

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 11
)
SHELBOURNE NORTH WATER STREET,) Case No. 13-44315 (JSB)
L.P.,)
) Honorable Janet S. Baer
Debtor.)
) **Hearing Date: September 10, 2014**
) **Hearing Time: 9:30 a.m.**
) **Court Room: 615**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **September 10, 2014 at 9:30 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Janet S. Baer of the United States Bankruptcy Court for the Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, or whomever may be sitting in her place and stead, and then and there present the **Debtor's Motion (i) to Approve Entry into First Amendment to Second Amended Plan Investment Agreement, (ii) to Approve Incremental Break-up Fee, and (iii) to Limit and Reduce Notice**, a copy of which is attached hereto and hereby served upon you.

Dated: September 3, 2014

Respectfully submitted,

SHELBOURNE NORTH WATER STREET,
L.P.

By: /s/ Joseph D. Frank
One of its attorneys

Joseph D. Frank (IL No. 6216085)
Jeremy C. Kleinman (IL No. 6270080)
FRANKGECKER LLP
325 North LaSalle Street, Suite 625
Chicago, Illinois 60654
Telephone: (312) 276-1400
Facsimile: (312) 276-0035
jfrank@fgllp.com
jkleinman@fgllp.com

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In re:)	Chapter 11
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SHELBOURNE NORTH WATER STREET,)	Case No. 13-44315 (JSB)
L.P.,)	
)	Honorable Janet S. Baer
Debtor.)	

**DEBTOR’S MOTION (I) TO APPROVE ENTRY INTO FIRST
AMENDMENT TO SECOND AMENDED PLAN INVESTMENT
AGREEMENT, (II) TO APPROVE INCREMENTAL BREAK-UP
FEE, AND (III) TO LIMIT AND REDUCE NOTICE**

Shelbourne North Water Street, L.P. (the “Debtor”), by its attorneys, respectfully requests entry of an order authorizing the Debtor to enter into that certain First Amendment to Second Amended Plan Investment Agreement, in substantially the form attached hereto as Exhibit A (the “PIA Amendment”), which amends the previously-approved Second Amended Plan Investment Agreement (the “PIA”) between the Debtor and Atlas Apartment Holdings LLC (“Atlas”), and to limit and reduce notice with respect thereto. In support of this motion, the Debtor states as follows:

JURISDICTION

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. Consideration of the motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O).
2. The statutory bases for the relief requested herein are sections 105, and 363 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 9006(c) and 9007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

INTRODUCTION

3. The Debtor owns 2.2 acres in downtown Chicago (the “Property”) on which it plans to build the tallest building in the Western Hemisphere – the 150-story residential skyscraper commonly known as the Chicago Spire (the “Spire”). The global financial crisis at the end of the last decade halted development of the Chicago Spire and ultimately led to the Debtor’s chapter 11 bankruptcy, but the Debtor has continued to work toward completion of the building and has actively pursued recapitalization opportunities. Through these efforts, the Debtor reached an agreement with Atlas under which Atlas will provide plan-related financing enabling the Debtor to pay its creditors and complete its reorganization. The terms of the agreement between Atlas and the Debtor are set forth in the PIA, approved by order of this Court on March 26, 2014.

4. Following its entry into the PIA, the Debtor continued to progress toward its reorganization, negotiating a settlement with RMW Acquisition Company, LLC and its affiliates (collectively, “RMW”) that resolved RMW’s claims and facilitated the filing of the Second Amended Joint Chapter 11 Plan of Reorganization of Shelbourne North Water Street, L.P., RMW Acquisition Company LLC, RMW CLP Acquisitions LLC and RMW Acquisitions II LLC [Docket No. 245] (the “Plan”). As the Debtor and Atlas have moved toward closing the transaction contemplated by the PIA, the Debtor has received additional expressions of interest from third parties wishing to participate in the Debtor’s reorganization. In addition, the Debtor and Atlas have encountered certain delays in their efforts to close the transaction. In order to address these circumstances and provide the necessary flexibility to best ensure that the Debtor is able to complete its reorganization, the Debtor and Atlas now seek to amend the PIA.

