UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Daniel Miller d/b/a Danielson Grain, d/b/a Danielson Trucking,	)	Case No. 04-60106
Gary Hoper, Plaintiff, vs. Daniel Miller, Defendant.	)	Adversary Case No. 04-6035 **NOTICE OF HEARING AND MOTION OF PLAINTIFF FOR EXTENSION OF DISCOVERY DEADLINE AND DEADLINES FOR FILING FOR NONDISPOSITIVE AND DISPOSITIVE MOTIONS**

The Plaintiff, Gary Hoper, moves this court to extend the deadline in this case for completion of discovery and the filing of non-dispositive and dispositive motions.

1. The Court will hold a hearing on this motion on September 28, 2004, at 11:00 a.m., U.S. Bankruptcy Courtroom, #204, U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota.

2. Any response to this motion must be filed and delivered not later than seven days, including intermediate Saturdays, Sundays and legal holidays, prior to the time set for the hearing, or mailed and filed not later than ten days before the hearing date. Unless a response opposing the motion is timely filed, the Court may grant the motion without a hearing.

3. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 34 Bankruptcy Rule 5005 and Local Rule 1070-1. The adversary proceeding in which this motion

is filed is a core proceeding. The case was originally commenced as an involuntary Chapter 7 proceeding by the filing of a petition on February 3, 2004. On February 19, 2004, the case was converted to a Chapter 11 proceeding. Said bankruptcy case and this adversary action are now pending in this Court. This motion arises under Paragraph 7 of this Court's June 30, 2004 Scheduling Order.

4. Plaintiff requests that this Court extend the deadlines for discovery and the filing of non-dispositive and dispositive motions in this adversary proceeding as follows:

a) Discovery deadline - December 15, 2004;

b) Non-dispositive motion filing deadline - December 15, 2004;

c) Dispositive motion filing deadline - January 15, 2005.

The extension of these deadlines is appropriate for the reasons set forth below.

5. This adversary proceeding was commenced by Plaintiff in early June, 2004. Plaintiff alleges that Defendant obtained Plaintiff's property as a consequence of false pretenses, false misrepresentations and/or actual fraud and that the Defendant's conduct constituted willful and malicious injury with respect to Plaintiff's interests and property.

6. On July 22, 2004, in an effort to obtain information concerning the facts and circumstances surrounding the transactions which form the basis of this adversary action Plaintiff served Interrogatories and Demand for Production of Documents, Set I, on Defendant's counsel on July 22, 2004.

7. On August 10, 2004, Defendant served his Answers to Plaintiff's Interrogatories and Demand for Production of Documents, Set I. True and accurate copies of these responses

are annexed hereto as Exhibit A. A review of Defendant's responses reveal the following difficulties:

a) Defendant's answers are preceded by six general objections. In that the same are not specifically limited to any particular interrogatory or demand for production of documents, it is impossible to determine what information and documents Defendant is failing to disclose based on those general objections.

b) All of Plaintiff's Interrogatories and Demand for Production of Documents are answered by the Defendant tendering for inspection, all of Defendant's business records (at the offices of Defendant's attorney in New Ulm, Minnesota). As more fully detailed by the objections submitted in adversary no. 04-6043 to the Debtor's motion to establish a procedure for document inspection, the defects in Defendant's proposal to simply tender documents in response to discovery requests are as follows:

i) Defendant's documents have been relocated in excess of 300 miles from Defendant's residence and the location of Defendant's business. This will make inspection far more burdensome and expensive for the Plaintiff.

ii) Defendant proposes to have an employee of his attorney oversee any review of the documents. The wages of that individual are be paid by the Plaintiff.

iii) Under Rule 33 of the Federal Rules of Civil Procedures,

documents cannot be tendered in lieu of a narrative response to interrogatories unless the information sought is not known to the party and the burden of reviewing the documents containing the information is the same for the party seeking discovery as it would be for the party responding to the discovery request.

iv) Even where the burden of obtaining information by reviewing documents is equal, under Rule 33 of the Federal Rules of Civil Procedure, the party tendering the documents must specify the particular documents containing the information sought. In the instant case, there is no indication the Defendant has attempted to segregate the records containing the information necessary to answer Plaintiff's Interrogatories.

8. Plaintiff wishes to attempt to resolve the above discovery difficulties without involving the Court. Extension of the discovery and motion filing deadlines is appropriate to allow the parties to informally address these discovery issues.

