THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: October 15, 2016

Beth E. Hanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: Green Box NA Green Bay, LLC,	Case No. 16-24179-beh
Debtor-in-possession.	Chapter 11

DECISION AND ORDER DENYING
UNITED STATES TRUSTEE'S MOTION TO DISMISS

Before the debtor filed its proposed plan and disclosure statement, the United States trustee filed a motion to dismiss. Three secured creditors later joined the motion.

The peculiar history of the debtor, Green Box NA Green Bay LLC ("Green Box"), and its relationships with multiple entities with overlapping ownership, makes this an atypical chapter 11 debtor-in-possession. Complicating matters is the fact that the debtor's former managing member was subject to a grand jury investigation in the last twelve months—for matters unrelated to the business of debtor—and was removed from his management position with the debtor just several days after the petition was filed. The debtor's new managing member, formerly a significant investor in the debtor by way of the debtor's

parent and other related entities, has had to become familiar with a multitude of operational facts. He and his staff's efforts to complete the debtor's petition and schedules accurately, and to provide on-going information to the trustee and creditors, have been hampered by a lack of access to information. Prior to this bankruptcy but after creditors had forced the debtor into state court receivership, law enforcement seized dozens of boxes of the debtor's business records as well as its electronic files. Some, but not all, of that information was returned to the debtor several weeks before the hearing on this motion to dismiss.

The United States trustee asserts that the debtor's management has been deficient in providing information and protecting its assets to the detriment of the estate and creditors. The United States trustee also maintains that the debtor's current non-operating status and reliance on related entities show that the debtor is incapable of rehabilitation. The debtor responds that there are unique circumstances surrounding this case, and that its current management is providing all of the information it has and is taking no action detrimental to the estate or creditors. The debtor asserts that success of its proposed roll-up plan is in the best interest of all parties because more value will be returned to creditors.

For the reasons that follow, the court concludes that the United States trustee and the joining creditors have not established that dismissal is warranted under 11 U.S.C. section 1112(b), so the court will deny the motion. The following constitutes the court's findings of fact and conclusions of law. Fed. R.

Bankr. P. 7052 (incorporating Fed. R. Civ. P. 52(a))

I. FACTUAL BACKGROUND

The debtor was formed in 2011 and is in the business of recycling and reusing plastic waste. CM-ECF, Doc. No. 81, at 5. The debtor plays a role in a larger paper and plastic reclamation process, along with several related entities. The debtor owns real estate and equipment which it contributes to the operation, while the related entities contribute labor, technology, sales and marketing, as well as other equipment. The larger operation is spearheaded by an entity known as Reclamation Technology Solutions, LLC ("RTS"), which was formerly known as Environmental Advanced Reclamation Technology HQ, LLC ("EARTH"). RTS has its own employees and provides services to its subsidiaries, which include the debtor and the related entities. RTS also receives and apportions funds to the debtor and the related entities from outside investors and lenders.

The debtor, these related entities, and the paper and plastic reclamation processes were formed and developed by Ron Van Den Heuvel ("RVDH").

RVDH had substantial experience working in the paper and tissue manufacturing business and had developed technology that would allow for the reclamation of paper and plastic waste. *Id.* at 5–6. The business model developed by RVDH would involve the debtor contracting with municipalities to take their paper and plastic waste, sanitize and convert that waste into reclaimed paper and plastic products, and then sell the reclaimed products to large wholesale paper manufacturers. *Id.* at 6. This model is attractive because it

would save municipalities money by reducing the traditional costs of disposing paper and plastic waste in landfills, and also generate a new product which could be sold to end users. *See id.* Between 2011 and 2014, RVDH received approval from the Food and Drug Administration for his sanitation processes, had designed and constructed manufacturing and converting lines, and was working to have his processes patented. *Id.* at 7. During this time, RVDH received loans from various creditors and funds from various investors, like Stephen Smith ("Smith") the debtor's current managing member. RVDH used those funds to purchase real estate, equipment, and working capital. In 2014, RVDH engaged investment bankers from Raymond James to evaluate and underwrite his business plan so that he could go to market to obtain full financing for the project. *Id.*

While RVDH was in the process of obtaining financing for the overall project, the debtor went into default on several of its loans, most notably one held by Ability Insurance Company ("Ability"). That loan is secured by the debtor's real property at 2107 American Blvd in De Pere, Wisconsin (the "American Blvd property"). Ability, along with several other petitioning creditors including the other movants here: Cliffton Equities ("Cliffton") and the Wisconsin Economic Development Corporation ("WEDC"), placed the debtor into receivership in May 2015. Shortly thereafter, the receiver terminated the debtor's operations. Consequently, RVDH transferred the debtor's employees into a related entity, Patriot Tissue, LLC, in order to keep the reclamation processes operating. RVDH was largely uncooperative during the receivership

and eventually the Brown County Circuit Court issued a bench warrant for his arrest for violating court orders. On April 19, 2016, RVDH was indicted for bank fraud in an unrelated matter. On April 22, 2016, RVDH resigned his managing position with the debtor.

The debtor filed its chapter 11 petition on April 27, 2016.

In the days immediately following the petition date, several important events transpired: The debtor's largest creditor, Ability, filed a motion for relief from the automatic stay, a motion to prohibit the debtor's use of cash collateral, and a motion to declare the debtor a single asset real estate entity; and Smith was elected as the debtor's new managing member.

On June 27 and 28, the court held a two-day evidentiary hearing on Ability's motions, and heard extensive testimony from Smith and the debtor's Chief Financial Officer, Edward Kolasinski ("Kolasinski"). Ultimately, the court denied all three motions of Ability. Specifically, the court concluded that the debtor did not file this case in bad faith, the debtor was not using cash collateral, and the debtor was not a single-asset real estate entity because its business was not income-producing real estate and it had assets in addition to its building which contributed to its operations. The court did, however, order the debtor to escrow monthly adequate protection payments to cover current real estate taxes.

