UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In the Matter of :

Case No. 16-24179-BEH 11

GREEN BOX NA GREEN BAY, LLC,

Debtor.

CLIFFTON EQUITIES, INC.'S OBJECTION TO DEBTOR'S DISCLOSURE STATEMENT

Cliffton Equities, Inc. ("Cliffton"), by and through its undersigned counsel, hereby objects to the *Disclosure Statement Dated September 26, 2016* (the "Disclosure Statement") (Dkt. No. 81) filed in the above-captioned bankruptcy case.

The Disclosure Statement should not be approved because it lacks sufficient and necessary information. As more fully set forth below, the lack of necessary information in the Disclosure Statement relates to fundamental disclosures, including basic financial information such as sources of funding, plan projections, and information related to intellectual property, among others. Without this information, creditors, including Cliffton, cannot make an informed voting decision regarding the Plan.

Debtor's Disclosure Statement fails to provide any concrete or specific information related to confirmation of its Chapter 11 plan. Accordingly, the Disclosure Statement and should not be approved.

Drafted by:
Brittany S. Ogden
Quarles & Brady LLP
33 E. Main Street, Suite 900
Madison, WI 53703
Phone: (608) 251-5000
Facsimile: (608) 251-9166
Brittany.ogden@quarles.com

I. THE DISCLOSURE STATEMENT LACKS ESSENTIAL INFORMATION NECESSARY FOR CREDITORS TO MAKE AN INFORMED VOTING DECISION.

The Disclosure Statement lacks essential information for creditors to make an informed voting decision for two reasons. First, it does not contain adequate information. Second, the Disclosure Statement contains misstatements and material omissions.

A. The Disclosure Statement Does Not Contain Adequate Information

Bankruptcy Code § 1125(a)(1) requires that a disclosure statement provide "adequate information" such that a hypothetical investor in a class of claims would be able to make an informed judgment whether to accept or reject the proposed plan. The main purpose of a disclosure statement is "to provide all material information which creditors and equity security holders affected by the plan need in order to make an intelligent decision whether to vote for or against the plan." *In re Unichem Corp.*, 72 B.R. 95, 97 (Bankr. N.D. Ill.), aff'd, 80 B.R. 448 (N.D. Ill. 1987). Courts have created a list of factors that should be disclosed which include the following:

> "(1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates."

See In re Budd Co., Inc., 550 B.R. 407, 412–13 (Bankr. N.D. Ill. 2016).

Other courts have held that "[a]t a minimum, the disclosure statement must include: (a) a description of the business; (b) a synopsis of the debtor's pre-petition history; (c) certain financial information regarding the debtor's operations; (d) a description of the plan and how it is to be executed; (e) a liquidation analysis; (f) management to be retained by the debtor and such management's compensation; (g) a projection of operations, inclusive of pending litigation and transactions with insiders; and (h) tax consequences of the reorganization." *In re S.E.T. Income Properties, III*, 83 B.R. 791, 792 (Bankr. N.D. Okla. 1988) (*citing In re Malek*, 35 B.R. 443, 443–44 (Bankr. E.D. Mich. 1983)).

Where a debtor fails to provide adequate disclosure in a bankruptcy case, the disclosure statement should not be approved. *See In re Unichem Corp.*, 72 B.R. at 96. If inadequate disclosure statements are accompanied by other uncooperative behavior or Debtor has had sufficient opportunity to reorganize, dismissal may be appropriate. *See In re Egan*, 33 B.R. 672 (Bankr. N.D. Ill. 1983)(Chapter 11 petition was properly dismissed without prejudice where such insufficient disclosure statement was accompanied by debtors' delays, evasiveness, and general lack of cooperation while case was pending for more than one year.); *see also See In re Hirt*, 97 B.R. 981, 982 (Bankr. E.D. Wis. 1989)(finding that cause existed to dismiss bankruptcy case due to inadequate information in disclosure statement and debtor's inability to effectuate a feasible plan within ten months.)

Here, the Disclosure Statement falls well short of providing the adequate information required under Bankruptcy Code § 1125(a) based on at least the following[1]:

[1] Cliffton respectfully reserves the right to assert any and all objections to the Debtor's plan and/or any amended disclosure statement and plan even if they are not raised here. Cliffton reserves all rights and waives nothing.

i. Failure to Identify Financing Arrangements.

