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7 Proposed Attorney for Debtor and Debtor-in-Possession

8 **UNITED STATES BANKRUPTCY COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **SAN FERNANDO VALLEY DIVISION**

11 In re: ) Case No. 1:18-bk-10162-VK  
12 )  
13 ) Chapter 11  
14 )  
15 ) **DEBTOR'S EMERGENCY MOTION TO**  
16 ) **AUTHORIZE USE OF CASH COLLATERAL;**  
17 ) **MEMORANDUM OF POINTS AND**  
18 ) **AUTHORITIES IN SUPPORT THEREOF**  
19 )  
20 ) Date: [To Be Set]  
21 ) Time: [To Be Set]  
22 ) Ctrm: 301  
23 ) 21041 Burbank, Blvd.,  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION.**

1. JBC Staples, LLC (“Debtor” or “JBC”), is an entity formed by Jack M. Cohen and his wife Barbara for the purpose of owning the subject commercial real estate, a retail building, in Monroe, Michigan (the “Property”). Mr. Cohen is a Managing Member of the Debtor.

2. At the time of the acquisition, the Property was occupied by a Staples Office Supply store. However, in early 2012, Staples elected to vacate the Property. Later in 2012, JBC fortunately entered a lease with the Salvation Army, which now occupies the space, and for nearly identical monthly rent as had been previously received. The Salvation Army lease expires in 2022, but there are two 5-year options to extend the lease after the initial period, which the Debtor believes will be exercised.

3. On January 18, 2018 (the “Petition Date”), JBC filed its voluntary petition (the “Petition”) pursuant to Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”), and an Order for Relief has been entered by the Court. The Debtor is in the business of owning and operating a commercial building, retail space, in Monroe, Michigan.

4. The Debtor has been operating as a debtor-in-possession since the Petition Date pursuant to Sections 1107 and 1108 of the Bankruptcy Code, 11 U.S.C. §§ 1107 and 1108.

5. No trustee has been appointed in the Debtor’s case, nor has any request been made for the appointment of a trustee or examiner. No official committee has been established in the Debtor’s Chapter 11 case.

**II. JURISDICTION AND VENUE.**

6. This Court has jurisdiction of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this case in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The statutory predicates for the relief sought herein are Sections 105(a), 361, 363, 1107(a), and 1108 of Chapter 11, Title 11 of the United States Code (the “Bankruptcy Code”), as well as Rules 2002, 4001, 6004, 7001, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 4001-2 of the Local Rules of Bankruptcy Procedure for the Central District of California (the “Local Bankruptcy Rules” or “LBR”).

8. This Motion constitutes a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (M).

**III. BACKGROUND.**

9. By way of background, the Debtor hereby incorporates by reference in its entirety, the Declaration of Jack M. Cohen in Support of Motion to Use Cash Collateral (the “Declaration”), filed concurrently herewith. Briefly, JBC acquired the commercial building that is its sole asset in November of 2006 as the subject of a 1031 exchange. At the time, the tenant was Staples, which is the source of the name of the Debtor, and the purchase price of the building was \$3.1 million, with a down payment of \$870,000.00.

10. The original lender for the acquisition was Principal Life Insurance Company, an Iowa corporation. On or about November 14, 2006, Principal Life Insurance Company, an Iowa corporation (“Principal LI”), made a loan (the “Loan”) to the Debtor, allegedly by and through Principal Real Estate Investors, LLC, a Delaware limited liability company, its supposed authorized signatory, in the original principal amount of \$2.3 million (\$2,300,000). The Loan is allegedly evidenced by, among other instruments, that certain Promissory Note (the “Note”) dated November 14, 2006, allegedly executed by the Debtor in favor of Principal Life Insurance Company.

11. The Loan is alleged to be secured by, among other instruments, that certain Mortgage dated November 14, 2006, relating to real property commonly known as 1525 Mall Road, Unit #1, Monroe, Michigan, 48612 (the “Property”), and the legal description of which is attached thereto, between DG Staples, LLC, a Delaware limited liability company, and JBC Staples, LLC, a Delaware limited liability company, as Tenants in Common, and Principal Life Insurance Company, an Iowa corporation, together with its successors and assigns, recorded on November 20, 2006, allegedly as a first priority lien, in the State of Michigan, Monroe County, by the Register of Deeds, as Liber 3185, Page 180.

12. The Note, Mortgage, and any other documents allegedly evidencing, securing, or relating to the Loan may be collectively referred to as the “Loan Documents.”