On August 10, the court held a scheduling and status conference. Debtor's counsel informed the court that it would seek a 30-day extension of the exclusivity periods as the debtor was still negotiating with creditors and working

with investment bankers to put together a feasible plan, in addition to awaiting the return of its documents from law enforcement. No parties opposed the extension request. At the status conference, the United States trustee took issue with the dearth of historical financial information in the debtor's schedules and statements of financial affairs.

On August 11, as promised, the debtor filed its motion to extend the exclusivity periods by 30 days to September 26 and November 25, respectively. *See* 11 U.S.C. § 1121(d). No parties objected, but on August 26 the United States trustee filed the pending motion to dismiss. On August 30, Ability joined the United States trustee's motion to dismiss and filed a renewed motion for relief from stay.

On August 31, the court held an adjourned scheduling conference. The court granted the debtor's motion to extend the exclusivity period and also set a tentative schedule for next steps. To enable the debtor to have its plan and disclosure statement on file before the hearing on the motion to dismiss, the United States trustee and Ability consented to the court hearing their motions outside of the traditional 30-day windows on September 30. *See* 11 U.S.C. §§ 362(e)(1) & 1112(b)(3).

On September 16, Cliffton and WEDC joined the United States trustee's motion to dismiss.

On September 26, the debtor filed its disclosure statement and chapter 11 plan. The debtor's plan proposes to roll the assets of the debtor and several related entities into a NewCo which will carry on the paper and plastic

reclamation processes. The debtor's plan is contingent upon receiving outside financing which will pay existing creditors in exchange for the release of their liens and claims against RTS, the parent entity, which will hold a substantial interest in the NewCo. The debtor anticipates that creditors could receive payment on their claims as soon as March 31, 2017, if the plan is confirmed and financing is obtained.

II. LEGAL ANALYSIS

For cause shown, a court shall dismiss or convert a case to chapter 7, whichever is in the best interests of creditors and the estate. § 1112(b)(1). Section 1112(b)(4) contains a non-exhaustive list of grounds that constitute cause for dismissal. *In re Attack Props., LLC*, 478 B.R. 337, 344 (N.D. Ill. 2012). In determining whether cause exists to dismiss or convert a chapter 11 case, the court must engage in a factual inquiry that focuses on the circumstances of each debtor. *In re Creekside Sr. Apartments, L.P.*, 489 B.R. 51, 60 (B.A.P. 6th Cir. 2013). The party seeking dismissal bears the burden of proof by a preponderance of the evidence. *Id.*

Once cause is shown, "it is incumbent on the debtor to show that relief under section 1112(b) is not warranted." *Loop Corp. v. U.S. Trustee*, 379 F.3d 511, 518 (8th Cir. 2004) (*quoting In re Lizeric Realty Corp.*, 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995)); *Matter of Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994). The burden then shifts to the debtor to establish all of the grounds enumerated in section 1112(b)(2), namely, that: (1) unusual circumstances exist, (2) conversion or dismissal is not in the best interests of creditors or the estate,

(3) there is a reasonable likelihood of plan confirmation within the time constraints of the Code, (4) the grounds for cause do not include continuing loss to the estate, (5) there is a reasonable justification for the act or omission of the debtor, and (6) the act or omission can be cured within a reasonable time. *In re Korn*, 523 B.R. 453, 465 (Bankr. E.D. Pa. 2014). A bankruptcy court has broad discretion to dismiss a chapter 11 case under section 1112(b). *Matter of Woodbrook*, 19 F.3d at 316.

The United States trustee's motion alleges five separate grounds to establish cause for dismissal of the debtor's case under 11 U.S.C. section 1112(b): (1) the debtor is not acting in the best interests of the estate because it is misusing estate assets; (2) the debtor is experiencing substantial and continuing losses and has no reasonable likelihood of rehabilitation; (3) the debtor does not have the ability to a confirm a chapter 11 plan; (4) there is an unexcused failure of the debtor to file complete and accurate schedules and a statement of financial affairs ("SOFA"); and (5) the estate is administratively insolvent.[1] CM-ECF, Doc. No. 59, at 1. The court will address each ground in turn.

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1 The joinder motions of Ability and WEDC do not add to the grounds enumerated by the United States trustee's motion. Cliffton's joinder motion urges that there is cause to dismiss the case for failure to maintain adequate insurance on collateral subject to Cliffton's security interest. *See* § 1112(b)(4)(C); CM-ECF, Doc. Nos. 76 & 77. The parties submitted evidence to establish that insurance is in place for the American Blvd property and its contents, but the record does not support a finding that Cliffton's collateral in South Carolina is likewise covered. Nevertheless, debtor's counsel and Smith both stated that the debtor had no objection to a lift of the automatic stay as to Cliffton so it may pursue its collateral in South Carolina. Moreover, the debtor's proposed chapter 11 plan contemplates surrender of the same collateral to Cliffton. For these reasons, the court is not satisfied that the debtor has failed to maintain appropriate insurance "that poses a risk to the estate or to the public." *See* § 1112(b)(4)(C). The court denies Cliffton's joinder motion on this basis.

