartment buildings by $4,197,750, to $79,757,250. See, Referee's Recommendation Sheet, Exhibit P; CBOE; Affidavit of Larry Shouse, ¶ 23.

If it was unsatisfied with the CBOE's determination, MSRESS III had three options under C.R.S. § 39-8-108(1): appeal to the Colorado Board of Assessment Appeals ("BAA"), appeal to Colorado District Court, or seek binding arbitrations. All of these appeals are as a matter of right. Id.

In hearings before the BAA, the taxpayer has right to introduce exhibits, call witnesses, including expert witnesses, cross examine the County's witnesses, file briefs, make an opening statement and a closing argument. See, Rules of the BAA, Exhibit Q hereto, Rules 11, 12, 13, 14. The taxpayer and the County each receives the other party's documentary evidence, including the other party's written appraisal, 10 business days prior to the hearing, and is entitled to serve rebuttal documentary evidence up to 3

business days prior to the hearing. See, BAA Rule 11, Exhibit Q. In real property cases, the County is required to prepare and serve a formal appraisal 10 days prior to the hearing. However, there is no requirement that the taxpayer prepare an appraisal (in commercial cases, many taxpayers choose to serve and use an appraisal).

Similar rights and rules apply in state district court and in arbitrations.

The proceedings in each of these forums are *de novo*. See, C.R.S. § 39-8-108(1). .

Appeal from the BAA and from state district court is to the Colorado Court of Appeals. See, C.R.S. § 39-8-108(2). The arbitrator's determinations are final and unappealable. Id. From the Colorado Court of Appeals, discretionary appeal lies with the Colorado Supreme Court under a motion for writ of *certiorari.*

Notice of appeal of the CBOE's decision to any of the three forums must be filed within 30 days of the CBOE's written decision. See, C.R.S. § 39-8-107(1). A timely notice of appeal is jurisdictional. .

MSRESS III's time to file a notice of appeal expired on November 30, 2009, but MSRESS III did not file a notice of appeal. On that date, the CBOE's decision became unappealable. See, Affidavit of Larry Shouse, ¶¶ 24, 25.

When MSRESS III elected not to appeal the CBOE decision, it evidently made the legal and business decision that it was satisfied with reduction in value it had obtained from the CBOE. If the true obligor on the 2009 property taxes on the Improved Parcel is the Debtors, then the decision of MSRESS III not to appeal the CBOE decision is binding on the Debtors, or the Debtors may have a cause of action against MSRESS III for failing to appeal the CBOE's decision to the BAA or state district court.

Here, "[t]he extent to which the 'fresh start' objective of the Bankruptcy Code is implicated is thus minimal, particularly given that … the debtor made [no] effort to contest the allegedly inflated value on the … property as avenues to challenge the state tax valuation passed them by." Hinsley v. Harris County, State of Texas v. F.D.I.C (In the Matter of George R. Hinsley), 69 Fed.Appx. 658 at * 4.

"Section 505 was enacted to protect creditors from the prejudice caused by an ailing debtor's failure to contest tax assessments …..It was not enacted to afford debtors a second bite at the apple at the expense of outside creditors." New Haven Projects Ltd. Liab. v. City of New Haven (In re New Haven Projects Ltd. Liab.), 225 F.3d 283, 290 (2nd Cir.2000). These Debtors had the opportunity to appeal the CBOE''s determination of the tax valuation of the Improved Parcel containing the four large apartment buildings to the BAA or state district court, but they failed to avail themselves of the opportunity. They are now seeking an impermissible second bite at the apple.

B. If MSRESS III Had Pursued its State Law Remedies on the 2009 Property Taxes with Respect to the Improved Parcel Containing the Four Large Apartment Buildings, It Would Have Had an Adjudication by the Colorado Board of Assessment Appeals or the Colorado District Court By the End of 2010

If MSRESS III had appealed the CBOE's decision on the 2009 property taxes on the Improved Parcel containing the four large apartment buildings, the BAA or state district court probably would have heard the case before the end of 2010, since the BAA is already hearing 2009 Douglas County cases, and the BAA typically renders its decisions within 30 days, as it is required to by statute, C.R.S. § 39-2-125(1)(c). See, Affidavit of Larry Shouse, ¶ ¶ 14, 15. For property tax cases, the state district court uses an accelerated process, compared to other types of district court cases. This accelerated process usually results in trials and decisions that are nearly as rapid as the BAA. See,