The Disclosure Statement provides that the Debtor "has managed to contractually secure a nationally recognized Investment Bank who has been engaged in taking the entire project forward." *See* Disclosure Statement, p. 13, ¶ 1. However, when prompted to identify which bank is providing services at the United States' Trustee's Hearing on its Motion to Dismiss conducted on September 30, 2016 (the "Hearing"), Stephen Smith ("Smith"), an investor and individual with various ties to the Debtor and related entities, stated that he would "rather not disclose." (*See* Hearing Transcript, p. 67, Ln. 11.) Although Smith provided some limited information about this financing, the Disclosure Statement fails to include any pertinent information about how the Debtor will move forward.

Among other things, the Debtor fails to identify in the Disclosure Statement a commitment letter, lending terms, the amount of any funds that have been secured, or the party providing the funds. Also, it doesn't appear that the Debtor has any assets which are not fully encumbered, underscoring the question of how such capital can be secured. The Disclosure Statement provides that the Debtor will have funding by the end of the first quarter in 2017, but fails to specifically set forth how this will be accomplished.

ii. Failure to Provide Financial Information.

A disclosure statement must contain the necessary financial information, data, and projections relevant to the creditors' decision to accept or reject the Chapter 11 plan to satisfy the requirements of adequate information under § 1125. *See In re Ferguson*, 474 B.R. 466, 476 (Bankr. D.S.C. 2012); *see also In re Adana Mortgage Bankers, Inc.*, 14 B.R. 29, 31 (Bankr. N.D. Ga. 1981) ("The creditors are not expected to be mindreaders or clairvoyant. The basic financial information must be supplied in the statement."). The Debtor asserts that it has been "hampered"

by "a lack of any meaningful documentation or business records, computer, and server." (*See* Disclosure Statement, p. 13, ¶ 2.) However, the Debtor offers that it "is currently, as time is available, reviewing the various records of the Debtor which were returned to it from the Sheriff's Department." (*See* Disclosure Statement, p. 14, ¶ 2.) Smith's testimony at the Hearing illustrated that he has access to information that was not included in any schedule or the Disclosure. (*See* Hearing Transcript, pp. 114-115.) He also testified to playing a role in the preparation and pitching to Raymond James for funding before the bankruptcy. (*See* Hearing Transcript, p. 98, Ln. 16.)

Critical to the disclosure statement process in bankruptcy is the requirement that a debtor provide creditors with meaningful financial information regarding its operation. Blaming the various investigations by government entities, the Debtor concedes that it has not reviewed its own financial records. The Debtor has completely failed to provide creditors (and the Trustee) with any financial information through which they may evaluate the Debtor and its financial standing. In fact, the Debtor states that it "has little, if any, relevant financial information which would add anything to accepting or rejecting the Plan of Reorganization." (*See* Disclosure Statement, p. 17, ¶ 4.) Without this information, it is impossible to determine the feasibility and legality of the Debtor's plan. Importantly, "where debtors are sophisticated in business, and carry on a business involving significant assets, creditors have an expectation of greater and better record keeping." *In re Scott*, 172 F.3d 959, 970 (7th Cir. 1999). This failure to provide creditors with any actual financial disclosure disqualifies the Disclosure Statement from serious consideration. Only when the Debtor provides this information will the submission of a disclosure statement be appropriate.

iii. Incomplete and Inaccurate Schedules and Statements.

One of the bases for dismissal of the case set forth in the *United States Trustee's Motion to Dismiss or Convert Case to Chapter 7* (the "Trustee Motion to Dismiss") (Doc. No. 59) is that the "Debtor has not used reasonable diligence in preparing the Schedules and SOFA" which "remain incomplete." (*See* Trustee Motion to Dismiss, p. 11, ¶ 46-47.) Among other things, the Debtor has failed to provide information related to the use of bank accounts in 2014, 2015, and 2016; whether the Debtor has employment-related liabilities; the amount of rent collected from subtenants; and the disclosure of any potential claims against Ronald Van Den Heuvel or related entities. (*See* Trustee Motion to Dismiss, p. 11, ¶ 50.) A debtor must attest that all information in the petition, schedules, and statements has been reviewed and is correct. *See In matter Gibas*, 543 B.R. 570, 584 (Bankr. E.D. Wis. 2016). Until the Schedules and SOFA are amended to include all necessary information in this bankruptcy case, and that such information is accurate, the Disclosure Statement should not be approved.

iv. Insufficient Information Related to Intellectual Property.