A. The debtor is not acting in the best interests of the estate because it is misusing estate assets.

The United States trustee contends that the debtor is misusing assets of the estate based on one particular failing: the debtor has not collected rent from a related entity, Patriot Tissue LLC, that is operating in the American Blvd property. CM-ECF, Doc. No. 59, at 5–6. The United States trustee argues that the debtor is a fiduciary to the estate and to creditors and that the debtor is wrongfully diverting funds by allowing Patriot to remain in the American Blvd property without collecting rent. *Id.* The United States trustee's position is that the debtor must take action to remove Patriot from the premises and seek a new tenant if Patriot is unable to pay rent.

The trustee relies on two cases in support of dismissal where debtors were misusing funds to the detriment of creditors and the estate: *Matter of NuGelt, Inc.*, 142 B.R. 661 (Bankr. D. Del. 1992), and *In re Fall*, 405 B.R. 863 (Bankr. N.D. Ohio 2009).

In *NuGelt*, the bankruptcy court found cause to dismiss the case where corporate shareholders and officers used assets of the estate to satisfy their personal obligations. 142 B.R. at 666–67. These officers used corporate funds to pay for their own alimony, child support, and legal fees. *Id.* at 666. The court concluded that the debtor, through its corporate officers, breached its fiduciary duty to creditors and the estate by failing to segregate its funds and diverting those funds for personal expenses. *Id.* at 667. This was cause, the court held, to dismiss the case. *Id.*

In *Fall*, small business debtors' ability to rehabilitate was dependent upon their ability to improve the income earning potential of their largest asset, a commercial plaza. 405 B.R. at 868. The court noted that two of the debtors' underperforming tenants in the plaza were insiders: one of the individual debtors himself, and the debtors' son. *Id.* Neither the debtor nor his son had tendered a single lease payment since the commencement of the case, and the debtor was using lease payments from other tenants to pay for his personal expenses. *Id.* at 869. The court concluded that the debtors' halfhearted efforts to obtain new tenants plus continued personal use of estate assets were aspects of gross mismanagement and were unfairly detrimental to their largest secured creditor and dismissed the case. *Id.*

Here, the testimony of Smith and Kolasinski contrasts significantly with the evidence in *NuGelt* and *Fall*.

Both Smith and Kolasinski testified that Patriot did not have sufficient funds to pay its rental obligations to the debtor. While this testimony confirms that the debtor was not collecting rental income from a related entity, it also establishes that the debtor wasn't actively misusing rental income. This distinction is in stark contrast to the debtors' conduct in *NuGelt* and *Fall* where each court found that the debtors had used funds of the estate for personal expenses. Here, Smith explained that there was a sound business reason for allowing Patriot to use the American Blvd property without paying rent: namely, the importance of continuing the pulping and converting operations, which are crucial to the debtor's roll-up plan. Kolasinski confirmed the importance of

maintaining the operations at Patriot. He testified that Patriot's continued operation in the American Blvd property was critical to maintaining plan feasibility. Kolasinski explained that there was a great "benefit to having [all of the operations together] and being able to bring [potential investors] to see it firsthand." Kolasinski also confirmed that the debtor had explored other tenancy options for the American Blvd property, but that it would be expensive and difficult to remove the currently-installed machinery in order to accommodate a new tenant. And that accommodation would be short-lived because the property is needed for NewCo operations.

The preponderance of the evidence does not show gross mismanagement or that the debtor has misused property of the estate. The debtor was not siphoning off funds to pay personal expenses that should have been used to pay creditors. The evidence also shows that the debtor's management has a sound business reason for allowing Patriot, a related entity, to remain in the property rent free—a rationale the debtors in *Fall* lacked. A sound business reason which stands to benefit creditors and the estate cuts against the assertion that the debtor breached its fiduciary duty to these same entities. Based on the evidence at hand, the court cannot conclude that there is cause to dismiss the debtor's case for misuse of property of the estate.

B. The debtor is experiencing substantial and continuing losses and has no reasonable likelihood of rehabilitation.

One of the enumerated grounds that constitutes cause for dismissal of a chapter 11 case is substantial or continuing loss to or diminution of the estate's

assets and an absence of reasonable likelihood of rehabilitation. § 1112(b)(4)(A). Both the continued or substantial loss and the inability to rehabilitate prongs must be proved. *Creekside Sr. Apartments*, 489 B.R. at 61. To satisfy the first prong, a movant may demonstrate continued losses, negative cash flow, or a decline in value of estate assets since the petition date. *Id.* To satisfy the second prong, the movant must show that the debtor or some other party will not be able to "stem the debtor's losses and place the debtor's enterprise back on a solid financial footing within a reasonable amount of time." *Id.*

(i) Substantial and continuing losses.

The United States trustee contends that the debtor has continued to incur substantial losses because its MORs show net operating losses for the months of May, June, and July 2016; the debtor did not collect any post-petition rent from Patriot; and the debtor relies on non-debtor entities to pay its business expenses. CM-ECF, Doc. No. 59, at 8.

Persistent negative cash flow can support the conclusion that there is a continuing loss to or diminution of the estate because the purpose of section 1112(b)(4)(A) is to "preserve estate assets by preventing the debtor in possession from gambling on the enterprise at the creditors' expense when the there is no hope of rehabilitation." *Loop Corp.*, 379 F.3d at 516 (*quoting In re Lizeric Realty Corp.*, 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995)).

In *Loop Corp.*, the debtor ceased its business operations and intended to liquidate to pay its creditors. *Id.* at 513. Among the debtor's main assets were $3.25 million in cash and potential causes of action against corporate officers

and an outside accounting firm. *Id.* Despite its intent to liquidate, the debtor and the creditors' committee wished to remain in chapter 11 to pursue the debtor's causes of action in the hope of recovering more for the estate. *Id.* at 514. The United States trustee moved to dismiss because, after two attempts, the debtor had failed to propose a feasible plan and the costs of administration were eating away at the debtor's remaining assets. *Id.* The bankruptcy court agreed with the trustee that there was cause to convert the case to chapter 7 because the debtor's monthly operating reports showed negative net monthly income which was diminishing the debtor's cash reserves. *Id.* The Eighth Circuit agreed that the debtor's persistent negative cash flow supported a finding of continuing loss or diminution of the estate because the debtor's main asset—its cash—was not being preserved. *Id.* at 515–16.