Affidavit of Larry Shouse, ¶ 16. Tax arbitrations typically proceed on a faster pace than the BAA. See, Affidavit of Larry Shouse, ¶ 17. Therefore, proceeding in the state system would not have materially delayed determination of the amount of the Douglas County property tax claim or postconfirmation administration of this bankruptcy estate, especially in light of the fact that the Debtors did not file their Amended Motion for Determination of Tax Liability until April 2, 2010, and the Fourth Amended Joint Plan of Reorganization was not confirmed until April 16, 2010..

Outside of bankruptcy, the 2010 property taxes are not due until June 16, 2011. See C.R.S. § 39-10-102(1)(b)(1). Thereafter, if they wished to contest the amount of the 2010 taxes, the Debtors would have the appeal rights described above and could expect decisions within the time frames described above.

The Court should grant Douglas County's pending Motion for Payment of Administrative Expenses. If the Debtors contest the 2010 taxes, this Court should abstain from adjudicating the legality or amount of the 2010 taxes, and the Debtors should be obligated to bring their challenge through the state system.

C. Adjudication of Douglas County's Tax Claim Requires Specialized Expertise Because of Peculiarities of Colorado *Ad Valorem* Property Tax Law

There are significant differences between the valuation of property for *ad valorem* property tax purposes under Colorado law and the valuation of property normally undertaken by bankruptcy courts, many of which have been described above.

1. Real Property Taxes

For the prepetition 2009 real property taxes, Colorado law requires the property to be valued as of the value it had on June 30, 2008. See, C.R.S. § 39-1-104(10.2)(a). The comparable sales must be sales that occurred during the 18 or 24 months immediately prior to June 30, 2008 (the "base period" or "study period"). Id. If there are insufficient comparable sales during that 18-month period, sales during the previous 6-month period may be considered. Id If there are insufficient comparable sales during that 6-month period, sales during the prior 6-month period may be considered, with such 6-month periods going back to 5 years prior to June 30, 2008. Id . See, Introduction, above.

As shown above under Arguments III.3 and III.5, only the sales comparison method may be used on the Improved Parcel containing the four large apartments.

For the 2010 real property taxes, for which Douglas County seeks administrative expense treatment under 11 U.S.C. § 503(b)(1)(B)(i),[14] the valuation date is June 30, 2009. The Study Period is the 18 or 24 months that ended on June 30, 2009, and the successive 6-month look backs operate in a similar manner.

2. Commercial Personal Property Taxes

As described above, the amount of the Debtors' personal property tax obligation is based exclusively on the Declarations filed by the Debtors under penalty of perjury and DPT's depreciation schedules.

The Debtors have never challenged their 2008 or 2009 Douglas County commercial personal property taxes. See, Affidavit of Larry Shouse, ¶ 18. They filed neither a protest nor a request for an abatement. Id. Nor has MSRESS III ever filed a protest or

[14] Douglas County has filed an application for allowance and payment of administrative expenses, notwithstanding the fact that § 503(b)(1)(D) does not require such an application.

request for an abatement with respect to the 2008 or 2009 Douglas County commercial personal property taxes.

D. The Personal Property Taxes and the 2008 Real Property Taxes

The preceding analysis also applies to the 2009 commercial personal property taxes and the 2008 real property valuations, and this Court should abstain from adjudicating the legality or amount of those tax claims

Neither the Debtors nor MSRESS III have ever protested the 2009 commercial personal property tax valuations or the 2008 real property tax valuations to the Douglas County Assessor. The deadlines for such protests were June 15, 2009 for the personal property taxes, and June 15, 2008 for the 2008 real property taxes. Both of these dates are prepetitition dates.

However, the Debtors can still seek an abatement for the 2009 personal property taxes, and MSRESS III can still seek an abatement for the 2008 real property taxes on the Improved Parcel containing the single family residence, because no protest has been filed for such properties. (Where a taxpayer has filed a protest, he cannot also file an abatement.) The deadlines are close of business December 31, 2010 for the 2008 taxes and December 31, 2011 for the 2009 taxes.[15]

[15] From a ruling on the abatement, a taxpayer can appeal to the BAA (but cannot appeal to district court or arbitration). See, C.R.S. § 39-10-114.5(1).

