

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re: :
: Case No. 09-07047
Taylor, Bean & Whitaker Mortgage Corp. : Judge Jerry A. Funk
: Chapter 11
Debtor. :
:

**RESPONSE TO OBJECTION TO CLAIM OF OHIO DEPARTMENT OF
TAXATION**

The Ohio Department of Taxation (“ODT”) hereby responds to the Official Committee of Unsecured Creditors (the “Committee”) and Taylor, Bean & Whitaker Mortgage Corp.’s (the “Debtor”) *Objection to Claim of Ohio Department of Taxation* (Doc 3355) (the “Objection”) by stating that the Objection is without merit and should be denied for the following reasons:

The Objection is Unsupported

1. The Objection reads, in pertinent part:

Claimant	Proof of Claim #	Amount	Basis for Disposition	Recommended Disposition
Ohio Department of Taxation, 30 East Broad Street, Columbus, OH, 43215	904	\$337,117.12	Ohio Taxation’s calculation of net taxable purchases, total sales and use tax to be applied to the TBW location in Hamilton, Ohio, and its accounting of previously paid sales tax leads to an overstated claim. A further reconciliation of TBW’s books and records, including a review of the value, use and dispatch of a Hitachi server to Ohio, demonstrates that the net taxable purchases in the amount of \$2,887,196.24 yield only \$204,556.48 in total sales/use tax applicable to the Hamilton location. Additionally, TBW’s payment of \$17,017.04 towards the tax liability	Claim should be stricken and disallowed to the extent it exceeds \$230,673.07.

2. ODT has not received any payments, returns or documents from Debtor and/or from the Committee to establish an assessment as outlined in the “Recommended Disposition” above.

Claim 904 was Properly Estimated.

3. Because Debtor did not provide payrolls as required by Ohio Revised Code (“ORC”) § 5741.02 et al., and because 11 USC § 502(c) requires estimation of claims so as not to *unduly delay of the administration of the case*, ODT estimated and filed Claim 904.

4. Claim 904, as filed, represents ODT’s assessment of tax, penalty and interest as indicated below:

1 Use Tax Assessment XXXX9391	Priority	
1. Tax Due For 1/1/2003 through 8/23/2009		
2. Total Amount of Tax Due	\$237,533.41	
3. Total Amount of Interest Due	\$63,953.70	
4. Total Amount of Penalty Due	\$35,630.01	
5. Total Amount of Assessment	<u>\$337,117.12</u>	
<hr/>		
TOTAL AMOUNT DUE	\$337,117.12	

CLAIM FILED
JACKSONVILLE, FLORIDA
FEB 11 2010
CLERK, U. S. BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

Claim 904 is Prime Facie Evidence of Debtor’s Liability

5. Claim 904 was timely filed¹ on February 11, 2010. Generally, in reference to a filed claim, the presumptive validity of such a claim is not altered, unless,

¹ In reviewing any governmental bar dates, the petition in this case was filed February 11, 2010. Therefore, pursuant to 11 USC §502(b)(9), the “earliest” governmental claims bar date would have expired on February 20, 2010, and the claims bar date was set for June 15, 2010. Therefore, the claim as filed is timely.

an **objection** is filed and supported by substantial evidence.² An objecting party must raise a substantive objection, one that is contained within 11 USC § 502(b) 1-9.³ Framed differently, “prepetition claims are presumed to be *prima facie* valid and the presumption may be overcome by the objecting party only if it offers evidence of equally probative value in rebuttal.”⁴

Claim 904 is a Tax Claim

6. Next, pursuant to 11 U.S.C. §§ 502 and 503 and, well settled case law: “in Bankruptcy, state law governs the substance of claims”.⁵ In the instant case, the substance of these claims is governed by ORC § 5741.02 et al. which requires the collection and remittance of this tax.

7. Finally, Claim 904 is priority tax claim. The purpose of assigning priority status to certain tax claims is to enhance the government's ability to collect them.⁶ The United States Supreme Court defines a tax as a “pecuniary burden” 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.”⁷ Use Tax assessments are such “. . . a financial obligation to a government entity. . . .”⁸

² *Brown v. IRS (In re Brown)*, 82 F.3d 801 (8th Cir. 1996); *In re Hemingway Transp.*, 993 F.2d 915, 28 C.B.C.2d 1545 (1st Cir. 1993).

³ *In re Guidry*, 321 B.R. 712 (Bankr. D. Ill. 2005).

⁴ *In re Fullmer*, 962 F.2d 1463, 27 C.B.C.2d 92 (10th Cir. 1992)

⁵ *Butner v. United States*, 440 U.S. 48, 57, 59 L.Ed 136, 99S Ct. 914. (See also, *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15 (U.S. 2000.))

⁶ *In re Miller*, 199 Bankr. 631 (Bankr. S.D. Tex. 1996); *Ramos v. IRS (In re Ramos)*, 208 B.R. 655, 658 (D. Tex. 1996)

⁷ *New York v. Feiring*, 313 U.S. 283, 285, 85 L. Ed. 1333, 61 S. Ct. 1028 (1941); see also *New Jersey v. Anderson*, 203 U.S. 483, 492, 51 L. Ed. 284, 27 S. Ct. 137 (1906). *In re Lorber Indus. of Cal.*, 675 F.2d 1062, 1066 (9th Cir. 1982); *In re Adams*, 40 B.R. 545, 547 (E.D. Pa. 1984). See also: *In re Jenny Lynn Mining Co.*, 780 F.2d 585, 588 (6th Cir. 1986) quoting *United States v. River Coal Co.*, 748 F.2d 1103, 1106 (6th Cir. 1984). *Accord Williams v. Motley*, 925 F.2d 741, 743 (4th Cir. 1991); *In re Metro Transp. Co.*, 117 Bankr. 143, 153 (Bankr. E.D.Pa. 1990); *In re Downs*, 99 Bankr. 51, 52 (Bankr. W.D.Wash. 1987).

⁸ *Yoder v. Ohio Bureau of Workers' Compensation (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338 (6th Cir. 1993) (“*Suburban I*”); *Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor*

WHEREFORE, OBWC respectfully requests that this Court enter an order which denies and overrules the above referenced Objection until such time as Debtor provides evidence of the claimed payment and documentation to support its Objection and ODT has had time to review and reply to such documentation, and which allows Claim 904 as a priority tax claim, in any event.

Respectfully submitted pursuant to
LR 2090-1(C) (2),

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Certificate of Service

I hereby certify that on August 11, 2011, Copies of the foregoing *Response to Objection* was served via Court's electronic filing system Parties may access copies of the Motion electronically through the Court's electronic filing system and via E-Mail and/or ordinary US Mail as follows:

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