In *Creekside Sr. Apartments*, the court concluded that there was cause to dismiss the debtors' cases where the debtors projected negative cash flow for eight years, while the debtors' investors claimed tax credits which diminished the value of the underlying properties. 489 B.R. at 62. The debtors' primary assets were real property on which they operated low-income apartment complexes. *Id.* at 55. The debtors failed to make adequate protection payments to their secured creditor and failed to file an amended plan after the bankruptcy court ordered it to do so. *Id.* at 59 & 62. The bankruptcy court held that these omissions evidenced diminution of the estate, and dismissed the case. *Id.* at 59. The bankruptcy appellate panel agreed and upheld the dismissal. *Id.* at 62.

Here, Kolasinski testified regarding the debtor's MORs. He explained that $6,906.15 of the debtor's operating expenses for the months of May, June, and July represented a sublease expense with Little Rapids Corporation. Kolasinski cautioned, however, that the entire lease expense was not properly allocated to the debtor as the space was used to store equipment that belonged to other entities. Kolasinski added that the debtor had worked out an agreement with Little Rapids to eliminate this expense going forward, and that the past MORs should be amended to reflect a reduced lease expense.

Kolasinski also testified that the other recurring expense on the debtor's MORs was the adequate protection payment of $10,247 for real estate taxes. Kolasinski and Smith confirmed that these sums had been escrowed in the debtor's bank account. The only other operating expenses listed by the debtor during these periods were $18,903.80 for legal services provided by debtor's counsel in June[2] and $337 for miscellaneous operating expenses in July.

Smith and Kolasinski testified that the debtor pays its expenses from outside funds provided to RTS, which are later apportioned to the debtor. The debtor's August MOR confirms that testimony as $30,949 in income is listed as attributable to payments by EARTH, Patriot, and a separate entity owned by Smith, GlenArbor Partners Inc. CM-ECF, Doc. No. 79, at 9. Taking all of this into consideration, Kolasinski stated the debtor's profit and loss statement is

2 While the debtor has incurred legal fees, the fees have not yet come due. Debtor's counsel has agreed in its proposed chapter 11 plan to defer allowance of his claim and compensation until after financing is obtained. *See* CM-ECF, Doc. No. 82, at 8. Additionally, the allowance of compensation is subject to this court's review. 11 U.S.C. § 330(a).

"pretty much a wash, with the exception of whatever minor expenses [are] incurred [for] bank fees . . . and United States trustee's fees." Indeed, the debtor's August MOR reflects a positive net operating income of $13,681.79; though this amount is likely explained by the receipt of past-due adequate protection payments. The United States trustee filed his motion to dismiss before receipt of the August MOR.

The testimony of Ms. McSherry, an analyst at the United States trustee's office, does not diminish Kolasinski's testimony. Ms. McSherry stated that her calculations show that the debtor operated at a loss in the month of August because $30,000 of contributions from the debtor's related entities did not constitute revenue of the debtor. As the court will address below, the fact that a related entity paid for the debtor's operating expenses does not establish a continuing loss to the estate. For this reason, the court discounts Ms. McSherry's testimony.

Green Box's conduct is unlike the conduct of the debtors in *Loop* and *Creekside Sr. Apartments*. Kolasinski's testimony establishes that the debtor is not likely to operate at a loss going forward. Rather, the debtor is simply breaking even as the only recurring expenses it has are adequate protection payments offset by funds received from its related entities. Significantly, neither the United States trustee nor the creditors offered evidence that the debtor's real estate or equipment are losing value. This preservation of the status quo is in stark contrast to the situation in *Creekside Sr. Apartments* where debtors were attempting to hold their secured creditor at bay for eight years with

net losses while the underlying assets depreciated in value. Here, Green Box is not burning through its cash reserves like the debtor in *Loop* because it does not have any cash reserves. The evidence supports a finding that the debtor has been and will continue to keep afloat while it seeks permanent financing. The evidence does not support a finding that there is a substantial or continuing loss or diminution of the estate because of persistent negative cash flows.

Nor is there evidence that the debtor's failure to collect post-petition rent from Patriot evidences a substantial or continuing loss to the estate. In another case cited by the United States trustee, *In re CNN Realty Corp.*, 23 B.R. 261 (Bankr. S.D.N.Y. 1982), a single asset real estate debtor failed to collect rent from an insider despite a state court order to do so. The debtor also failed to pay real estate taxes, failed to show it could obtain additional capital, and failed to file a chapter 11 plan within the exclusivity period. *Id.* at 262–63. The court found the debtor's delay unreasonable and that the accruing real estate taxes reflected a continuing diminution of the estate to the detriment of the debtor's secured creditor. *Id.* at 263. None of those deficits are present here. As explained above, the debtor has a sound business reason for allowing Patriot to remain in the American Blvd property without collecting rent. Indeed, it appears more cost-effective for the estate to do so. The debtor has escrowed its real estate taxes, has timely filed its chapter 11 plan, and has offered testimony as to its plan to obtain financing. *CNN Realty* is distinguishable and does not provide a basis to conclude that this debtor's failure to collect post-petition rent is a continuing loss to the estate.