BACKGROUND

5. On October 9, 2013 (the “Petition Date”), four purported creditors (the “Petitioners”) filed an involuntary petition against the Debtor seeking relief under chapter 11 of

the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Delaware Bankruptcy Court”).

6. On November 8, 2013, pursuant to a stipulation among the Debtor and the Petitioners, the Delaware Bankruptcy Court entered an order for relief under chapter 11 of the Bankruptcy Code, designated the case (the “Case”) as a single asset real estate case and transferred venue of the Case to this Court. No trustee or committee has been appointed in the Case, and the Debtor continues to manage its affairs pursuant to sections 1107 and 1108 of the Bankruptcy Code.

7. On February 6, 2014, the Debtor filed a motion [Dkt. No. 94] (the “PIA Motion”) to approve the PIA, pursuant to which Atlas will provide plan-related financing that should facilitate payment in full of all allowed claims and ultimately allow the Debtor to complete the Spire. In connection therewith, the Debtor agreed to provide Atlas with certain investor protections, including a conditional break-up fee (the “Break Up Fee”) in the amount of \$3,750,000, plus expenses of up to \$1,050,000.

8. On February 18, 2014, RMW filed an objection to the PIA Motion [Docket No. 108]. Approval of the PIA Motion was fully briefed and trial was to begin on March 11, 2014.

9. On March 10, 2014, the Debtor filed its Chapter 11 Plan of Reorganization (the “Original Plan”) [Docket No. 165] and accompanying Disclosure Statement (the “Original Disclosure Statement”) [Docket No. 166], proposing payment in full of all allowed non-insider claims.

10. The Court entered an order extending the Debtor’s plan exclusivity under section 1121 of the Bankruptcy Code through October 31, 2014 [Docket No. 235].

11. Subsequently, the Debtor, Atlas and RMW entered into a settlement agreement (the “Settlement Agreement”) [Docket No. 176; at Exhibit 1] that resolved the primary disputes among them. In part, the Settlement Agreement liquidates and provides for the allowance of RMW’s

secured claim against the estate (the “RMW Claim”) and requires that the RMW Claim (and other amounts owed to RMW by the estate) be paid. The Settlement Agreement also requires that the Effective Date of a confirmed plan proposed by the Debtor occur no later than October 31, 2014, unless the Debtor exercises its one-time option to extend the deadline for the Effective Date from October 31, 2014 to March 31, 2015 in exchange a payment by the Debtor to RMW of \$22,000,000, which payment must be received by October 31, 2014.

12. Under the Settlement Agreement, if the Debtor is unable to timely pay the RMW Claim in full, ownership of the Property will transfer to RMW. Under that scenario, RMW has agreed to pay to the Debtor’s creditors an amount equal to the amount of all scheduled and allowed non-insider claims timely and actually filed against the Debtor prior to the January 27, 2014 bar date, which should facilitate a substantial distribution to non-insider general unsecured creditors.

13. On March 19, 2014, the Debtor filed its Motion to Approve the Settlement Agreement [Docket No. 176]. At a hearing on March 26, 2014, the Court entered orders authorizing the Debtor’s entry into the Settlement Agreement and the PIA, as amended [Docket Nos. 193 and 194].

14. On April 17, 2014, the Debtor and RMW filed the Amended Joint Chapter 11 Plan of Reorganization of Shelbourne North Water Street, L.P., RMW Acquisition Company, LLC, RMW CLP Acquisitions, LLC and RMW CLP Acquisitions II, LLC [Docket No. 213], to implement and consummate the terms of the PIA and the Settlement Agreement.

