

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 16 2009

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 08-36182
	)	
Donald Eric Gilmer,	)	Chapter 13
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

**ORDER**

This case is before the court on Debtor’s objection to the claim filed by Plymouth Park Tax Services, LLC [Doc. # 39] and Plymouth Park Tax Services, LLC’s (“Creditor”) objection to confirmation [Doc. # 29]. The court held a hearing on the objections that the Chapter 13 Trustee and counsel for Debtor attended in person and counsel for Creditor attended by telephone. The parties were granted leave, and did, file additional briefs in support of their respective positions. [Doc. ## 50, 55, & 56].

After considering the briefs submitted by the parties, because some of the issues raised by the parties require a further evidentiary hearing, and because the court finds it necessary to decide issues not addressed in the parties’ briefs, the following discussion presents the court’s tentative ruling and the court will entertain oral argument on the issues discussed herein at the further evidentiary hearing. For the following reasons, the court would sustain Debtor’s objection to the extent he objects to Creditor’s claim including interest on accumulated interest, and 18% interest on attorney fees, and other costs and fees, and will set the objection for further hearing to determine the reasonableness of attorney fees and the propriety of other costs and fees included in Creditor’s claim. The court would also sustain in part and overrule in part

Creditor's objection to confirmation.

### **BACKGROUND**

Creditor acquired from the Lucas County, Ohio Treasurer the right to payment of delinquent real estate taxes relating to real property owned by Debtor by purchasing two tax certificates in a negotiated sale pursuant to Ohio Revised Code § 5721.33. The terms of such a sale that may be negotiated by the county treasurer include, among other things, a premium to be added to or a discount to be subtracted from the "certificate purchase price," the amount to be paid in private attorney's fees related to a tax certificate foreclosure, reimbursement of the treasurer's costs in preparing for and administering the sale and payment of any fees set forth by the treasurer in the tax certificate sale/purchase agreement. *See* Ohio Rev. Code § 5721.33(A)(1) & (3), (J). The tax certificate delivered on November 30, 2006, states that the amount of delinquent taxes for 2004 to 2005 is \$1,557.27, and sets forth a "certificate purchase price" of \$1,557.27, a negotiated interest rate of 18%, a premium paid of \$19.07 and Treasurer's fees of \$350.00. A second tax certificate delivered to Creditor on October 31, 2007, states that the amount of delinquent taxes for 2007 is \$641.79, and sets forth a "certificate purchase price" of \$641.79, a negotiated interest rate of 18% and Treasurer's fees of \$125.00 and no premium or discount.

Pursuant to the sale "the superior lien of the state and its taxing districts for those delinquent taxes" was conveyed to Creditor, thus entitling it to initiate foreclosure proceedings within certain time parameters. *See* Ohio Rev. Code. §§ 5721.33(G), 5721.37(A)(2). A creditor may initiate foreclosure proceedings by submitting the payments required under § 5721.37(B) and by filing with the county treasurer either a request for foreclosure, after which the county prosecuting attorney is required to commence a foreclosure proceeding, or a notice of intent to foreclose, after which the creditor's private attorney commences a foreclosure action. Ohio Rev. Code § 5721.37. In this case, a foreclosure proceeding was commenced in state court by Creditor's attorney.

On November 12, 2008, Debtor filed for relief under Chapter 13 of the Bankruptcy Code. On his bankruptcy Schedule A, Debtor states that the real property that is the subject of the tax certificates, which property is not Debtor's principal residence, has a value of \$20,000 and lists no secured claim relating to that property. Creditor objected to Debtor's proposed Chapter 13 plan wherein he proposes to pay to Creditor \$5,000 at 0% interest as a priority claim over a term of thirty-six months. Creditor filed a timely proof of claim, asserting a secured claim as of November 30, 2008, consisting of a principal amount of \$2,199.06, interest of \$685.77, and fees in the amount of \$2,918.98, for a total secured claim of \$5,803.81 plus interest at the rate of 18% per year. In its response to Debtor's objection to claim, Creditor provides

an itemization of the fees included in its claim. The fees include Treasurer fees totaling \$475.00, lien costs totaling \$123.98, title search fees totaling \$520.00, foreclosure action filing fees of \$550.00, and legal fees totaling \$1,250.00.