The Debtor asserts that Smith "has secured the intellectual property necessary to operate the process." (*See* Disclosure Statement, p. 12, ¶ 5.) Moreover, the Debtor argues that "[t]he intellectual property has previously been evaluated by independent consultants, which have placed a significant value on it." (*See* Disclosure Statement, p. 19, ¶ 5.) Meanwhile, the Debtor's Schedule B provides that the value of such intellectual property is "unknown" while simultaneously asserting that the "IP is essential to operation of the business." (*See* Schedules and Statements, p. 8 (Doc. No. 14).) In spite of this assertion of value, Smith testified at the Hearing that the Debtor's intellectual property is not identifiable or listed out in any documents. (*See* Hearing Transcript, p. 98, Ln. 16.)

Conspicuously absent from the Disclosure Statement are such details as, among other things, what is the intellectual property, who owns it, why it is necessary to the plan, the assignability of such intellectual property, and information supporting the basis for the "significant value" attributed to such intellectual property. Although this intellectual property is ostensibly critical to the Debtor, creditors have next to no information by which they can evaluate it within the context of the plan. This valuable intellectual property is an asset of the Debtor which must be specifically identified and described in the Disclosure Statement. *See In re Hirt*, 97 B.R. 981, 982 (Bankr. E.D. Wis. 1989) (Finding that the debtor's disclosure statement could not be approved due in part to "a lack of detail as to assets and liabilities.")

v. No Disclosure of Transactions with Insiders.

A "disclosure statement must describe fully, completely, and in detail all transactions within insiders." *See Malek*, 35 B.R. at 444. As set forth in the Trustee's Motion to Dismiss, Debtor failed to provide adequate information related to insiders in the Statement of Financial Affairs (the "SOFA"). In the SOFA, the Debtor vaguely asserts, in response to the request for information related to the transfer of property within a year of filing which benefited an insider, that Ronald Van Den Heuvel "received 'various payments of rent from subtenants' in an 'unknown' amount and was used to 'pay labor, insurance, and material.'" (Trustee Motion to Dismiss, p. 11, ¶ 50.) To date, the Debtor has not provided any useful or specific information about transactions with insiders and related entity as is required in a disclosure statement.

vi. Insufficient Listing of Tax Consequences.

The Disclosure Statement should "reveal the probable tax consequences if the Chapter 11 plan is confirmed." *See Malek*, 35 B.R. at 444. The Debtor's Disclosure Statement does not adequately analyze any tax consequences that the Debtor - or related entities - could face through

the bankruptcy, merely stating that "any losses attributable to that event would be to the individual investors/members and not to the Debtor." (*See* Disclosure Statement, p. 17, ¶ 4.) Additional analysis is necessary before this portion of the Disclosure Statement can be deemed adequate.

vii. No Liquidation Analysis.

The Debtor's Disclosure Statement fails to provide any actual numerical analysis, instead asserting in a general fashion that creditors would receive less under a liquidation than they will of the plan is confirmed. The Debtor is required to provide specific analysis to demonstrate the comparison between liquidation and confirmation of the proposed Chapter 11 plan; vague statements are not helpful to creditors attempting to determine whether to support the plan. *See In re Multiut Corp.*, 449 B.R. 323, 346 (Bankr. N.D. Ill. 2011) finding that debtor's liquidation analysis in its disclosure statement was deficient where debtor provided "no actual evidence or analysis to indicate what creditors would receive in a Chapter 7 case versus a Chapter 11 case.").

viii. No Description of Risk Factors.

In spite of the speculative nature of the potential success of the Debtor's plan, even in light of sparse financial information, the Debtor fails to disclose or address any potential risks in the Disclosure Statement. For example, one significant (and foreseeable) risk to the Debtor is the failure to capitalize; Debtor must provide an assessment of this and other similar risks. The Disclosure Statement appears to rely on aspirations more than facts, which is completely inappropriate in the disclosure process. *In re Egan*, 33 B.R. 672, 675 (Bankr. N.D. Ill. 1983) (opining that a "disclosure statement is not the place for a bottom-line opinion. It is inappropriate to lobby, even if supporting facts are present.")

ix. No Discussion of Management of Debtor and Compensation.