15. On June 12, 2014, the Plan Proponents filed the Plan and the Amended Disclosure Statement with Respect to the Second Amended Joint Chapter 11 Plan of Reorganization of Shelbourne North Water Street, L.P., RMW Acquisition Company LLC, RMW CLP Acquisitions LLC and RMW Acquisitions II LLC [Docket No. 246] (as the same may be amended, the “Disclosure Statement”). As contemplated by the Settlement Agreement, the Plan contemplates

two alternative restructuring transactions, referred to in the Plan as the “Debtor Plan Transaction” and the “RMW Alternative Plan Transaction.” As discussed above, the Debtor Plan Transaction contemplates that the Debtor will pay RMW’s Claim by October 31, 2014 or March 31, 2015, as applicable, and will make payment in full on account of the allowed claims of the Debtor’s remaining non-insider creditors. If the Debtor does not timely pay the RMW Claim in the agreed upon amount, the RMW Alternative Plan Transaction will be triggered and the Property will be transferred to RMW in satisfaction of the RMW Claim, with RMW then becoming required to make a *pro rata* distribution on account of the allowed claims of the Debtor’s remaining non-insider creditors.

16. On August 20, 2014, the Court entered an order approving the Disclosure Statement as adequate (the “Disclosure Statement Order”). The Disclosure Statement Order, conditioned upon Atlas’s consent, directed RMW and the Debtor to solicit in support of the Plan by September 4, 2014, set a hearing on confirmation of the Plan on October 7, 2014 and set a September 29, 2014 deadline for voting and/or the filing of objections to the Plan.

17. On August 28, 2014, Atlas provided its consent to solicitation and the parties agreed that the Disclosure Statement would be modified further to include discussion of the proposed Amendment.

18. Throughout the last five months, the Debtor and Atlas have experienced certain delays in connection with their efforts to advance the Debtor Plan Transaction upon which the Plan is based. During this time, the Debtor has received communications from third parties expressing interest in participating in the financing and/or development of the Spire. The Debtor presently anticipates that it will be able to complete its contemplated restructuring transaction with Atlas. However, in an effort to ensure that its reorganization is successful and that its non-insider creditors receive payment in full on their allowed claims, the Debtor has asked Atlas for permission to

explore financing with an alternative to Atlas to potentially act as assignee of Atlas under the Settlement Agreement, the 9019 Order and the Debtor Plan Transaction which is not presently permitted under the PIA. Additionally, the PIA Amendment adjusts certain deadlines set forth in the PIA, including the date by which an order confirming the Plan must be entered and the date by which Atlas may terminate the PIA based on its due diligence investigation, which adjustments benefit both the Debtor and Atlas.

19. In connection with the Debtor's desire for added flexibility under the PIA, the Debtor and Atlas and have engaged in lengthy discussions, leading to the PIA Amendment. The PIA Amendment permits the Debtor to engage in discussions to find a potential replacement for Atlas under the Settlement Agreement, the 9019 Order approving the same, and the Plan, with any such replacement being bound by the Settlement Agreement, the 9019 Order, and the Plan. Such replacement for Atlas, if found, would, at the Debtor's election, step into the shoes of Atlas as assignee and be required to timely fund the Debtor Plan Transaction under the Plan without any modifications or changes to the existing Effective Dates for the Plan as established in the 9019 Order (an "Alternative Transaction"). Further in the PIA Amendment, the Debtor stipulates that the only Alternative Transaction it is permitted to pursue is as set forth in amended subsection 2(b) of the PIA Amendment, and that it shall not seek a disposition of the Assets pursuant to section 363 of the Bankruptcy Code or otherwise, and it shall not interfere with the timely solicitation, confirmation or effective date of the Plan as contemplated under the Settlement Agreement or the 9019 Order approving the same.

20. In exchange for permitting the Debtor to seek out an Alternative Transaction as defined herein, the PIA Amendment provides Atlas with additional protection in the form of an incremental break-up fee in an amount equal to \$7.75 million less the amount of the Break Up Fee and Expense Reimbursement to which Atlas is entitled under Section 5(a) of the PIA on the date

Atlas terminates the PIA (the “Incremental Break-Up Fee”). Under the PIA Amendment, the Incremental Break-up Fee is triggered if, *inter alia*, the Debtor elects to proceed with an Alternative Transaction by replacing Atlas as its funding partner in its reorganization efforts.