The court also cannot conclude that the debtor's reliance on its related entities to pay its operating expenses equates to a continuing loss to the estate. In *Hassen Imports P'ship v. City of West Covina (In re Hassen Imports P'ship)*, No. 2:11-42068, 2013 WL 442508 (B.A.P. 9th Cir. Aug. 19, 2013), the appellate panel upheld the bankruptcy court's finding of cause to convert a case to chapter 7 because there was a substantial and continuing loss to the estate. *Id.* at *13–14. The bankruptcy court determined that the debtor's failure to pay $175,000 in post-petition property taxes and its substantial accruing administrative expenses were a continuing diminution of the estate. *Id.* at *13. The debtor had proposed to pay these expenses through the sale of a franchise dealership, but the bankruptcy court rejected this argument because the infusion of cash from the sale was merely "prospective" rather than "actual." *Id.* The appellate panel explained that "Debtor was unable to function without the promised, but *unfulfilled*, $3 million cash infusion. Debtor's inability to pay its obligations without this outside money only established further loss." *Id.* at *14 (emphasis supplied).

The *Hassen* court focused on the doubtful nature of the cash infusion. *Hassen* does not establish a *per se* rule that an outside entity paying a debtor's obligations evidences a continuing loss to the estate. Moreover, the testimony from Smith and Kolasinski confirms that the debtor's related entities understand the importance of the debtor making its adequate protection payments. And the debtor's monthly operating reports manifest that the cash infusions provided by the debtor's related entities are not prospective, but are actual. The debtor's

reliance on its related entities to pay its modest operating expenses does not establish a continuing loss to the estate.

(ii) No reasonable likelihood of rehabilitation.

The United States trustee also contends that the debtor does not have a reasonable likelihood of rehabilitation because it does not have any unencumbered assets for refinancing purposes, does not generate operating income, and remains unable to service its debt. *Id.* at 8–9.

While it is true that such circumstances can, in a particular case, establish that the debtor has no reasonable likelihood of rehabilitation, *see, e.g.*, *Paccar Financial Corp. v. Pappas (In re Pappas)*, 17 B.R. 662, 666 (Bankr. D. Mass. 1982); *CNN Realty Corp.*, 23 B.R. at 262; *Fall*, 405 B.R. at 863, the ultimate test is "whether the debtor's business prospects justify continuance of the reorganization effort." *In re Original IFPC Shareholders, Inc.*, 317 B.R. 738, 742 (Bankr. N.D. Ill. 2004). Rehabilitation is a much more demanding standard than reorganization. *Creekside Sr. Apartments*, 49 B.R. at 61. The test is not a technical one to see whether or not the debtor can confirm a plan, but instead seeks to determine if there is a reasonable expectation of success in the business enterprise. *See In re Cherry*, 84 B.R. 134, 138 (Bankr. N.D. Ill. 1988).

The crux of the rehabilitation issue at hand is the debtor's roll-up plan. In large part, the roll-up plan depends on the debtor's ability to obtain outside financing which will pay the claims of the estate. To establish that the debtor has no reasonable possibility of rehabilitation, the United States trustee must show by a preponderance of the evidence that the debtor has no reasonable

expectation of obtaining financing. *Original IFPC Shareholders*, 317 B.R. at 744–45. Once the United States trustee adequately raises the issue, the debtor bears the burden of production on issues of post-petition financing. *Id.* at 745.

The United States trustee's motion to dismiss did little to question the debtor's ability to obtain outside financing for its roll-up plan likely because the motion to dismiss was filed a month before the debtor filed its proposed roll-up plan. *See* CM-ECF, Doc. Nos. 59 & 82. Rather, the United States trustee's motion to dismiss focused on the debtor's past cash infusions from investors as reflecting its inability to generate a positive operating cash flow from its business. CM-ECF, Doc. No. 59, at 9.

At the evidentiary hearing, the United States trustee and the moving creditors directed a relatively small portion of their questioning toward the debtor's ability to obtain financing. The United States trustee voiced concern about the debtor requiring parties to sign non-disclosure agreements before it would turn over financial projections from its investment banker. Counsel for Cliffton inquired into the debtor's past attempt to obtain financing before the debtor's receivership. And counsel for Ability inquired into the current underwriting process of the investment banker. No parties solicited testimony that undermined Smith's credentials or his team's ability to successfully market the debtor's project.

In any event, assuming the United States trustee or the creditors sufficiently raised the issue, debtor's counsel solicited direct testimony from Smith that provides a basis to conclude that the debtor has a reasonable

expectation of obtaining financing. Smith testified to his decades of experience raising private capital. Smith testified that engineers have vetted the project's technology and that the debtor's proposed roll-up stands to generate significant profits. Smith further testified that the project's projected debt coverage and equity returns are very attractive to investors, which is why he believes the debtor will be successful obtaining financing. Moreover, Smith confirmed that an investment bank had successfully underwritten the debtor's project prior to its receivership and that the project was close to receiving funding until RVDH's legal troubles burgeoned.

Particularly in light of Smith's testimony, which was not refuted, the evidence fails to show that the debtor is without a reasonable expectation of obtaining financing. Because of this, the bases enumerated in the trustee's motion to dismiss likewise fail.

It does not matter that the debtor does not have any unencumbered assets because obtaining external financing does not hinge on further encumbering the debtor's assets. To the contrary, as Smith testified, the anticipated financing will pay off creditors in exchange for the release of their liens and claims against RTS, and the NewCo will issue bonds to investors.

