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.	

ABILITY INSURANCE COMPANY'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Ability Insurance Company ("Ability"), by and through its undersigned attorneys, submits the following brief in support of its Motion to Dismiss filed on October 3, 2017. [Doc. 301.]

INTRODUCTION

At the November 1, 2017 hearing, Wisconsin Economic Development Corporation ("WEDC") urged this Court to convert Debtor's collapsed Chapter 11 to a Chapter 7 in lieu of dismissal. Section 1112(b) requires this Court to determine whether conversion or dismissal is in the best interest of creditors and the estate. 11 U.S.C. §1112(b). The Court questioned whether there were any assets in Debtor's estate to convert to a Chapter 7 in the first instance, and then challenged WEDC to identify *specific* assets that could benefit creditors upon conversion. The Brief submitted by WEDC fails to address the Court's first concern at all, and then fails to adequately address the Court's second concern. As a result, this Court should grant Ability's request to dismiss the Chapter 11.

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ARGUMENT

I. Property of the estate upon conversion.

As a preliminary matter, Debtor's Chapter 11 bankruptcy estate ceased to exist on February 1, 2017 when this Court confirmed Debtor's Chapter 11 Plan. [Doc 223.] At that moment, by operation of statute, all property of the Chapter 11 estate revested in the newly reorganized Green Box NA Green Bay, LLC, and the automatic stay that formerly protected Debtor evaporated. 11 U.S.C. §1141(b) and §362(c). Nothing in the Plan provided otherwise. Much like property of a Chapter 11 bankruptcy estate that may have been sold from the estate under Section 363 or abandoned by the estate under Section 554, property that reverted to the newly reorganized debtor is no longer property of the bankruptcy estate. Section 348, which defines the Chapter 7 estate upon conversion from a Chapter 11 case, does not change the effect of a confirmation. The mere act of conversation does not replenish to the estate assets that were otherwise sold, abandoned, or revested to the reorganized Debtor.

The Court cited the case of T.S.P. Industries, Inc., 117 B.R. 375 (N.D. Ill 1990) *Mot. for Recons. Den.* 120 B.R. 107 (N.D. Ill. 1990), which stands for this very proposition. In T.S.P. Industries, the debtor's Chapter 11 plan was confirmed and, thereafter, the debtor defaulted in its payments under the plan. The U.S. Trustee urged the court to convert the case to one under Chapter 7, rather than dismiss it. Much like WEDC in this case, the trustee in T.S.P. Industries wanted a Chapter 7 trustee to "investigate the Debtor's activities and search for assets, including any claims the Debtor may have." 117 B.R. at 375. Nevertheless, the Court found that conversion would be futile, finding:

> Since a chapter 7 trustee could sell only property of *the estate* and sue only on *the estate's* claims for relief, and since even after conversion there would be no property of *the estate*, the trustee could not benefit creditors in the way envisioned by the U.S. Trustee. Furthermore, without the protection of the automatic stay, nothing

> would prevent individual creditors from competing with a rather toothless trustee for whatever property there may be.

T.S.P. Indus., Inc., 117 B.R. at 378–79 (emphasis added). This analysis stands true in this case, where a Chapter 7 trustee would inherit Debtor's post-confirmation estate with no remaining assets to administer.

II. Investigation of fraudulent transfers and preference claims.

Even if the estate is void of any assets upon conversion, the T.S.P. Industries case recognized that conversion might still be in the best interest of creditors when there is a pre-confirmation preference or fraudulent conveyance that may be recovered. 117 B.R. at 379. Upon review, the Bankruptcy Court cautioned that this finding

> "…should not be used as a pretext for a fishing expedition, especially when the lake looks so barren. The mere possibility that a claim might be found is not reason enough to convert a case, appoint a trustee and incur administrative expenses that will almost certain never be paid. That result would not be in the best interest of creditors or the estate."

120 B.R. 107 at 111. What T.S.P. Industries referred to as a "fishing expedition" is perhaps more aptly described in this case as a "wild goose chase."

In May of 2015, a group of three sophisticated creditors – including WEDC – pushed Debtor into an involuntary Chapter 128 Receivership. [Doc. 9.] Attorney Michael Polsky, who is an experienced Chapter 128 Receiver, was appointed to investigate the assets of Debtor – including preference actions that could be recoverable under Wis. Stat. §128.07 or §128.19. For the next 10 months, the Receiver, with the active participation of the creditor group, investigated the assets of Debtor by reviewing information received from Debtor in response to the Order Appointing Receiver,[1] taking depositions of the former President (Ronald Van Den Heuvel), and

[1] Some of which was obtained only by filing a Motion for Contempt order against Debtor.

performing an independent investigation. Unfortunately, the information obtained by the Receiver was shoddy, at best, presumably due to the fact that Debtor lost possession of its records to the authorities who were investigating alleged wrongdoing by Ronald Van Den Heuvel. This left Steve Smith, the incumbent President, to provide information based only on what Smith had under his control. The Creditors – again, including WEDC – have questioned Steve Smith *ad nauseum* during evidentiary hearings in this case in a quest to discover missing assets of Debtor. [Doc. 45, 85.]