13. The Promissory Note provides, among other provisions, that monthly principal and interest payments in the amount of \$16,458.00 were to have been made for the period from November of 2006 through November of 2016 when the then current balance of the Promissory Note,

1 approximately \$2 million, became all due and payable. As that date approached, the Debtor's  
2 principals prepared to sell the Property. They had it appraised, but the appraisal, attached as Exhibit  
3 B to the Cohen Declaration, came in at \$1.6 million, below the then balance. They listed the Property  
4 for sale with a broker, but they were told that because the value of it had decreased below the then  
5 balance, they would need approval from the lender to essentially short-sell the Property. The lender  
6 refused.

7 14. Importantly, after the November 2016 maturity date, JBC continued to make the monthly  
8 payments to Berkadia, the then purported lien-holder, for five months, through April of 2017. The  
9 payments were accepted and cashed by Berkadia. In December of 2016, the loan was supposedly  
10 transferred for servicing from Berkadia to C-III Asset Management, LLC, as Special Servicer.

11 15. The Loan is asserted to have been assigned a number of times, but the validity of those  
12 assignments, and possibly even the underlying documents themselves, appears to be in question. For  
13 example, the original loan documents were never executed by the lender. The only place a signature  
14 appears is on what is called a "Property Reserves Agreement," which was entered apparently for the  
15 purpose of documenting perhaps a deposit and/or letter of credit in the amount of \$165,000 being  
16 held by the lender. At the end of that document, Exhibit E to the Complaint, is supposedly the  
17 signature block of the lender, as an extra page, which provides that it is being signed "By:  
18 PRINCIPAL REAL ESTATE INVESTORS, LLC, a Delaware limited liability company, *its*  
19 *Authorized signatory*" and below that "By unreadable name , with "Name: C. Kent Jurgensen,"  
20 then, below that, "Title: Director Closing" then, below that, "By Mari E. Larson (handwritten),  
21 below that "Name: Mari E. Larsen" then below that "Title: Senior Closing Consultant." There is no  
22 indication anywhere in the documents who these people are, and there are no notarizations of their  
23 signatures anywhere. In short, they could be anyone. The mess of the underlying documents will  
24 need to be straightened out, if possible, perhaps in an adversary proceeding.

25 16. Attached to the Complaint, discussed below, as Exhibit I are three what are called "Allonges,"  
26 which apparently are additional papers to the Promissory Note. All of them are similar to the  
27 signature block described above. None of them have signatures of anyone whose position with the  
28 lender is satisfactorily described, and none of those signatures are notarized. The last document in

1 Exhibit I is what supposedly is an “Assignment of Note, Mortgage, Assignment of Rents, and Related  
2 Security Documents.” However, even that document is unclear as to who the signatories actually are,  
3 even though their signatures appear to have been notarized, the notarial language appears to just  
4 repeat the unverified positions of the signatories. For these reasons, among others, the Debtor may  
5 challenge the validity of the underlying lien.

6 17. The initial loan documents, specifically the Mortgage, dated November 14, 2006, and  
7 recorded November 20, 2006, as noted blow, does contain an Assignment of Leases and Rents clause,  
8 whether ultimately deemed valid or not, at Section XVII, pages 24-29 thereof, and the Debtor seeks  
9 use of cash collateral whether it would ultimately be deemed the cash collateral of the lender or not.

10 18. As set forth in the Declaration, on December 19, 2017, Wells Fargo Bank, N.A., as Trustee  
11 for Morgan Stanley Capital I Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-  
12 HQ11 acting by and through C-III Asset Management LLC, as Special Servicer, (the “Trustee of  
13 Certificate Holder” or “TCH”), as alleged assignee of Principal Life Insurance Company, an Iowa  
14 corporation (“Principal”), the original lender, filed an action in the State of Michigan Circuit Court  
15 for the County of Monroe, Case No. 140 490 CB, seeking the appointment of a receiver and for a  
16 temporary restraining order and other relief, including an accounting. The hearing on the motion  
17 pursuant to that action was to have taken place on January 19, 2018, the day after the Petition Date  
18 herein. A copy of the Complaint, including the voluminous exhibits which include the Promissory  
19 Note and Mortgage relating to the transaction, is attached as Exhibit A to the Cohen Declaration.

