

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

GREEN BOX NA GREEN BAY, LLC

Case No. 16-24179

Chapter 11

Debtor.

**NOTICE OF MOTIONS (A) TO DIRECT DEBTOR TO RELEASE TAX ESCROW FUNDS
AND TO EXECUTE STIPULATION, pursuant to 11 U.S.C. §1142, and
(B) FOR PRIORITY CLAIM, pursuant to 11 U.S.C. §507(b)**

Ability Insurance Company (“Ability”), by and through its attorneys, Law Firm of Conway, Olejniczak & Jerry, S.C. has filed a motion with the Court for relief from the automatic stay pursuant to 11 U.S.C. §362(d) of the Bankruptcy Code.

YOUR RIGHTS MAY BE AFFECTED. YOU SHOULD READ THESE PAPERS CAREFULLY AND DISCUSS THEM WITH YOUR ATTORNEY, IF YOU HAVE ONE, IN THIS BANKRUPTCY CASE. (IF YOU DO NOT HAVE AN ATTORNEY, YOU MAY WISH TO CONSULT ONE).

If you do not want the Court to grant relief as set forth in Ability’s motion (a copy of which is attached), or if you want the Court to consider your views on the motion, then, within fourteen (14) days of this notice, you or your attorney must file with the Court a written request for a hearing, or if the Court requires a written response, an answer, explaining your position at:

Clerk
U.S. Bankruptcy Court
Eastern District of Wisconsin
Room 126, Federal Building
517 East Wisconsin Avenue
Milwaukee, WI 53202

If you mail your request to the Court for filing, you must mail it early enough so the Court will receive it on or before the date stated above.

You must also mail a copy to the following:

Attorney Michele M. McKinnon
Counsel for Ability Insurance Company
Law Firm of Conway, Olejniczak & Jerry, S.C.
P.O. Box 23200
Green Bay, WI 54305-3200

and Attorney Paul G. Swanson
Attorney for Debtor
107 Church Avenue
P.O. Box 617
Oshkosh, WI 54903-0617

and Attorney Amy J. Ginsberg
Office of the U.S. Trustee
517 E. Wisconsin, #430
Milwaukee, WI 53202

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief.

Dated this 20th day of April, 2017.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Ability Insurance Company

By: /s/ Michele M. McKinnon
Michele M. McKinnon
State Bar No. 1041053

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re: Case No. 16-24179

GREEN BOX NA GREEN BAY, LLC Chapter 11

Debtor.

**MOTIONS (A) TO DIRECT DEBTOR TO RELEASE TAX ESCROW FUNDS AND
TO EXECUTE STIPULATION, pursuant to 11 U.S.C. §1142, and
(B) FOR PRIORITY CLAIM, pursuant to 11 U.S.C. §507(b)**

Ability Insurance Company (“Ability”), by its undersigned attorneys, seeks an order directing Debtor to release tax escrow funds to the Brown County Treasurer and to execute the Stipulation to Judgment attached as **Exhibit A** hereto. Ability also seeks a determination of its priority claim pursuant to 11 U.S.C. §507(b). As grounds in support of these motions, Ability states the following:

BACKGROUND FACTS

1. Ability holds the Class I Claim, secured by a perfected mortgage and assignment of rents with respect to real estate located at 2107 American Blvd., DePere, Wisconsin (the “Real Estate”).
2. Promptly after Debtor’s Chapter 11 filing, Ability filed its Motion for Relief from Automatic Stay or, in the Alternative, Seeking Adequate Protection Payments. [Doc. 9].
3. On July 27, 2016, this Court entered an Order directing Debtor to pay to Ability, as adequate protection, the amount of \$10,247.00 on or before the 28th day of each month. This payment represented payment for accruing tax liabilities on the Real Estate. [Doc. 52].
4. This Court confirmed Debtor’s Chapter 11 Plan on February 17, 2017. [Doc. 223].

With respect to the Class I Claim, the confirmed Plan provided the following:

a. That upon confirmation, all adequate protection payments escrowed by Debtor for accruing taxes would be paid directly to the Brown County Treasurer for application toward the unpaid taxes. (Plan ¶4.1).

b. That Debtor would continue to make the adequate protection payments on a monthly basis through the “roll up” directly to the Brown County Treasurer. Id.

c. That Ability would receive payment of approximately \$8.1 million upon “roll up” of the Plan, not later than March 31, 2017. Id., Art. VIII.

d. That, in the event that the “roll up” was unsuccessful, that Debtor consented to the immediately relief from the automatic stay and waived any right of redemption with respect to the Real Estate. Id.

5. Debtor escrowed some, but not all, of the adequate protection payments prior to the February 17, 2017 confirmation. According to Debtor’s January 2017 Monthly Operating Report (filed on February 22, 2017), Debtor escrowed the total amount of \$51,524.00 in an account at East West Bank in El Monte, California for the tax escrow. [Doc. 226].