Creditors have repeatedly complained to this Court about the incomplete and/or inaccurate information provided to them by Debtor. [Doc. 9, 59, 75, 100, 101, 122, 124, 128, 202.] WEDC even obtained an order from this Court authorizing WEDC to take a 2004 exam of the Debtor on May 1, 2017. [Doc. 239.][2] Creditors have articulated the very gaps that WEDC points to now – specifically that the information prepared by Van Den Heuvel is inconsistent with the information they received from Smith, and there appears to be missing information. With respect to those complaints, this Court has found that the Debtor (specifically, through Steve Smith) prepared its disclosures based on the information that it reasonably had within its control. [Doc. 92, p. 30.]

The confirmed Chapter 11 Plan has now failed by its own terms. WEDC wants to convert the Chapter 11 to a Chapter 7, so that a Chapter 7 Trustee can continue to chase the wild goose that has eluded the creditor group – despite their collective efforts – for the past two and one-half years. This exercise is futile.

[2] Ability does not know if that deposition took place, but it was yet another opportunity for WEDC to ask Debtor for specific information regarding Debtor's assets.

A. WEDC has not identified any specific assets that may be available to a Chapter 7 Trustee.

Ignoring this Court's request that WEDC identify *specific* assets that may be available to a Chapter 7 trustee upon conversion, WEDC does nothing more than repeat its speculation as to the existence of assets and claims that could benefit creditors (such as the existence of intellectual property and ownership in other entities). What, exactly, does WEDC expect that a Chapter 7 Trustee can identify that the creditor group, the U.S. Trustee and the Receiver have been unable to identify to date? WEDC does not say.

For example, WEDC suggests that the June 30, 2014 balance sheet is sufficient to prove that Debtor transferred numerous items of intellectual property, having a value of more than $270 million, sometime after that date; however, WEDC does not identify any registration documents from the United States Patent and Trademark Office showing that *this Debtor* ever owned any patents in the first instance. To the contrary, the approved 3rd Amended Disclosure Statement and the 3rd Amended Plan state that intellectual property is owned by a non-debtor: PC Fibre Technology, LLC. [Doc. 176, pg. 8; Doc. 178, p. 16.] Members of the creditor group and the U.S. Trustee have found that the alleged "intellectual property" is nothing more than a pending application made by Ronald Van Den Heuvel, which has been rejected by the USPTO office numerous times. [Doc. 100, p. 2; Doc. 122, p. 11.]

As another example, WEDC suggests that an undated organization chart shows that Debtor owned interest in two other entities at some point in time. [Nowicki, Exh. N-3.] However, none of the creditors have been able to find any evidence confirming such ownership (such as an operating agreement or a K-1 tax form). Nor does WEDC's brief put such alleged ownership in temporal context of this bankruptcy.

The reason that WEDC has not provided the specific information requested by this Court is simple: that information has never been discovered and, most likely, that information does not exist.

WEDC's request for the appointment of a Chapter 7 trustee to "investigate" the transfer of assets will only put a Chapter 7 trustee in the position to repeat the unsuccessful efforts of the creditor group, the U.S. Trustee, and the Receiver. As this Court is aware, Ronald Van Den Heuvel is the target of pending criminal actions and, as of the last deposition, he asserted his Fifth Amendment right to not answer questions. A Chapter 7 trustee cannot force him to talk any more than could the creditor group who was left with his refusal to answer. Steve Smith has repeatedly alleged (and will continue to allege) that he has incomplete information about Debtor's business before May of 2016. [Doc. 16.] A Chapter 7 Trustee cannot cause Smith to create more information than what he has provided to the creditor group and this Court.

In summary, conversion to a Chapter 7 will only perpetuate the wild goose chase for documents and evidence that have eluded the creditor group, the US Trustee and the Chapter 128 Receiver. Doing so serves no purpose, and is not in the best interest of creditors or the estate.

B. <u>A chapter 7 trustee is not necessary to continue the investigation that WEDC advocates</u>.

WEDC, in its capacity as a creditor, has individual standing to continue its investigation into potential fraudulent transfers, as advocated in its brief. See Wis. Stat. §242.07. WEDC also has standing to pursue any "alter ego" claims against related parties. <u>Consumer's Co-op. of Walworth County v. Olsen</u>, 142 Wis. 2d 465 (1988). Alternatively, the Chapter 128 Receiver (whose actions are stayed pending this bankruptcy) will be able to pursue preference claims and fraudulent transfers for the benefit of creditors, if the creditor group collectively determines that it is cost effective to do so. Wis. Stat. §128.07 and §128.19. If WEDC is confident that there is

sufficient evidence to support any of these claims – even in absence of any evidence to date – then WEDC should bear the time, cost, and effort of continuing that investigation and subsequent litigation. WEDC should not be allowed to transfer the burden of this pointless endeavor to a Chapter 7 Trustee or to creditors (both secured and unsecured) who are unwilling or disinterested in doing so.

Dated this 29th day of November, 2017.

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CERTIFICATE OF SERVICE

I, Michele M. McKinnon, certify that I caused a copy of the foregoing Brief in Support of Motion to Dismiss to be served upon the following individuals by electronic filing through ECF on November 29, 2017:

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