The Debtor fails to disclose how Smith or other management will be compensated through the execution of the plan. The Debtor also fails to specify what GlenArbor's role is with respect to the Debtor including whether they will be paid back for the financing they have provided to the Debtor.

x. No Projections of Operations.

A debtor "is required to make a full, clear, and complete disclosure of all underlying assumptions" with respect to its projections. *See Malek*, 35 B.R. at 444. Notwithstanding Debtor's failure to provide any information to creditors with which they may assess the viability of the Debtor based on its own projections, Debtor nonetheless offers that "[d]etailed financial projections concerning the Project will be shared with creditors on the basis of enforceable non-disclosure agreements being signed *once such financial projections are finalized and approved by the Investment Bank*." (*See* Disclosure Statement, p. 23, ¶ 4 (emphasis added).) Setting aside that this statement is an admission that the Debtor does not currently have any financial projections, Debtor nonetheless attempts to pacify creditors with an empty offer to provide these prospective projections subject to non-disclosure agreements. When prompted at the Hearing whether the Debtor would provide the Trustee without their assent to sign a non-disclosure agreement, Smith replied "No. I want a nondisclosure agreement. Why would I?" (*See* Hearing Transcript, p. 50, Ln. 10.) Providing financial projections and other necessary financial information is not a conditional requirement; creditors must be permitted access to these documents without any strings attached. Debtor's failure to provide these projections through the Disclosure Statement is inexcusable. *See Hirt*, 97 B.R. at 982 (Finding that the debtor's disclosure statement could not be approved due in part to "gross inaccuracies in cash flow

projections.") Debtor also fails to point out which assets will be rolled up into the NewCo in order to support the feasibility of its projections.

xi. Releases of Third Parties.

Debtor's Disclosure Statement casually mentions that releases will be necessary from certain of the Debtor's creditors to confirm the plan. (*See* Disclosure Statement, p. 23, ¶ 3.) Debtor fails to address such releases including who will be released, why they will be released, and whether there will be any consideration to support such releases. Debtor offers no details about the necessity for such releases.

Given the near complete lack of substance of the Disclosure Statements, creditors are not in a position to assess the viability of the Debtor's plan. Consequently, the Disclosure Statement should not be approved.

B. <u>The Disclosure Statement Contains Misstatements and Material Omissions</u>

Additionally, a disclosure statement cannot be approved if it contains material misstatements and omissions. *See e.g., In re Dakota Rail, Inc.*, 104 B.R. 138 (Bankr. D. Minn. 1989) (finding a disclosure statement materially misleading where the debtor estimated that it had 1,000 revenue-producing cars when it knew that only 850 would produce revenue: "[a] disclosure statement is misleading where it contains glowing opinions or projections, having little or no basis in fact and/or contradicted by known fact."). The following are just a few examples of material misstatements and omissions in the Debtor's Disclosure Statement:

i. Operation of Patriot Tissue, LLC.

The Disclosure Statement asserts that Patriot Tissue, LLC ("<u>Patriot</u>"), a related entity, owes a substantial amount of rent to the Debtor. *See* Disclosure Statement, p. 14, ¶ 5. The Disclosure Statement goes on to provide that because Patriot was unable to pay rent and ceased

operations, the Debtor has determined that the unpaid rent is "uncollectible." *See* Disclosure Statement, p. 15, ¶ 1. At the Hearing, however, Smith testified at various points, contrary to the Disclosure Statement, that Patriot is operating and has done so throughout the month of September 2016. (*See* Hearing Transcript, pp. 118-119.) This omission is troubling considering the Debtor is allowing a related entity to operate rent-free at the location in spite of a sizeable, and supposedly uncollectible, default in rent. While unsecured creditors stand to receive nothing through the plan, Debtor is bestowing a benefit on a related entity, allowing Patriot to continue its operations without requiring the payment of current rent or previously unpaid rent. The relationship between a debtor and its affiliates is among the type of information that should be disclosed. *See In re Applegate Prop., Ltd.*, 133 B.R. 827, 829 (Bankr. W.D. Tex. 1991)

ii. No Demonstration of Insurance Coverage for Debtor's Collateral.