6. Upon information and belief, Debtor has not made any post-confirmation escrow payments to the Brown County Treasurer.

7. Pursuant to this Court’s July 27, 2016 Order, Debtor *should have* escrowed (or paid to the Brown County Treasurer) the following amounts through March 31, 2017:

	Running Balance
June 2016	\$10,247.00
July 2016	20,494.00
August 2016	30,741.00
September 2016	40,988.00
October 2016	51,235.00
November 2016	61,428.00
December 2016	71,729.00
January 2017	81,976.00
February 2017	92,223.00
March 2017	102,470.00

8. Debtor failed to submit the remaining tax escrow of \$50,946.00.

9. Debtor has failed to successfully “roll up” the Plan by the March 31, 2017 deadline,

nor did Debtor move this Court for an extension of time to do so.

ARGUMENTS

a. This Court should direct Debtor to release escrow funds to the Brown County Treasurer and to execute a stipulation waiving its right to redeem the property, pursuant to the confirmed Plan.

10. Code Section 1141(a) provides that “the provisions of a confirmed plan bind the debtor ...” Code Section 1142(a) similarly provides that “the debtor ... shall carry out the plan and shall comply with any orders of the court.”

11. Upon failure to perform according to the Plan, the court may direct the debtor to perform any act that is necessary for the confirmation of the plan. 11 U.S.C. § 1142(b); 11 U.S.C. § 105(a).

12. Furthermore, Code Section 105(a) provides:

The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title ... shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

13. In order to effectuate Debtor’s promises to Ability under the confirmed Plan, this Court should direct Debtor to release the funds held by East West Bank to the Brown County Treasurer for application of past due taxes on the Real Estate.

14. Also to effectuate the confirmed Plan, this Court should direct Debtor to execute a Stipulation in the form attached as **Exhibit A**, which will allow Ability to obtain a judgment of foreclosure in Wisconsin Circuit Court for foreclosure of the Real Estate and to sell the Real Estate without a redemption period.

b. This Court should grant Ability a priority over administrative claims, pursuant to 11 U.S.C. 507(b), in the amount of \$50,946.00.

15. The purpose of the adequate protection payments required by this Court was to

protect Ability from any loss to the value of its collateral position that would otherwise be caused by a priming lien in favor of Brown County for accruing real estate taxes, while allowing Green Box to use the Real Estate toward its reorganization efforts.

16. Despite the adequate protection order, the value of Ability's interest in the Real Estate has now been reduced by not less than \$50,946.00, representing the accrued taxes that will enjoy a priming lien over Ability's interest upon sale of the Real Estate.

17. The accrual of real estate taxes during Debtor's Chapter 11 resulted in a diminution of Ability's interest in the real estate, against which it was not adequately protected, so that Ability is entitled to super-priority status under 11 U.S.C. §507(b) in the amount of \$50,946.00. See In Re Isaacson Steel, Inc., Nos. BR11-12415 and 11-12416, 2013WL 5310550 (D. N.H., 2013) (unpublished).

WHEREFORE, Ability respectfully requests that this Court grant the relief requested above.

Dated this 20th day of April, 2017.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorney for Ability Insurance Company

/s/ Michele M. McKinnon

Michele M. McKinnon (State Bar No. 1041053)
Steven J. Krueger (State Bar No. 1064350)

MAILING ADDRESS:

231 South Adams Street
P.O. Box 54305-2300
Green Bay, WI 54305-3200
Telephone: (920) 437-0476
2567450

EXHIBIT A

**[Stipulation to Judgment of Foreclosure and
Waiver of Redemption Period]**

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re: Case No. 16-24179

GREEN BOX NA GREEN BAY, LLC Chapter 11

Debtor.

STIPULATION TO JUDGMENT AND WAIVER OF REDEMPTION PERIOD

Ability Insurance Company (“Ability”), by its attorneys, Law Firm of Conway, Olejniczak & Jerry, S.C. and Green Box NA Green Bay, LLC (“Green Box”) stipulate as follows:

1. Green Box stipulates that this Court may immediately enter a judgment of foreclosure with respect to the real estate located at 2107 American Blvd., De Pere, Wisconsin (the “Real Estate”).
2. Green Box expressly waives any and all rights to redemption that it may have in the Real Estate pursuant to Wis. Stat. §846.01 et. seq.
3. Green Box consents to the immediate Sheriff’s Sale of the Real Estate following notice of the sale being made by Bank as provided by law.
4. Green Box consents to Bank’s request to reopen this case, if necessary, for the purpose of entering a judgment of foreclosure with respect to the Real Estate.

Dated this ____ day of _____, 2017.

LAW FIRM OF CONWAY, OLEJNICZAK, & JERRY, S.C.
Attorneys for Ability Insurance Company

By: _____
Michele M. McKinnon
State Bar No. 1041053

Dated this ____ day of _____, 2017.

GREEN BOX NA GREEN BAY, LLC

By: _____
Stephen A. Smith, Its Manager

This Stipulation was acknowledged before me on the ____ day of _____, 2017, by Stephen A. Smith, in his capacity as Manager of Green Box NA Green Bay, LLC.

_____, Notary Public
My Commission expires: _____