21. Under the PIA Amendment, as is the case with the Break-up Fee and Expense Reimbursement under the PIA, any claim for the Incremental Break-up Fee will (a) constitute an administrative claim under section 503(b) of the Bankruptcy Code, (b) be secured by valid, enforceable, perfected first-priority liens on and security interests in all of the Debtor’s assets that are not subject to Existing Liens (as defined below), and (c) be secured by valid, enforceable, perfected junior liens on and security interests in all of the Debtor’s assets that are subject to valid, enforceable, properly perfected, non-avoidable security interests or liens (the “Existing Liens”). Atlas’s rights to the Incremental Break-up Fee under the PIA Amendment are subject to Section 13 of the Settlement Agreement. In addition, to the foregoing, under any and all circumstances (including if the Plan is not confirmed or does not go effective, if the Chapter 11 Case is converted to one under chapter 7 or if a trustee is appointed in this Bankruptcy Case) the Incremental Break-up Fee will be subordinated to all Allowed Claims other than Claims and Interests held by Insiders (each as defined in the Plan) of the Debtor and will have priority only over any value paid or transferred to, or retained by, any Insiders of the Debtor, provided, however, that nothing in the PIA Amendment shall affect the rights and obligations of the Debtor, Shelbourne Development and Atlas with respect to the “Shelbourne Payment” and the “Atlas Payment” provided for in Section 14 of the Settlement Agreement.

RELIEF SOUGHT

22. The Debtor seeks entry of an order (substantially in the form attached hereto as **Exhibit B**, the “Order”) (a) authorizing the Debtor to enter into, and perform its obligations under, the Amendment to the PIA, and (b) approving the Incremental Break-up Fee.

BASIS FOR THE RELIEF SOUGHT

I. Entry into the PIA Amendment Should Be Approved as a Sound Exercise of the Debtor's Business Judgment.

23. The Debtor seeks authorization to enter into the PIA Amendment pursuant to section 363(b) of the Bankruptcy Code. The use of estate property should be authorized under section 363(b) so long as a sound business purpose exists for the transaction. See, e.g., *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991) (holding that section 363 is satisfied where the proposed use of the property outside of the ordinary course is based on "sound business reasons"); *In re Telesphere Commc'ns, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1994) (noting that the "general thrust" for court approval under section 363 of the debtor's use of estate property is that the action be in "the best interest of the estate"); see also *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (court may approve a transaction involving property of the estate that is outside of the ordinary course of business when the court finds a good business reason for such transaction).

24. After thorough evaluation, the Debtor believes that entry into the PIA Amendment represents the best available opportunity for the Debtor to complete its reorganization while maximizing the value of the Debtor's assets for the benefit of its creditors. Importantly, the PIA Amendment provides the Debtor with additional flexibility to best ensure that, upon confirmation and effectuation of the Plan, all allowed claims of non-insider creditors can be paid in full under the Debtor Plan Transaction. Additionally, because the Incremental Break-up Fee will be subordinated to all Allowed Claims other than Claims and Interests held by Insiders of the Debtor, and will have priority only over any value paid or transferred to, or retained by, any Insiders of the Debtor, the Incremental Break-up Fee will have no effect on the Debtor's non-insider creditors, provided, however, that nothing in the PIA Amendment shall affect the rights and obligations of the Debtor,

Shelbourne Development and Atlas with respect to the “Shelbourne Payment” and the “Atlas Payment” provided for in Section 14 of the Settlement Agreement.

25. Atlas has advised the Debtor that over the last five months, it has spent well in excess of \$1,000,000 in connection with the PIA, performing due diligence, assisting the Debtor in its efforts to draft and negotiate the Plan, and addressing other matters arising in the Debtor’s bankruptcy case.