The Disclosure Statement does not include any statement that the Kool Units or any other collateral in the Debtor's bankruptcy estate are adequately insured. At the Hearing, Smith confirmed that he has not investigated or provided any proof that the collateral in the bankruptcy is adequately insured to protect from risk of loss. (*See* Hearing Transcript, p. 166 Ln. 6-23.) Information related to insurance coverage should be provided in a disclosure statement. *In re U.S. Brass Corp.*, 194 B.R. 420, 426 (Bankr. E.D. Tex. 1996) (finding that the debtor's several page discussion of insurance coverage in its disclosure statement provided creditor with adequate information). Here, there is no insurance policy provided, and Smith has testified that he has not even bothered to look at an insurance policy.

iii. Prospective Operation of Joint Venture in South Carolina.

The Disclosure Statement provides that the Debtor has an interest in a joint venture agreement with Advanced Resource Materials, LLC ("ARM") which is said to involve the use of

an unassembled PC Kool Unit. *See* Disclosure Statement, p. 16, ¶ 3. The Disclosure Statement provides that the Debtor will surrender the PC Kool Units to Cliffton. *See* Disclosure Statement, p. 32, ¶ 2. In this respect, the Disclosure Statement is consistent with Smith's testimony at the Hearing that the Debtor intends to turn over the Kool Units. (*See* Hearing Transcript, p. 168, Ln. 16-19.)

The Debtor's Disclosure Statement provides no information about this proposed operation; this is particularly troubling considering that it appears that ARM intends to use property of the bankruptcy estate (a Kool Unit) to operate its own business. Further, because the Debtor owns an interest in the joint venture, it would ostensibly stand to receive funds from the operation, but fails to disclose anything related to this prospective project.

iv. Negotiation of Contracts and GlenArbor.

Debtor's Disclosure Statement provides that GlenArbor, through Smith, has "entered into agreements with various entities" and "continues to negotiate contracts for both products generated from the process as well as inputs which are necessary to fuel the process." *See* Disclosure Statement, p. 12, ¶ 5. The agreements and contracts, aside from this casual mention of them, are completely omitted from the Disclosure Statement. Again, while the Debtor stresses the importance of these actions to bolster confirmation on the one hand, it undercuts its credibility by failing to provide concrete and specific information about such efforts.

The Debtor's Disclosure Statement contains substantial and material misstatements and omissions that render it deficient. The Court should not approve a defective Disclosure Statement that omits or misstates such critical financial information from creditors and from the Court.

II. THE DISCLOSURE STATEMENT MUST BE REJECTED AS THE DEBTOR'S PLAN IS FACIALLY UNCONFIRMABLE.

When it is apparent that the plan accompanying the disclosure statement is not confirmable, a court may refuse to approve a disclosure statement." *Hirt*, at 982–83; *see also In re Century Inv. Fund VIII Ltd. P'ship*, 114 B.R. 1003, 1005 (Bankr. E.D. Wis. 1990). Where a plan is "patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile." *In re Quigley Co., Inc.*, 377 B.R. 110, 115–16 (Bankr. S.D.N.Y. 2007).

In addition to all of the foregoing omissions and inadequate information set forth herein, Debtor has "virtually no income" but asserts that "GlenArbor is providing capital on an as-needed basis in order to take the overall project forward." (*See* Disclosure Statement, p. 13, ¶ 2.) Smith has confirmed at the Hearing that the Debtor does not currently generate any revenue. (*See* Hearing Transcript, pp. 127-128.) The Debtor discloses not having any cash on hand or in bank accounts - although the Debtor's Schedules provide that at some point the Debtor would open a DIP account. As the Trustee has pointed out, without cash or other funds, it is unclear how the Debtor will be able to confirm a plan.

Meanwhile, the Debtor has provided no information that would give the Court any basis to confirm a plan. There is no analysis that supports feasibility beyond conclusory statements insisting that the Debtor (and all creditors) will benefit from confirmation of the Debtor's plan. The Debtor admits that it has not reviewed any financial information related to the Debtor, casting doubt on the credibility of the details of the plan and any assumptions upon which the Debtor relies. The Debtor refuses to provide any financial projections, which it admits are not yet complete, without a party first signing a non-disclosure agreement, nor will it provide the identity of an investment bank or the terms of such financing that it has allegedly arranged.