20 **IV. MOTION AND REQUESTED RELIEF.**

21 19. Pursuant to this Cash Collateral Motion, the Debtor seeks the use of the cash collateral  
22 allegedly of Wells Fargo Bank, N.A., as Trustee for Morgan Stanley Capital I Inc., Commercial  
23 Mortgage Pass-Through Certificates, Series 2007-HQ11, acting by and through C-III Asset  
24 Management LLC, as Special Servicer, (the “Trustee of Certificate Holder” or “TCH”), as purported  
25 assignee of Principal Life Insurance Company, an Iowa corporation (“Principal”), the original lender.  
26 TCH asserts an interest in cash collateral by virtue of a purportedly valid Assignment of Leases and  
27 Rents clause in the Mortgage, Section XVII, pages 24-29 thereof, dated November 14, 2006, and  
28 recorded November 20, 2006. The Debtor seeks the use of this cash collateral in its business of

1 owning and operating the Property consistent with the amounts and for the purposes set forth on the  
2 budget attached to the Cohen Declaration, as Exhibit E, filed concurrently herewith.

3 20. The Debtor also proposes to make monthly adequate protection payments to TCH in the total  
4 amount of \$8,800.00, which amount consists of interest based on 5% interest on the secured loan  
5 balance of \$1.6 million, based on the appraisal, amortized over 30 years, plus the fixed monthly  
6 amount of \$2,000.00 toward principal. The Debtor understands and agrees that no payments will be  
7 made to owners or officers of the Debtor or to its professionals, unless and until such professional has  
8 had its application for employment approved by this Court and any such payment is authorized.

9 21. The Debtor further understands and agrees that pending further order of the Court, the debtor-  
10 in-possession account established by the Debtor shall be used first to pay the reasonable and  
11 necessary expenses of the business, consistent with the payments set forth on the budget, Exhibit E to  
12 the Declaration of Jack M. Cohen, Managing Member of the Debtor, in Support of Debtor's Motion  
13 to Authorize Use of Cash Collateral, filed concurrently herewith, and next to pay adequate protection  
14 payments. The Debtor agrees to provide a report, through Debtor's counsel, of the receipts and  
15 disbursements of the business and a variance report comparing the cash collateral budget to actual  
16 figures to TCH by the 15<sup>th</sup> business day of each month covering the prior monthly period.

17 **V. SUMMARY OF ESSENTIAL TERMS OF PROPOSED USE OF CASH**  
18 **COLLATERAL.**

19 22. The mandatory form, Statement Regarding Cash Collateral or Debtor in Possession Financing  
20 [FRBP 4001; LBR 4001-2], F 4001-2.STMT.FINANCE, is being filed, attached as Exhibit F to the  
21 Cohen Declaration, filed concurrently herewith. However, and because just one box is checked on  
22 the form, for ease of reference, following are the provisions to be identified pursuant to the former  
23 version of LBR 4002(b):

- 24 a. Cross-Collateralization. None will be granted.  
25 b. Binding Estate as to Validity, Perfection or Amount of Prepetition Lien. Order will not so  
26 provide.  
27 c. Waiver of Estate's Rights under 11 U.S.C. § 506. Order will not.  
28

- d. Deeming Prepetition Secured Debt to be Postpetition Debt. Order will not, but will grant replacement lien only to extent and validity of prepetition lien.
- e. Disparate Treatment of Committee Professionals. N/A
- f. Priming of Lien. Not necessary.
- g. Payments to TCH. Debtor will pay monthly payments to TCH in the amount of \$8,800.00, which amount consists of interest calculated at 5% interest on the secured loan balance of \$1.6 million, based on a 30-year amortization, as adequate protection, plus \$2,000.00 per month toward principal.

## **VI. LEGAL ARGUMENT.**

### **A. The Court May Authorize the Use of Cash Collateral.**

A debtor's use of property of the estate is governed by Section 363 of the Bankruptcy Code, 11 U.S.C. § 363, which provides, in pertinent part:

If the business of the debtor is authorized to be operated under section 1108 . . . of this title and unless the court orders otherwise, the trustee may enter into such transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing..

Bankruptcy Code Section 363(c)(1) permits a debtor to use, sell or lease property in the ordinary course of business. However, Section 363(c)(3) imposes an absolute prohibition on the use, sale, or lease of cash collateral unless (1) the creditor with an interest in the collateral consents, or (2) the court authorizes the use after notice and a hearing.

Cash collateral is defined in Section 363(a) as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . ." The Debtor is informed that TCH asserts an interest in the Debtor's assets, including revenues generated by the operation of the Debtor's business, the rental of the Property. Therefore, and if true, such rental revenue constitutes cash collateral pursuant to Section 363 (a) of the Code.