Debtor objects to Creditor's claim, arguing that it improperly asserts a claim for interest on the entire \$5,803.81. Debtor further argues that Creditor's documentation does not permit the court to determine the reasonableness or propriety of the costs and fees included in its claim. Debtor's plan and Creditor's objection to confirmation also raise the issue of how Creditor's claim should be characterized – as a priority claim as characterized by Debtor in his plan, as a secured claim as characterized by Creditor, or otherwise.

### LAW AND ANALYSIS

#### **I. Creditor's Claim is Secured in Part and Unsecured in Part**

The court first addresses whether Creditor's claim is secured as asserted in its proof of claim. In his supplemental brief, Debtor acknowledges that the purchase of the tax certificates gave Creditor the right to foreclose on Debtor's real property, thus conceding that Creditor's claim is, at least in part, a secured claim. [Doc. # 55, p. 1]. Under Ohio law, "the tax certificate vests in the certificate holder the first lien previously held by the state and its taxing districts . . . for the amount of taxes, assessments, interest and penalty charged against a certificate parcel . . . in the amount of the certificate redemption price. . . ." *See* Ohio Rev. Code. §§ 5721.35(A). "Certificate redemption price" is specifically defined with respect to a negotiated tax certificate sale, as occurred in this case, as the sum of the following:

- (1) The certificate purchase price;
- (2) Interest accrued on the certificate purchase price at the certificate rate of interest from the date on which a tax certificate is delivered through and including the day immediately preceding the day on which the certificate redemption price is paid;
- (3) The fee, if any, charged by the county treasurer to the purchaser of the certificate under division (J) of section 5721.33 of the Revised Code;
- (4) Any other fees charged by any county office in connection with the recording of tax certificates.

Ohio Rev. Code § 5721.30(F). "Certificate purchase price" is, in turn, defined as "the amount equal to delinquent taxes charged against a certificate parcel at the time the tax certificate respecting that parcel is sold. . . ." Ohio Rev. Code § 5721.30(D).

These provisions thus serve to limit a tax certificate holder's lien to the specified amounts, which amounts do not include attorney fees, title search fees, filing fees, and, to the extent not a fee for recording

the tax certificates, “lien costs.”<sup>1</sup> In this case, Creditor’s secured claim is limited to the total certificate purchase prices (\$2,199.06) plus accrued interest (\$685.77 as of November 30, 2008) plus the county treasurer fees (\$475.00), for a total secured claim of \$3,359.83. The remainder of the claim asserted by Creditor is an unsecured claim.

## **II. Interest Rate as to Creditor’s Secured Claim**

Two sections of the Bankruptcy Code must be considered in determining whether Creditor is entitled to 18% interest on each component of its secured claim as asserted. First, § 1325(a)(5)(B)(ii) requires that “the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.” As interpreted by the United States Supreme Court, this provision requires the payment of interest to compensate a secured creditor for the time value of the money owed to it plus the risk of nonpayment. *See Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004). The method of determining an appropriate interest rate set forth in the plurality opinion of the Supreme Court is the formula method, that is, the prime interest rate adjusted for the risk of nonpayment. *Id.* at 478-80.

An exception to this method is found in § 511, added by Congress under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. That section provides that “[i]f any provision of this title requires the payment of interest on a tax claim . . . or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.” 11 U.S.C. § 511(a). Because present value under § 1325(a)(5)(B)(ii) requires payment of interest on Creditor’s secured claim, to the extent that its claim is a tax claim, in order to properly calculate interest on that claim, the court must look to applicable nonbankruptcy law, in this case, Ohio law.