As discussed above, the debtor's non-operating status is not determinative here because the debtor is not incurring expenses beyond which it can pay and its past and current operations are simply prelude to its future operations. The debtor is not reorganizing in the traditional sense that its new business will be exactly the same as its old business, except with better management and greater

access to resources. Rather, the debtor's proposal is to roll all of its and its related entities' assets together to operate the entire paper and plastic reclamation process—something that the debtor has not done before. Thus far, the reclamation process has only been operated in parts. Kolasinski elaborated on this progression: he testified that there will be five key pieces to the debtor's roll-up operation and that the external financing that the debtor is seeking will allow it to connect two of its key pieces, the pulping and converting lines, by way of a tissue machine. As a result, the debtor's past and present financial records are not wholly probative of the debtor's ability to rehabilitate itself. *Cf. In re Canal Place Ltd. P'ship*, 921 F.2d 569, 579 (5th Cir. 1991). This is so not only because the debtor's future operations will be aggregated, but also because its future operating revenues will not fund the plan—third party financing will. *See id.*

Finally, the debtor's ability to service its debt is directly tied to the financing it seeks. The court has already concluded that there is a reasonable possibility of obtaining financing, and Smith and Kolasinski's testimony is that the financing could be available as early as the end of March 2017 if the debtor's plan is confirmed by the end of this year. March 2017 is less than one year after this case was filed, and approximately five months from now. This is not an unreasonable amount of time to achieve that goal. *Cf. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 366–67 (1988) (explaining that the debtor's showing of a reasonable possibility of reorganization is less demanding during the exclusivity period).

The debtor's unique relationship with its related entities and its proposed roll-up plan makes this case different than traditional single-entity reorganization cases. The result is that circumstances which may otherwise point to an inability of a debtor to rehabilitate do not necessarily fit in this case. At this stage, the United States trustee has not demonstrated sufficient evidence to show that that the debtor lacks a reasonable likelihood of rehabilitation.

Consequently, the court cannot conclude that there is cause to dismiss the debtor's case for substantial or continuing losses and the absence of a reasonable likelihood of rehabilitation.

C. The debtor does not have the ability to a confirm a chapter 11 plan.

In a related argument, the United States trustee claims that there is cause for dismissal because the debtor cannot effectuate a chapter 11 plan. CM-ECF, Doc. No. 59, at 6–7. Once a separate and enumerated ground for cause under section 1112(b), *see Original IFPC Shareholders*, 317 B.R. at 743 (pre-BAPCPA under § 1112(b)(2)), courts still recognize that inability to confirm a plan constitutes cause to dismiss a chapter 11 case*, see, e.g., In re SHAP, LLC*, 457 B.R. 625, 628 (Bankr. E.D. Mich. 2011); *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 660–61 (Bankr. E.D. Pa. 2009); *In re Local Union 722 Int'l Bhd. of Teamsters*, 414 B.R. 443 (Bankr. N.D. Ill. 2009). Inability to effectuate a chapter 11 plan inherently involves an analysis of the debtor's prospects of rehabilitation, but is primarily concerned with the technical plan confirmation requirements of section 1129(a). *See DCNC North Carolina*, 407 B.R. at 664–65; *Cf. Original IFPC Shareholders*, 317 B.R. at 743.

Section 1129(a) lays out sixteen requirements that must be met in order for a court to confirm a chapter 11 plan. 11 U.S.C. § 1129(a)(1)–(16). In order for the court to dismiss the case the United States trustee and the moving creditors bear the burden to establish the debtor's inability to meet the requirements of section 1129(a). *Local Union 722*, 414 B.R. at 452.

The sole technical requirement enumerated by the movants is the United States trustee's contention that the debtor may not be able to propose a plan that pays its delinquent taxes within 60 months of the petition date. CM-ECF, Doc. No. 59, at 12–13; *see* § 1129(a)(9)(C). The United States trustee notes that the debtor has failed to file tax returns since 2011 and has yet to retain an accountant to prepare the delinquent returns. Several pieces of evidence weaken that argument.

The Wisconsin Department of Workforce Development, Internal Revenue Service, and Wisconsin Department of Revenue have all filed proofs of claim, so the debtor at least has an idea of how much money it must allocate to pay these priority claims. *See* Claims Register, Claim Nos. 2, 3, & 5. The debtor's plan addresses these proofs of claim and provides for their payment in full by the date financing is expected to be received, March 31, 2017, which is within 60 months of the petition date. CM-ECF, Doc. No. 82, at 5, 8, & 11. So, on the plan's face, the debtor is in compliance with section 1129(a)(9)(C).

The testimony from Kolasinski on cross-examination does not undermine the plan's projections. Kolasinski testified that he has been in talks with the Internal Revenue Service to obtain past returns and historical information of the

debtor and its related entities, and has accountants in line to help him prepare amended returns. He stated that interim funding to pay the accountants was being arranged by RTS and should be ready within a few weeks. Kolasinski also recalled that Smith had paid a substantial debt to the Internal Revenue Service in April or May 2015, on behalf of debtor. And while Kolasinski testified that he did not file a tax return for the debtor in April 2016, he also stated that he believed the debtor could show it had no operating income in 2015. Kolasinski's proffer is plausible because for the majority of 2015 the debtor was in receivership, and the receiver had suspended operations.

Based on the debtor's plan provisions and the testimony of Kolasinski, the court cannot conclude that the debtor will be unable to confirm a chapter 11 plan based on the United States trustee's challenge under section 1129(a)(9)(C).

The United States trustee's principal argument, though, is really plan feasibility. The argument is as follows: The debtor is not operating or generating income to fund a chapter 11 plan, the necessary equipment and technology to run operations are not in place, and the possibility of third-party financing is speculative, so there is no way the debtor can propose a feasible plan to pay its creditors. CM-ECF, Doc. No. 59, at 6–7.