Where the use of cash collateral is authorized, it may only be used to pay the actual and necessary expenses of operation. *Matter of Plaza Family Partnership*, 95 B.R. 166( E.D. Cal 1989);

1 *In re MadCat Two, Inc.*, 120 B.R. 990 (Bankr. E.D. Ark. 1990). The Debtor submits that all of the  
2 expenses listed on the cash collateral budget, Exhibit E, to the Cohen Declaration, are necessary to  
3 the efficient operation of the Debtor's business. The items and amounts contained in the budget are  
4 consistent with the operation of similar commercial buildings and with a case of the Debtor's size and  
5 complexity.

6 The use of cash collateral pursuant to this Cash Collateral Motion is justified in this case  
7 because, absent the use of cash collateral, the Debtor's business will suffer irreparable harm and will  
8 not survive, all to the injury of the estate's creditors and the members of the Debtor entity. Without  
9 the benefits afforded by the use of cash collateral, the Debtor's ability to maintain business  
10 operations, preserve the going-concern value of its business and assets, and provide an opportunity  
11 for the Debtor to reorganize its business operations will be destroyed.

12 B. The Court May Condition the Use of Cash Collateral to Provide Adequate Protection.

13 Pursuant to Section 363(e) of the Code, the Court may condition the use of property,  
14 including cash collateral, as necessary to provide adequate protection of an entity's interest in such  
15 cash collateral. The question of whether a secured party's interest in collateral is adequately  
16 protected, by its nature, must be determined on a case-by-case basis. *In re Belco, Inc.*, 38 B.R. 525,  
17 527 (Bankr. W.D. OK. 1984); *City Nat'l Bank v. San Clemente Estates (In re San Clemente Estates)*,  
18 5 B.R. 605, 609 (Bankr. S.D. Cal. 1980) ("adequate protection must be applied in light of the peculiar  
19 facts of each case and upon equitable considerations arising therefrom.")

20 Adequate protection is intended to accommodate for the risk of "decrease in the value of [the  
21 secured creditor's] interest in such property." Generally, adequate protection is sought where the  
22 collateral is expected to depreciate during the course of the bankruptcy, either through use or time. *In*  
23 *re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11<sup>th</sup> Cir. 1984). Therefore, if  
24 there is no diminution in the value of the assets, secured creditors are not entitled to adequate  
25 protection. *See United States v. Booth Tow Services, Inc.* 64 BR. 539, 543 (W.D. Mo. 1985).

26 Here, the Debtor's purpose for requesting the use of cash collateral is the preservation of the  
27 estate's primary asset, the shopping center, and the protection against any diminution in its value.  
28 The right to use cash collateral for this purpose is well-recognized. *See, e.g., In re Marion Street*



1 *Partnership*, 108 B.R. 218, 227 (Bankr. D. Minn. 1989) (allowed the debtor to use cash collateral to  
2 pay the ordinary course expenses and management fees without requiring further adequate  
3 protection); *In re Orlando Trout Creek Ranch*, 80 B.R. 190, 192 (Bankr. N.D. Ca. 1987) (adequate  
4 protection exists when the debtor uses cash collateral for its ordinary and necessary operating  
5 expenses so long as the value of the underlying collateral is maintained); *Stein v. United States*  
6 *Farmers Home Adm. (In re Stein)*, 19 B.R. 458, 460 (Bankr. E.D. Pa. 1982) (use of cash collateral  
7 authorized despite creditor being undersecured when such use was necessary to the continued  
8 operations of the debtor); *Hartigan v. Pine Lake Village Apartment Co. (In re Pine Lake Village*  
9 *Apartment Co.)*, 16 B.R. 750, 756-757 (Bankr. S.D. N.Y. 1982) (debtor permitted to use cash  
10 collateral generated from rental income to enhance the value of real property which also secured  
11 creditor's claim). The Debtor is not proposing to alter the extent, priority, or validity of the  
12 prepetition liens held by TCH at this time, but it will not agree that the prepetition liens are valid.  
13 The Debtor will continue operations and make monthly payments to TCH, as set forth above.