Whether a particular obligation is a “tax” for bankruptcy purposes is a federal question. *City of New York v. Feiring*, 313 U.S. 283, 285 (1941). “When state law, however, creates the obligation at issue, a court looks to that law to ascertain its attributes so that the court can determine its characterization under federal bankruptcy law.” *Reconstituted Comm. of Unsecured Creditors v. N.J. Dept. of Labor (In re United Healthcare Sys., Inc.)*, 396 F.3d 247, 252 (3d Cir. 2005) (citing *Feiring*, 313 U.S. at 285). The Supreme Court defined “tax” for the purpose of determining priority status under the Bankruptcy Act as “those

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<sup>1</sup> It is not clear what is included in “lien costs,” as itemized by Creditor. As a further hearing on other aspects of Creditor’s claim will be necessary, the court will allow Creditor to clarify whether this item is properly included in its secured claim at that hearing. However, for purposes of this Order it is not so included.

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.” *Feiring*, 313 U.S. at 285. It later explained that a “tax” provides for the support of government. *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (distinguishing a tax from a penalty). Other courts have added glosses to the Supreme Court’s description of what qualifies as “taxes” in the bankruptcy context, including, among other things, the Sixth Circuit’s requirement that “the pecuniary obligation be universally applicable to similarly situated entities.” *Ohio Bureau of Workers' Comp. v. Yoder (In re Suburban Motor Freight, Inc.)*, 36 F.3d 484, 488 (6th Cir.1994).

Under Ohio law, the certificate purchase price is the amount equal to the delinquent property taxes that are transferred to the certificate holder. *See* Ohio Rev. Code §§ 5721.30(D), 5721.33(E). There is no dispute that property taxes constitute a “tax” for bankruptcy purposes. They are imposed for the purpose of defraying the expenses of government and are universally applicable to similarly situated real property owners. In *In re Cortner*, 400 B.R. 608 (Bankr. S.D. Ohio 2009), the court addressed the question of whether a tax certificate holder that is not a governmental entity held a “tax claim” for the debt owed to it by the debtor. Finding that it did hold such a claim and rejecting the trustee’s argument that the creditor held a secured claim but not a tax claim, the court explained:

It is true that the Ohio tax certificate statutes reference the transfer of the lien on the real property to the tax certificate purchaser. However, under Ohio law, the holder of tax certificates does not pay a county treasurer for the taxes and in turn hold a completely new debt with a lien against the real estate. Rather, under Ohio law, from the language chosen by the Ohio legislature in creating the procedures for the sale of tax certificates, the delinquent taxes are transferred and, therefore, the Creditor's claim is a tax claim. The last sentence of ORC § 5721.32(E) refers to both a transfer of the taxes and the “superior lien of the state” to the certificate holder. Thus, the “claim” of the Creditor-as defined by § 101(5)-represents delinquent taxes purchased under Ohio law by the certificate holder and, therefore, must be paid according to Ohio law. 11 U.S.C. § 511. Unlike other jurisdictions which have statutes to allow state entities to recoup delinquent real estate taxes, it is not only the lien that is being transferred, but the amount owed for delinquent taxes.

*Id.* at 612-13. The court further observed that unlike other sections of the Code, § 511 is not limited to government units, but instead it uses the broad term “creditor.” *Id.* at 613 (citing *In re Davis*, 352 B.R. 651, 654 (Bankr. N.D. Tex. 2006)).

The court agrees with the reasoning in *In re Cortner*. Section 5721.33(E) provides that “[u]pon issuing a tax certificate, the delinquent taxes that make up the certificate purchase price are transferred. . . .” Creditor’s tax claim, therefore, includes the amount of the certificate purchase prices. Courts have also found that a tax claim includes accrued interest. In finding that prepetition interest is part of the underlying