This argument is largely addressed above where the court examined the debtor's reasonable possibility of rehabilitation, and concluded that there is a reasonable expectation that the debtor will be able to obtain financing to pay creditors and commence its project within a reasonable time. This conclusion necessarily disposes of the United States trustee's arguments related to

operations and generating income, as well as to the speculative nature of the third-party financing. The court also notes that the United States trustee's focus in his brief on the debtor's Kool units has been mooted by the debtor's plan, which proposes to surrender the collateral to Cliffton.

In closing argument, counsel for WEDC briefly articulated a ground that may implicate the technical requirements of section 1129(a). Counsel for WEDC argued that the lack of clarity relating to the debtor's past and future financial situation will make it difficult for his client to make its section 1111(b) election[3] before the October 19 hearing on approval of the debtor's disclosure statement. Debtor's counsel responded that WEDC stands to receive nothing under the plan if it does not make its section 1111(b) election, so that argument fails on its face. Debtor's counsel also argued that to the extent WEDC and other parties have not been satisfied with the information forthcoming from the debtor, they could have sought permission to conduct a Rule 2004 examination.

The court agrees with the debtor that WEDC and other parties in interest could have pursued means of discovery before the evidentiary hearing. The court also does not find WEDC's argument persuasive because, even to the extent that making its section 1111(b) election involves some investigation, it does not have to make its election before the commencement of the hearing on approval of the disclosure statement. Rule 3014 provides that WEDC has until the conclusion of the hearing or within such time as the court may fix. Fed. R.

3 An undersecured creditor has the ability to make an election under section 1111(b)(2) to treat its claim as fully secured without application of section 506(a). 11 U.S.C. § 1111(b)(2).

Bankr. P. 3014. If WEDC is concerned about its ability to make its election before the conclusion of the disclosure statement hearing, it can file a motion requesting that the court set a later deadline for it to make its election.

In sum, at this point in the proceedings, the court is not satisfied that the United States trustee or the moving creditors have established that the debtor cannot meet the technical requirements of section 1129(a) to confirm its plan.

Accordingly, there is not cause to dismiss the debtor's case for inability to confirm a chapter 11 plan.

D. There is an unexcused failure of the debtor to file complete and accurate schedules and a SOFA.

Arguably the United States trustee's biggest bone of contention is that the debtor has failed to comply with its statutory duties to file complete and accurate disclosures. CM-ECF, Doc. No. 59, at 10. The United States trustee argues that the debtor's management has not used reasonable diligence to discover information which should have been provided in its schedules and SOFA. *Id.* at 10–11. The United States trustee also contends that Smith should have had information available to him from his past investments in the debtor and its related entities to more thoroughly complete the schedules and SOFA. *Id.* at 11.

A debtor is required to file schedules of its assets, liabilities, income and current expenditures, and a statement of its financial affairs within 14 days of the petition date. 11 U.S.C. § 521(a); Fed. R. Bankr. P. 1007(c). The bankruptcy process hinges on the debtor's veracity and complete disclosures, so

a debtor has an affirmative duty to use reasonable diligence to thoroughly complete its schedules and accurately answer questions in its disclosures. *In re Gaulden*, 522 B.R. 580, 589 (Bankr. W.D. Mich. 2014). Failure to comply with these requirements can constitute cause for dismissal or conversion under section 1112(b)(4)(F) if the failure is *unexcused*. *See In re Justice*, No. 02-01524, 2002 Bankr. LEXIS 1857, at *9 (Bankr. D.S.C. Aug. 29, 2002); *Korn*, 423 B.R. at 465; *see also In re Franmar, Inc.*, 361 B.R. 170, 178–79 (Bankr. D. Colo. 2006) (explaining that the word "unexcused" gives the court leeway under the appropriate circumstances to find that cause has not been established).

Justice is one of the cases the United States trustee cites. CM-ECF, Doc. No. 59, at 10. The court in *Justice* found cause to convert the debtor's case to chapter 7 because there were material inaccuracies and glaring omissions in the debtor's schedules that the debtor failed to correct even after prompting by the United States trustee. 2002 Bankr. LEXIS 1857, at *17. The court found that the debtor's failure to list real property, transfers of real property, and pending litigation constituted material inaccuracies in his schedules. *Id.* at *7–8. The court focused on the prejudice to creditors that the inaccuracies caused, and the debtor's lengthy delay in taking action to fix the inaccuracies. *Id.* at *9–15. The court concluded that the debtor's actions failed to demonstrate an intent to reorganize his affairs. *Id.* at *14.

The United States trustee also cited *Gaulden* in his motion and at oral argument. CM-ECF, Doc. No. 59, at 10. The *Gaulden* court found cause to dismiss a chapter 7 debtor's case because the debtor failed to correct material

inaccuracies in his schedules. 522 B.R. at 592–93. The court began by recognizing that courts routinely encounter debtors who innocently err in the preparation of their schedules in haste. *Id.* at 590. The court went on to explain, however, that the debtor was distinguishable from those who make honest errors in haste. According to the *Gaulden* court, it was not the debtor's material inaccuracies themselves that were cause for dismissal, but the debtor's failure to correct the inaccuracies for six months even after admitting to their materiality at a meeting of creditors. *Id.* at 592. The court focused on the prejudice to the main creditor caused by the debtor's continued failure to provide an accurate financial picture. *Id.* at 592–93. The prejudice was that the creditor lacked basic information in order to determine whether or not continuation of the debtor's case was in the creditors' best interests. *See id.*

The bulk of questioning at the evidentiary hearing was directed at Smith in an attempt to solicit testimony that would establish that he had greater access to past financial information of the debtor than what was disclosed. Smith's testimony reveals that such was not the case.