VI.

UNDER § 505(a)(2)(A), THIS COURT LACKS JURISDICTION TO DETERMINE THE LEGALITY OR AMOUNT OF THE OTHER 2008 AND 2009 REAL PROPERTY TAXES AND ON THE 2009 PERSONAL PROPERTY TAXES, BECAUSE A STATE ADMINISTRATIVE ADJUDICATION DETERMINED THOSE ISSUES PREPETITION, AND THE TIME TO APPEAL THE DECISION OF THE STATE ADMINISTRATIVE ADJUDICATION EXPIRED PREPETITION

On May 28, 2009, Debtor Littleton Campus filed a protest under C.R.S. § 39-5-122(2) with the Douglas County Assessor with respect to the 2009 Douglas County real property taxes on the two Vacant Land Parcels.

On May 28, 2009, MSRESS III filed a protest under C.R.S. § 39-5-122(2) with the Douglas County Assessor with respect to the 2009 Douglas County real property taxes on the Improved Parcel containing the single family residence.

The Assessor valued the 12.58 acre Vacant Land Parcel at $2,301,536; Debtor Littleton Campus contended that the value was $2,000,000. See, Notice of Determination, Exhibit R hereto. The Assessor valued the 18.06 acre Vacant Land Parcel at $3,304,113; Debtor Littleton Campus contended that the value was $3,000,000. See, Notice of Determination, Exhibit S hereto. The Assessor valued the Improved Parcel containing the single family residence at $862,966; MSRESS III contended that the value was $800,000. See, Notice of Determination, Exhibit T hereto.

On August 21, 2009, the Assessor denied all three of these protests. See, Notices of Determination, Exhibits R, S, and T.

Under C.R.S. §§ 39-8-106(1)(a), Debtor Littleton Campus had until September 15, 2009 to appeal the denial of the protest with respect to valuation of the two Vacant Land Parcels to the CBOE, and MSRESS III had until September 15, 2009 to appeal the denial

of the protest with respect to valuation of the Improved Parcel containing the single family residence to the CBOE. The Notices of Determination, Exhibits R, S and T so informed Debtor Littleton Campus and MSRESS III.

Where a taxpayer has filed a protest, appeal to the CBOE is a prerequisite to being able to appeal to the BAA, state district court, or to seek arbitration. See, C.R.S. 30-2-125(1)(c) ("The board of assessment appeals shall … hear appeals from decisions of county boards of equalization filed not later than thirty days after entry of any such decision."); C.R.S. §§ 39-8-108(1), 39-10-114.5(1); Board of County Commissioners of La Plata County v. Moga, 947 P.2d 1385, 1391 (Colo.1997); Hornell v. Department of Administration, 861 P.2d 1194, 1197 (Colo.1983).

Debtor Littleton Campus never appealed the Assessor's denial of its protest with respect to the Vacant Land Parcels to the CBOE. Likewise, MSRESS III never appealed the Assessor's denial of its protest with respect to the Improved Parcel containing the single family residence to the CBOE. Therefore, as a matter of state law, the Assessor's denial of these three protests became unappealable at close of business on September 15, 2009, when Debtor Littleton Campus had failed to appeal the Notices of Denial with respect to valuation of the Vacant Land Parcels to the CBOE, and MSRESS III had failed to appeal the Notice of Denial with respect to valuation of the Improved Parcel containing the single family residence to the CBOE.

11 U.S.C. § 505(a)(2)(A) provides:

> "The court may not so determine the amount or legality of a tax … if such amount or the legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of a case under this title."