26. Plan sponsors regularly require break-up fees and expense reimbursement and, in many cases, other protection as an inducement to make a binding offer. *See Official Comm. of Unsecured Creditors v. Interforum Holding LLC*, 2011 WL 2671254, No. 11-219, *1 (E.D. Wis. July 7, 2011) (internal citations omitted). *See also In re Edison Mission Energy*, Case No. 12-49219 (Bankr. N.D. Ill. [missing date]) [Docket No. 1424] (Court approved plan sponsor agreement and \$65 million break-up fee as protection for plan sponsor). The use of break-up fees has become an established practice in chapter 11 cases. *See Interforum Holding LLC*, 2011 WL 2671254 at *1. Break-up fees encourage prospective plan partners to submit binding proposals and compensate them for the time and expense incurred in conducting their due diligence efforts in the event that the transaction fails. A break-up fee may also compensate a committed party for its lost opportunity costs. *See In re Integrated Res., Inc.*, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) *aff’d*, 147 B.R. 650 (S.D.N.Y. 1992) (citations omitted). Furthermore, in the nonbankruptcy context, courts have generally recognized that break-up fees are common in corporate transactions. *See, e.g., Cottle v. Storer Commc’ns, Inc.*, 849 F.2d 570 (11th Cir. 1988); *CRTF Corp. v. Federated Dep’t Stores*, 683 F.Supp. 422 (S.D.N.Y. 1988); and *Samjens Partners I v. Burlington Indus.*, 663 F.Supp. 614 (S.D.N.Y. 1987).

27. In its March 26, 2014 order approving the PIA, this Court previously approved the Break-Up Fee in the amount of \$3,750,000, plus \$1,050,000 in Expense Reimbursement. Under the current PIA, the Debtor does not have the option to replace Atlas if it wishes to do so. In addition, the

PIA provides Atlas the option to terminate the PIA if an order confirming the Plan is not entered by August 31, 2014.

28. The Incremental Break-Up Fee is a necessary inducement to obtain Atlas's agreement to extend certain deadlines under the PIA and provide the Debtor additional flexibility to seek out an Alternative Transaction as defined in the PIA Amendment. The Incremental Break-Up Fee is the result of extensive, arm's-length negotiations and is reasonable given the size and type of this transaction, the benefit to the Debtor's estate, the due diligence efforts undertaken by Atlas and the limited circumstances under which it would be triggered (i.e., only upon the closing of an Alternative Transaction).

29. Although the Incremental Break-Up Fee represents an increase of approximately \$3 million, even if triggered, it will not impact the distributions made on the claims of the Debtor's non-insider creditors. After substantial negotiations, the Debtor and Atlas have included language in the PIA Amendment clarifying that there will be no adverse impact upon these creditors. Specifically, the PIA Amendment states:

[U]nder any and all circumstances (including if the Plan is not confirmed or does not go effective, if the Chapter 11 Case is converted to one under chapter 7 or if a trustee is appointed in this Bankruptcy Case), the Incremental Break-up Fee shall be subordinated to all Allowed Claims other than Claims and Interests held by Insiders (each as defined in the Plan) and will have priority only over any value paid or transferred to, or retained by, any Insiders.

PIA Amendment, ¶ 2(f). Furthermore, as set forth in Paragraph 13 of the Settlement Agreement, in the event that the RMW Alternative Plan Transaction is triggered, Atlas has expressly agreed that the Incremental Break-Up Fee shall be subject to Section 13 of the Settlement Agreement and treated as an additional Subordinated Atlas Claim (as defined in the Settlement Agreement).

30. As set forth above, the Debtor anticipates that it will be able to complete a reorganization with Atlas pursuant to the Debtor Plan Transaction outlined in the Plan. However, it is seeking additional flexibility in order to be able to seek out a potential replacement for Atlas

to ensure that the Debtor Plan Transaction, rather than the RMW Alternative Plan Transaction, proceeds, with payment in full on the allowed claims of non-insider creditors. The Debtor believes that if the Debtor completes an Alternative Transaction as defined in the PIA Amendment, the value obtained by the Debtor will have been enhanced by Atlas's participation, justifying the Incremental Break-Up Fee sought. Given that the Incremental Break-Up Fee, if triggered, will not adversely impact the Debtor's non-insider creditors, the Debtor believes, in its business judgment, that approval of the Amendment is appropriate and consistent with the best interests of its estate.