Finally, all of the assets of the bankruptcy estate are fully encumbered and it's unclear how potential investors would be in a position to protect their investment. Based on the

Disclosure Statement, the Debtor intends to surrender the Kool Units and it is unclear how the Debtor will move forward with its operation without these assets.

In this case, in spite of its duty to provide full and transparent information to its creditors, the Debtor has completely failed to provide any meaningful information. The Debtor has not provided information to its creditors relating to its financial history, purported lending terms it has reached with an unidentified entity, nor any information related to valuable intellectual property. The Debtor has failed to file complete and accurate schedules disclosing any insider transactions that have taken place. Moreover, the Debtor has obfuscated the disclosure process without any basis to do so by purporting to require creditors to enter into non-disclosure agreements before permitting creditors to view the Debtor's financial projections. Meanwhile, the Debtor has omitted information and mislead the Court by failing to inform creditors of a related entity operating its business with no obligation to pay rent and failing to disclose the potential operation of a joint venture in South Carolina involving estate property.

Finally, on October 15, 2016, the Court entered its *Decision and Order Denying United States Trustee's Motion to Dismiss* [Dkt. #92] providing that the UST and various creditors had not demonstrated cause for dismissal or conversion under § 1112. Unlike that section, which requires the moving party to demonstrate cause for dismissal or conversion, § 1125 sets forth that, before a Court can approve a disclosure statement, the Court must determine that the Debtor's plan provides creditors with adequate information which enables them to make an informed decision on how to vote for the Debtor's plan. The Debtor's Disclosure Statement does not provide adequate information. Without adequate information, creditors have no idea what is going on in a debtor's bankruptcy case and, under such circumstances, are not in a position to accept any proposed plan. In the event that the Debtor provides creditors with the requisite information, it can amend and resubmit its Disclosure Statement - accompanied by a confirmable plan - for consideration. However, given the near total lack of information from the Debtor and

the speculative prospects for confirmation of its plan, approval of the Disclosure Statement is not appropriate at this time.

III. CONCLUSION.

Based on the foregoing, Cliffton respectfully requests that the Court enter an Order:

A. Denying the approval of the Disclosure Statement; and

B. Granting such other and further relief as the Court deems just and proper under the facts and circumstances of this case.

Dated this 18th day of October, 2016.

Brittany S. Ogden

/s/Brittany S. Ogden
QUARLES & BRADY LLP
33 East Main Street
Suite 900
Madison, WI 53703
Phone: 608.251.5000
Fax: 608.251.9166

Attorneys for Cliffton Equities, Inc.

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Debtor.

CERTIFICATE OF SERVICE

I, Brittany S. Ogden, certify that I caused a copy of the foregoing Joinder of Cliffton Equities, Inc. Objection to Debtor's Disclosure Statement to be served upon the following individuals by electronic filing through ECF on October 18, 2016:

Carla O. Andres	candres@gklaw.comn, kboucher@gklaw.com, shuntema@gklaw.com
Daniel C. Beck	dbeck@winthrop.com, tcooke@winthrop.com
Amy J. Ginsberg	amy.j.ginsberg@usdoj.gov, Carrie.Jekelis@usdoj.gov
Michael D. Jankowski	mjankows@reinhartlaw.com
Michele M. McKinnon	MMM@lcojlaw.com, sarahl@lcojlaw.com
Office of the U.S. Trustee	ustpregion11.mi.ecf@usdoj.gov
Michael S. Polsky	mpolsky@bcblaw.ne, pfoster@beblaw.net
Paul G. Swanson	pswanson@oshkoshlawyers.com, hsaladin@oshkoshlawyers.com
Brian P. Thill	bthill@murphydesmond.com
Angela D. Dodd	dodda@sec.gov, okeefej@sec.gov;mathieb@sec.gov
Jonathan T. Smies	jsmies@gklaw.com, mlaluzerne@gklaw.com, kboucher@gklaw.com, pbrellenthin@gklaw.com

/s/Brittany S. Ogden
Brittany S. Ogden