tax debt, the Seventh Circuit considered the Bankruptcy Code's broad definition of claim in § 101 and its exclusion of only post-petition interest from an allowed claim under § 502. *In re Larson*, 862 F.2d 112, 119 (7<sup>th</sup> Cir. 1988), *accord Hardee v. Internal Revenue Serv. (In re Hardee)*, 137 F.3d 337, 342 (5<sup>th</sup> Cir. 1998); *cf. United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 44-45 (holding that postpetition interest accruing on postpetition tax debt was part of tax debt itself); *Bruning v. United States*, 376 U.S. 358, 360 (1964) (stating that “[i]n most situations, interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt. Interest on a tax debt would seem to fit that description.”). The court agrees that the Bankruptcy Code's broad definition of “claim” includes accrued interest. Under the authority cited above, in addition to the certificate purchase price, interest that accrued prepetition on the certificate purchase price in this case is part of Creditor's tax claim.<sup>2</sup>

The final component of Creditor's secured claim is county treasurer fees in the amount of \$475. These fees are paid by the purchaser of a tax certificate “to reimburse the treasurer for any part or all of the treasurer's costs of preparing for and administering the sale of the tax certificate.” Ohio Rev. Code § 5721.33(J). While these fees are arguably collected for the purpose of defraying the expenses of government, they are not universally applicable to similarly situated real property owners. Rather, they apply only where property owners are delinquent in paying their taxes and the county treasurer negotiates payment of the fees as part of a tax certificate sale. The county treasurer fees are in the nature of fees for service (i.e. preparing for and administering the sale) rather than a tax. As such, the treasurer fees are not part of Creditor's tax claim.

Having determined the components of Creditor's secured claim, the court next considers the proper calculation of interest, if any, required to be paid under Debtor's Chapter 13 plan. As discussed above, under § 511, Creditor is entitled to the interest on its tax claim to which it is entitled under Ohio law. Under Ohio Revised Code § 5721.30, a creditor is entitled to interest accrued on the certificate purchase price at the certificate rate of interest, which is defined as “the rate of *simple* interest per year not to exceed eighteen per cent per year fixed . . . by the county treasurer with respect to any tax certificate sold or transferred pursuant to a negotiated sale under section 5721.33. . . .” Ohio Rev. Code § 5721.30(F)(2) & (G) (emphasis added). The negotiated rate of interest on the tax certificates purchased by Creditor under § 5721.33 is

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<sup>2</sup> Debtor filed his Chapter 13 petition on November 12, 2008. Creditor's proof of claim includes simple interest on the certificate purchase prices as of November 30, 2008, which date includes nineteen days of *postpetition* interest. Its prepetition claim is thus overstated by this amount.

simple interest at 18%. A “simple interest” calculation precludes Creditor from asserting a claim for payment of interest on its prepetition interest. *See* Black’s Law Dictionary 813 (6<sup>th</sup> Ed. 1990) (defining simple interest as “that paid on the principal lent as distinguished from compound interest which is interest paid on unpaid interest”). Thus, under Ohio law, it is entitled to 18% interest only on the certificate purchase price of \$2,199.06 and no interest on its claimed prepetition interest.

As to the portion of the secured claim consisting of the \$475 county treasurer fee, Creditor is not entitled to 18% interest since that portion is not part of its tax claim governed by § 511. Rather, treatment of that portion of the secured claim is governed by *Till*. Under § 1325(a)(5)(B)(ii), Debtor’s Chapter 13 plan cannot be confirmed without providing for payment at the “prime-plus” *Till* rate of interest on this amount.

### **III. Creditor’s Unsecured Claim**

As discussed above, Creditor’s claim is bifurcated into a secured component and an unsecured component. Under Ohio Revised Code § 5721.38(B), Creditor is entitled to reasonable attorney fees relating to proceedings commenced to foreclose its lien and “other costs and fees of the proceeding allocable to the certificate parcel as determined by the court or board of revision.” Specifically, that portion of its claim including title search fees of \$520.00, a filing fee of \$550.00, legal fees of \$1,250, and possibly lien costs of \$123.98<sup>3</sup> is unsecured. The parties have set forth no basis for affording Creditor’s unsecured claim priority status, so this portion of Creditor’s claim would therefore be treated under Debtor’s plan as a general unsecured claim.