II. Waiver of Bankruptcy Rule 6004(a) and 6004(h)

31. To speed implementation of the PIA Amendment, the Debtor requests that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtor has shown cause to exclude such relief from the 14-day stay provided for by Bankruptcy Rule 6004(h).

NOTICE

32. Seven days' notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) all creditors that have timely filed proofs of claim; (iii) counsel to Atlas; (iv) the Internal Revenue Service; (v) the Illinois Department of Revenue; and (vi) those parties who have requested service of papers in this case pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtor requests that notice required for this Motion be reduced to the notice actually given.

33. The Debtor has fewer 60 days within which to complete its reorganization, during which the Debtor may conduct its investigation to seek out a potential Alternative Transaction, as defined in the PIA Amendment. As a result, cause exists to reduce required notice of this Motion to that actually given. In light of the nature of the relief requested herein, the Debtor respectfully submits that no further notice is necessary.

WHEREFORE, Shelbourne North Water Street, L.P., respectfully requests that the Court enter an Order:

- a. Authorizing the Debtor to enter into and perform under the PIA Amendment;
- b. Approving the Incremental Break-up Fee;
- c. Reducing and limiting required notice of this Motion to that actually given; and
- d. Granting such other and further relief as this Court deems just.

Dated: September 3, 2014

Respectfully submitted,

**SHELBOURNE NORTH WATER STREET,
L.P.**

By: /s/ Joseph D. Frank
One of its attorneys

Frances Gecker (IL No. 6198450)
Joseph D. Frank (IL No. 6216085)
Jeremy C. Kleinman (IL No. 6270080)
FRANKGECKER LLP
325 North LaSalle Street, Suite 625
Chicago, Illinois 60654
Phone: (312) 276-1400
Fax: (312) 276-0035
fgecker@fgllp.com
jfrank@fgllp.com
jkleinman@fgllp.com

CERTIFICATE OF SERVICE

I, Joseph D. Frank, an attorney, hereby certify that on **September 3, 2014**, a true and correct copy of the **Debtor's Motion (i) to Approve Entry into First Amendment to Second Amended Plan Investment Agreement, (ii) to Approve Incremental Break-up Fee, and (iii) to Limit and Reduce Notice** was filed electronically. Notice of the filing will be sent to all parties who are currently on the attached Court's Electronic Mail Notice List by operation of the Court's Electronic Filing System. A copy also was served this day via electronic or first class U.S. mail, postage prepaid, upon each of the parties listed below, as indicated.

/s/ Joseph D. Frank

VIA ELECTRONIC MAIL

MacKenzie Brown Design, Inc.
Attn: Andrew Brown
1730 North Clark Street, Suite 2701
Chicago, IL 60614
andy@mackenziebrown.com

VIA FIRST CLASS U.S. MAIL

Associate Area Counsel, SB/SE
200 West Adams Street, Suite 2300
Chicago, IL 60606

D. Patrick Mullarkey
Tax Division (Department of Justice)
P.O. Box 55
Ben Franklin Station
Washington, DC 20044

Case Foundation Company
1325 West Lake Street
Roselle, IL 60172

Riverview Condominium Association
445 East North Water Street
Chicago, IL 60611

Internal Revenue Service
P.O. Box 21126
Philadelphia, PA 19114

Internal Revenue Service
Mail Stop 5014 CHI
230 South Dearborn Street, Room 2600
Chicago, IL 60604

Department of the Treasury
Internal Revenue Service
Attn: Insolvency
P.O. Box 7346
Philadelphia, PA 19101-7346