See, Texas Comptroller of Public Accounts v. Trans State Outdoor Advertising Co., Inc. (In the Matter of Trans State Outdoor Advertising Co., Inc.), 140 F.3d 618, 621-22 (5th Cir.1998), and cases cited therein; Teal v. U.S.A. Internal Revenue Service (In the Matter of James Carroll Teal), 16 F.3d 619, 621-22 (5th Cir.1994); Mantz v. California State Board of Equalization (In re Mantz), 343 F.3d 1207, 1212 (9th Cir.2003) ("The Fifth Circuit in Texas Comptroller of Public Accounts v. Trans State Outdoor Advertising Co., Inc. (In the Matter of Trans State Outdoor Advertising Co., Inc.), 140 F.3d 618 (5th Cir.1998) held that … the jurisdictional bar of § 505(a)(2)(A) had been triggered because the administrative decision had not been appealed and had become final under state law prior to the bankruptcy filing."); City Vending Machine of Muskogee, Inc. v. Oklahoma Tax Commission, 898 F.2d 122, 125 (10th Cir.1990) ("a federal court … will have jurisdiction under § 505 to consider state tax issues … where the debtor has challenged the assessment through state proceedings which are still pending at the time the bankruptcy petition is filed.") . "Section 505(a)(2)(A) "expresses in jurisdictional terms, tradition principles of res judicata, or claim preclusion." Teal v. U.S.A. Internal Revenue Service (In the Matter of James Carroll Teal), 16 F.3d at 621 n. 3.

"[T]he fact that the decision of an administrative tribunal may be reviewed *de novo* hardly means that the decision does not constitute an adjudication [for the purposes of § 505(a)(2)(A)]." Cody, Inc. v. County of Orange (In re Cody, Inc.), 338 F.3d 89, 96 (2nd Cir.2003). See, Texas Comptroller of Public Accounts v. Trans State Outdoor Advertising Co., Inc. (In the Matter of Trans State Outdoor Advertising Co., Inc.), 140 F.3d at 6212-22.

Here, with respect to the valuation -- and hence the 2009 tax liability -- of the Vacant Land Parcels and the Improved Parcel containing the single family residence, Debtor Littleton Campus and MSRESS III timely filed protests with the Douglas County Assessor, but failed to appeal the adverse Notices of Determination to the CBOE by September 15, 2009, as required by C.R.S. § 39-8-106(1)(a). Debtor Littleton Campus and MSRESS III could have had an adjudication before the CBOE and the BAA or state district court at which they would have had the opportunity to introduce exhibits, present witnesses, cross examine the County's witnesses, and make legal argument, and they were advised in writing of their right to have such a hearing. But they chose not to avail themselves of this right, a right that expired on September 15, 2009 -- more than a month before the October 19, 2009 petition date. Thus, MSRESS III and Debtor Littleton Campus "had the full and fair opportunity to contest" the valuation, and hence the tax. Teal v. U.S.A. Internal Revenue Service (In the Matter of James Carroll Teal), 16 F.3d at 622.

Even at the protest stage, MSRESS III and Debtor Littleton Campus had the opportunity to offer exhibits. See, Notice of Valuation letters, Exhibit L and M hereto.

It is immaterial that the Assessor, in issuing the Notice of Determination, did not expressly address the legality of what she was adjudicating. See, In the Matter of James Carroll Teal, 16 F.3d at 621.

Therefore, due to the inaction of MSRESS III and Debtor Littleton Campus, there was an administrative adjudication prepetition of the valuation and amount of prepetition taxes owed with respect to the two Vacant Land Parcels and the Improved Parcel

containing the single family detached house. Under 11 U.S.C. § 505(a)(2)(A), this Court lacks jurisdiction to adjudicate the legality and amount of those prepetition taxes.

If the Court determines that it has jurisdiction under § 505(a)(2)(A) , it should abstain from exercising that jurisdiction for the reasons stated in Argument V above.

VII.

CONCLUSION

For the foregoing reasons, this Court should deny the Claim Objection, decline to hear the challenge to Douglas County's Claim under § 505, and allow Douglas County's Claim as a secured claim in the amounts stated in its Proofs of Claim.

DATED: June 18, 2010

Respectfully submitted,

OFFICE OF THE COUNTY ATTORNEY
DOUGLAS COUNTY, COLORADO

/s/ Robert D. Clark, Esq.
ROBERT D. CLARK
Colorado Atty. Reg. # 8103
Senior Assistant County Attorney
100 Third Street
Castle Rock, Colorado 80104
(303) 660-7392
Fax: (303) 668-6596
E-mail: rclark@douglas.co.us

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2010, a true and correct copy of the foregoing **Treasurer of Douglas County, Colorado's Response to Debtors' Second Amended Motion for Determination of Tax Liability ,** was filed electronically with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF systems.

/s/ Tonya McCann