Creditor would be entitled to claim interest on the general unsecured portion of its claim through the date of Debtor’s petition, *see* 11 U.S.C. § 502(b)(2), only to the extent it is entitled to do so under Ohio law. However, as the court’s tentative conclusion that Creditor has a bifurcated claim differs from Creditor’s claim filed as wholly secured, Creditor has not had the opportunity to assert and has not asserted of record any factual and legal basis upon which it contends it is entitled to pre-petition interest on the general unsecured portion of its claim. Moreover, given the filing of its claim as secured, Creditor has also not had the opportunity to assert and has not asserted of record any factual or legal grounds upon which it contends it is entitled to post-petition interest on its general unsecured claim. Creditor may address any legal and factual grounds upon which it contends Debtor is obligated to pay pre-petition interest and post-petition interest on Creditor’s general unsecured claim at the hearing set below.

The only legal basis that appears to be asserted by Creditor to support collection of interest on this portion of its claim, whether pre-petition or post-petition to any extent it is so entitled, is Ohio Revised Code

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<sup>3</sup> *See* note 1 above.

§ 5721.38(B). To the extent that Creditor relies on Ohio Revised Code § 5721.38(B) as a basis for asserting that it is entitled to interest at 18% on this portion of its claim, such reliance is misplaced. As the Chapter 13 Trustee points out, § 5721.38(B) provides for interest only on the certificate purchase price and the county prosecuting attorney fees where the tax certificate holder requested that the prosecuting attorney commence a foreclosure proceeding. *See* Ohio Rev. Code § 5721.38(B)(2) and (3). The statute does not, however, provide for interest on attorney fees where the tax certificate holder retained a private attorney, as in this case, or on other costs and fees. *See* Ohio Rev. Code § 5721.38(B)(4) and (5). Applying the canon of statutory construction “expressio unius est exclusio alterius,” that is, that “the express inclusion of one thing implies the exclusion of the other,” *Myers v. Toledo*, 110 Ohio St. 3d 218, 222 (2006), the court concludes that § 5721.38(B) is not a basis for claiming entitlement to 18% interest on attorney fees and other costs and fees. This conclusion is supported by the legislative history of the statute, which states that “[n]o interest accrues on attorney’s fees paid to a private attorney.” Ohio Legislative Commission Final Bill Analysis of H.B. 562, 127<sup>th</sup> Gen. Assembly, p. 205.

#### CONCLUSION

For the foregoing reasons, the court’s tentative legal conclusions are as follows:

(1) Creditor has an allowed secured claim in the amount of the sum of the certificate purchase prices (\$2,199.06), plus accrued interest to November 12, 2008, calculated at 18% simple interest, plus county treasurer fees (\$475.00);

(2) the remainder of the asserted claim is a general unsecured claim in the amount of \$2,443.98 to the extent that Creditor proves reasonable attorney fees and other costs and fees allocable to the real property that is the subject of the tax certificates;

(3) Creditor’s secured claim consists of a tax claim in the amount of the sum of the certificate purchase prices plus accrued interest to November 12, 2008. As to its secured “tax claim,” Creditor is entitled to postpetition interest at the rate of 18% on the certificate purchase prices and to no interest on the accrued interest portion of the tax claim. As to the non-tax claim of \$475.00 (the county treasurer fees), it is entitled to interest at a prime-plus rate under *Till*; and

(4) on the current record Creditor is not entitled to either pre-petition interest or post-petition interest, at 18% or at any other rate, on its general unsecured claim.

An evidentiary hearing will be scheduled to determine the reasonableness of the attorney fees, the propriety of the other costs and fees claimed by Creditor and any other issues set forth above to the extent a factual record must be developed. At that hearing, the court will also entertain oral argument on the legal



issues set forth in this Order.

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that Debtor's Objection to Proof of Claim [Doc. # 39] and Creditor's Objection to Confirmation [Doc. # 29] are set for further EVIDENTIARY hearing and oral argument as discussed above on **Friday, August 13, 2009 at 2:30 p.m.**