14 Although the term "adequate protection" is not expressly defined in the Code, Section 361  
15 provides three non-exclusive but illustrative examples of what constitutes adequate protection: (1)  
16 periodic cash payments equivalent to the decrease in the value of the collateral; (2) an additional or  
17 replacement lien to the extent of the collateral's decrease in value; and (3) such other relief as will  
18 result in the realization by the creditor of the "indubitable equivalent" of its interest in the property.  
19 See 11 U.S.C. § 361(2008). To determine whether a secured party's interest in cash collateral is  
20 adequately protected, the court must determine (1) the value of the cash collateral, and (2) whether  
21 the proposed use of the cash collateral threatens such value. *George Ruggiere*, 727 F.2d at 1020; see  
22 also *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108  
23 S.Ct. 626, 630 (1988). If the collateral in which the creditor has a security interest is worth less than  
24 the amount owed to the creditor, the debtor must only provide adequate compensation to the extent  
25 that the value of the collateral is decreasing. *Timbers*, 108 S.Ct. at 629; see *In re McCombs*  
26 *Properties VI, Ltd.*, 88 B.R. 261, 266 (Bankr. C.D. Cal. 1988) (post-*Timbers* case; adequate  
27 protection must be provided if the value of the collateral is likely to diminish during the time the cash  
28 collateral is used).

1 In the present case, the Debtor is willing to pay monthly payments amounting to interest TCH  
2 would have received had it invested the secured balance owed at the interest rate prevalent in the  
3 market. As set forth in the Declaration, the current market rate for loans of this type ranges between  
4 approximately 3.0% to as much as 7% or more. The Debtor is thus willing to make monthly  
5 payments of \$8,800.00, which payment would consist of \$6,800 in interest based on 5% interest on a  
6 secured loan balance of \$1.6 million and a 30-year amortization, together with \$2,000 per month  
7 toward the principal. The Debtor is also prepared to grant the Bank a replacement lien to the extent  
8 and validity of the underlying, prepetition, lien, as well as similar protections commonly afforded  
9 secured creditors whose cash collateral is being utilized. (The Debtor plans to have the value of the  
10 Property established by the Court shortly.)

11 The combination of cash payments and/or replacement liens should be more than sufficient to  
12 protect TCH, especially given the broad interpretation of adequate protection. “[A]dequate  
13 protection must be determined liberally, permitting debtors maximum flexibility in structuring a  
14 proposal for adequate protection.” *Unsecured Creditors’ Comm. v. Jones Truck Lines, Inc.*, (*In re*  
15 *Jones Truck Lines, Inc.*), 156 B.R. 608, 610 (W.D. Ark. 1992) citing *In re Martin*, 761 F.2d 472, 474  
16 (8<sup>th</sup> Cir. 1985).

17 **V. CONCLUSION.**

18 Wherefore, based upon the foregoing, the Debtor respectfully submits that good cause exists  
19 to grant this Cash Collateral Motion and requests that the Court enter an order:

- 20 1. Authorizing the Debtor to use cash collateral consistent with the proposed budget, Exhibit E  
21 to the Cohen Declaration;
- 22 2. Authorizing the Debtor to make adequate protection payments to TCH as provided; and
- 23 3. Authorizing the Managing Member of the Debtor to sign such documents and carry out such  
24 actions as are consistent with the purpose of this Cash Collateral Motion.

25 Dated: February 20, 2018

Respectfully submitted,

26 ILLYSSA I. FOGEL & ASSOCIATES

27 By: /s/ Illyssa I. Fogel  
28 Illyssa I. Fogel, Proposed Attorney for Debtor-in-  
Possession JBC Staples, LLC

In re:  
JBC STAPLES, LLC,

Debtor(s).

CHAPTER 11  
CASE NUMBER 1:18-bk-10162-VK

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
815 N. La Brea Ave., Ste 78, Inglewood, CA 90302

A true and correct copy of the foregoing document entitled: **DEBTOR'S EMERGENCY MOTION TO AUTHORIZE USE OF CASH COLLATERAL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner indicated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):** Pursuant to controlling General Orders and Local Bankruptcy Rules ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On February 20, 2018, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addresses indicated below:

Russell Clementson on behalf of U.S. Trustee United States Trustee (SV) - russell.clementson@usdoj.gov

Illyssa I Fogel on behalf of Debtor JBC Staples, LLC - ifogel@iiflaw.com

Keith C Owens on behalf of Creditor Wells Fargo Bank, National Association, as Trustee for Morgan Stanley Capital I Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-HQ11 - kowens@venable.com, bclark@venable.com; khoang@venable.com; DGLge@venable.com

United States Trustee (SV) - ustpregion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:** On February 20, 2018, I served the following persons and/or entities at the last known address in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Judge's Copy (served by mail) – The Honorable Victoria S. Kaufman, United States Bankruptcy Judge, United States Bankruptcy Court, 21041 Burbank Blvd., Suite 364, Woodland Hills, CA 91367

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on N/A, I served the following person(s) and/or entity(ies) by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

February 20, 2018  
Date

Illyssa I. Fogel  
Printed Name

Illyssa I. Fogel  
Signature