Lorig Construction Company
250 East Touhy Avenue
Des Plaines, IL 60018

PLCS Corporation
Gremley & Biederman, Inc.
James, Schaeffer & Schimming, Inc.
4505 North Elston Avenue
Chicago, IL 60630-4420

Thomas J. Murphy
Thomas J. Murphy, PC
111 West Washington Street
Suite 1920
Chicago, IL 60602

City Scents Flowers
209 East Ohio
Chicago, IL 60611

Aon Fire Protection Engineering Corp.
Attn: Craig Zaleski
4 Overlook Point
Lincolnshire, IL 60069

Distinctive Lifestyles
c/o Alan S. Rosenberg
Koleos Rosenberg PA
AM Trust Building
8211 West Broward Boulevard, Suite 330
Plantation, FL 33324

Rowan Williams Davies & Irwin, Inc.
Attn: Wiesje Henderson
650 Woodlawn Road
Guelph, ON
CANADA N1K 1B8

Alfred Benesch & Company
Attn: Penny L. Wizer
Risk Management and Safety Coordinator
913 Sheidley Avenue, Suite 110
Bonner Springs, KS 66023

OMD USA, LLC
AEGIS Professional Services
Attn: Nicholas B. Schopp
165 North Meramec, Suite 200
Clayton, MO 63105

A Perfect Event
Attn: Michael Springer
1240 West School Street
Chicago, IL 60657

Prime Scaffold
1220 North Ellis Street
Bensenville, IL 60106

111 South Wacker Drive
Attn: Julie Schmidt
Jones Lang LaSalle
111 South Wacker Drive, Suite 2950
Chicago, IL 60606

Altus Group Limited
Attn: Jordan Ross, Corporate Legal Counsel
33 Yonge Street, Suite 500
Toronto, ON
CANADA MJE 164

Camden Mill
Attn: Padraic Kelly
Lower Bristol Road
Bath, UK BA2 3DQ

CMGRP, Inc.
d/b/a Weber Shandwick
Attn: Daniel Zarek, VP Finance
875 North Michigan Avenue, Suite 2400
Chicago, IL 60611

Andres Imaging & Graphics, Inc.
Attn: Cherri Brakhage
2643 West Chicago Avenue
Chicago, IL 60622

East Water Place Homeowners
c/o Wolin-Levin, Inc.
325 West Huron, Suite 600
Chicago, IL 60654

Thornton Tomasetti, Inc.
Attn: Joseph G. Burns
330 North Wabash Avenue, Suite 1500
Chicago, IL 60611

Louis T. Delucia
SCHIFF HARDIN LLP
666 Fifth Avenue, 17th Floor
New York, New York 10103

Mailing Information for Case 13-44315

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

- John D. Beck , ishmael.kamara@haynesboone.com
- Lauren N. Beslow Lauren.Beslow@quarles.com, Faye.Feinstein@quarles.com
- Joseph D Frank jfrank@fgllp.com, ccarpenter@fgllp.com;jkleinman@fgllp.com
- Jeffrey L. Gansberg jgansberg@muchshelist.com, nsulak@muchshelist.com
- Frances Gecker fgecker@fgllp.com
- John W Guzzardo jguzzardo@shawfishman.com, jhampton@shawfishman.com
- Jeremy C Kleinman jkleinman@fgllp.com, ccarpenter@fgllp.com
- Patrick S Layng USTPRegion11.ES.ECF@usdoj.gov
- Paul C Mallon paul.mallon@kuserlaw.com
- N. Neville Reid nreid@fslc.com, bkdoCKET@fslc.com;kgoin@fslc.com
- Peter J Roberts proberts@shawfishman.com
- Ryan T Schultz rschultz@fslc.com, bkdoCKET@fslc.com
- Brian L Shaw bshaw100@shawfishman.com, bharrington@shawfishman.com
- Zane L Zielinski zzielinski@fgllp.com,
csmith@fgllp.com;dortiz@fgllp.com;ccarpenter@fgllp.com