On cross-examination by the United States trustee, Smith testified that he reviewed profit and loss statements of the debtor before investing in 2012. He also testified that he had viewed historical balance sheets and asset lists of the debtor in the past. But Smith clarified that the financial figures were only forward-looking projections and had not been audited. On cross-examination by counsel from Cliffton, Smith stated that RVDH was in charge of all of the decision-making and day-to-day operations of the debtor and was poor at

reporting anything substantive to investors and lenders.

The problem with the movant's contention is two-fold. First, Smith's testimony does not establish that the debtor omitted any specific material financial information that Smith reasonably had within his control. And second, there is no foundation to show that any of the historical financial information of the debtor that Smith previously viewed was accurate. In the end, the movants cannot prove a negative—because they cannot show what accurate information Smith reasonably had within his control, they cannot prove that the debtor omitted that specific information in its disclosures. Green Box is not like the debtor in *Gaulden* who had access to his income and expense figures and simply refused to amend his schedules to accurately disclose them.

What the court is left with is Smith's testimony that Kolasinski prepared the schedules and SOFA and that when Smith reviewed and signed the documents, he believed them to be complete and accurate. This testimony is particularly credible when viewed in light of the testimony of Kolasinski.

On cross-examination from the United States trustee, Kolasinski confirmed that he prepared the schedules and SOFA of the debtor. Kolasinski explained that he prepared the disclosures based on what was presented to the state-court receiver. He elaborated on the dearth of available information: "there were no hard copies of records, the server was gone, I did not have access to any normal financial statements [such as] accounts payable, accounts receivable, or any other system-generated reports for this entity." In the absence of the debtor's confiscated records, Kolasinski explained that he had to

make reasonable assumptions based on the records he did have. He explained that a bulk of the debtor's records were recently returned, but that they were in disarray and had not been sorted through fully.

The testimony of Kolasinski and Smith establishes that the debtor prepared its disclosures based on the information that it reasonably had within its control. However, like many debtors who hastily prepare their disclosures, the record reveals that there were some innocent errs made along the way.

Testimony at the evidentiary hearing revealed that there is one omission and one inaccuracy related to the debtor's disclosures. Debtor's counsel conceded that the debtor had inadvertently omitted some of its legal actions under question 7 of the SOFA. Counsel explained that in the haste of preparing the disclosures, the debtor did not consult CCAP (Consolidated Court Automation Programs) to verify that it had listed all of its state court legal actions. Debtor's counsel explained that the debtor would promptly amend its disclosures to list all of its legal actions. Kolasinski also stated on direct examination that the debtor's MORs from May through August are inaccurate to the extent that they reflect the entire Little Rapids Lease expense. Kolasinski stated that the MORs should be amended to reflected the proper reduced allocation.

Ultimately, the court cannot conclude that this omission and this inaccuracy constitute cause to dismiss this case. The reason is that neither of those deficits is material. Neither the failure to consult CCAP nor the failure to accurately reflect the reduced lease expense on the MORs are evidence that the

debtor was hiding assets or attempting to mislead. *Compare Korn*, 423 B.R. at 465 (cause to dismiss established because the debtor attempted to hide assets by intentionally omitting assets and prepetition transfers). And these deficits are not prejudicial to the movants because they have not affected the administration of the estate. Nor do the two deficits affect the movants' determination as to whether the continuation of this case is in their best interests. *Compare Justice*, 2002 Bankr. LEXIS 1857, at *9–15; *Gaulden*, 522 B.R. at 592–93. Moreover, the movants have not come forward with any authority for the proposition that a party must provide what it does not have. Consequently, the particular omission and inaccuracy are not "unexcused" for purposes of section 1112(b)(4)(F).

For the sake of argument, let's assume that the movants had established cause under section 1112(b)(4)(F). In that event, the court would have little difficulty concluding that the savings provision of section 1112(b)(2) applies. If ever there are unusual circumstances present in a case, having law enforcement confiscate the very information that is being demanded of you—through no fault of your own—would certainly qualify. More importantly, conversion or dismissal also does not appear to be in the best interests of creditors or the estate based on the increased potential distributions under the debtor's proposed chapter 11 plan. As the court discussed above, there is a reasonable likelihood of plan confirmation within the Code's time restraints and there are no continuing losses to the estate. There is also justification for the debtor's inaccuracy and omission given that they are innocent in nature. And finally,

the debtor has offered, and this court will so order, that the omission and inaccuracy be cured promptly.

In sum, the court does not find that there is evidence that the debtor omitted historical financial information that it had within its reasonable control. Additionally, the inaccuracy and omission described at the evidentiary hearing do not constitute unexcused deficits. As a result, the court cannot conclude that there is cause to dismiss the debtor's case for unexcused failure to file complete and accurate schedules and a SOFA.

E. The estate is administratively insolvent.

The last argument the United States trustee makes for dismissal is that the debtor is administratively insolvent. CM-ECF, Doc. No. 59, at 12. The United States trustee advances the same arguments that the court has already rejected when offered for proof that the estate is suffering substantial and continuing losses and the debtor has no reasonable possibility of rehabilitation. Consequently, the court cannot conclude that there is cause to dismiss the debtor's case because the estate is administratively insolvent.

III. CONCLUSION

For the reasons stated above, the court concludes that the United States trustee and the moving creditors have not met their burden to show that there is cause to dismiss the debtor's case.

Accordingly,

IT IS ORDERED that the United States trustee's motion to dismiss, joined

by Ability Insurance Company, Cliffton Equities, and the Wisconsin Economic Development Corporation, is **DENIED**.

IT IS FURTHER ORDERED that the debtor shall file its amended monthly operating reports and amended disclosures relating to its previous legal proceedings on or before **October 31, 2016**.

It is so ordered.

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