9. On information and belief it is stated that the Unsecured Creditors Committee will file an adversary action that seeks to deny the Defendant a discharge. Various of the issues raised in that proceeding will be similar, if not identical, to issues relevant to this adversary action. Extension of the discovery and motion deadlines in this case would be appropriate to allow the Unsecured Creditors Committee and Plaintiff to coordinate discovery. Additionally, if the Debtor is denied a discharge, trial of this adversary action will be unnecessary. Thus,

judicially economy and the goal of minimizing costs and expenses to the parties is served by extending the discovery and motion filing deadlines in the instant action.

10. The Unsecured Creditors Committee has retained the services of a forensic accountant to review the Defendant's records. The accountant is attempting to determine what happened to proceeds of grain delivered to the Defendant in 2003 (the Defendant has not accounted for these monies). The information gathered by the accountant will also show for what period of time the Defendant was insolvent and was inducing producers to sell grain to the Defendant with the intent of using the proceeds to pay older obligations. These facts are directly relevant to issues involved in this adversary proceeding. The discovery and motion filing deadlines should be extended to allow the forensic accountant retained by the Unsecured Creditors Committee to complete her work.

Dated this 30th day of August, 2004.

VOGEL LAW FIRM

By: _____

Jon R. Brakke #10765
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
(701) 237-6983
ATTORNEY FOR PLAINTIFF

Jon R. Brakke, counsel for the Plaintiff, the moving party named in the foregoing Notice of Hearing and Motion declares under penalty of perjury that the contents of this Motion are correct to the best of his knowledge, information and belief.

Dated this 30th day of August, 2004.

_____

Jon R. Brakke

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	)	
	)	Case No. 04-60106
Daniel Miller, d/b/a	)	
Danielson Grain, d/b/a	)	Chapter 11
Danielson Trucking,	)	
	)	
Debtor.	)	
**********	)	
Gary Hoper,	)	Adversary Case No. 04-6035
	)	
Plaintiff,	)	**DEFENDANT'S ANSWERS TO**
vs.	)	**INTERROGATORIES AND DEMAND FOR**
	)	**PRODUCTION OF DOCUMENTS, SET 1, FROM**
Daniel Miller,	)	**PLAINTIFF TO DEFENDANT**
	)	
Defendant.	)	

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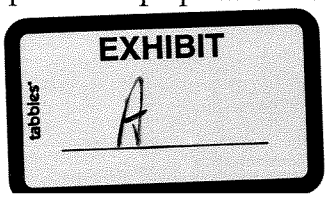
TO: PLAINTIFF GARY HOPER AND HIS ATTORNEY, JON R. BRAKKE, 218 NP AVENUE, PO BOX 1389, FARGO ND 58107-1389

GENERAL OBJECTIONS, QUALIFICATIONS AND RESERVATIONS

1. Defendant Debtor objects to these interrogatories to the extent that they seek information or documents protected by the attorney-client privilege, the work product doctrine, or information subject to any other applicable privilege. Such information or documents shall not be divulged, and an inadvertent disclosure shall not be deemed a waiver of any applicable privilege.

2. Defendant Debtor objects to these interrogatories to the extent that they call for information from any former employee, agent, representative, officer, director, or attorney of Defendant Debtor. Defendant Debtor acknowledges only a duty to provide information within its own possession, custody or control.

3. Defendant Debtor has not yet completed its investigation of the facts related to the issues in this case and has not completed its preparation for any trial that may be held in this



action. Any responses to the following interrogatories are based upon information currently known to and are given without prejudice to its right to produce evidence of any subsequently discovered information. Defendant Debtor further reserves the right to raise new contentions and to argue new legal theories subject only to such rules of civil procedure and evidence as may require an amendment of the pleadings.

4. Without in any way obligating itself to do so, except as required under the Federal Rules of Civil Procedure, Defendant Debtor reserves the right to alter, supplement, amend or otherwise modify these answers in any way at any time, including at trial, in light of facts determined to be relevant or revealed through discovery, further investigation or further legal analysis. Defendant Debtor also reserves the right to apply for relief to permit the insertion into these answers and responses any information that has been inadvertently or unintentionally omitted from these answers, or to introduce such information into evidence at the time of trial.

5. In responding to any interrogatory, Defendant Debtor does not concede the relevancy, materiality or admissibility of the request or of the subject matter to which the request refers or relates. Defendant Debtor's response to each interrogatory is made subject to, and without in any way waiving, or intending to waive, any objection to the competency, relevancy, materiality, privilege, or admissibility as evidence for any other purpose, of any of the responses given, or the subject matter, in any proceeding.

6. Except for explicit facts admitted herein, no incidental or implied admissions are intended hereby. The fact that Defendant Debtor has responded or objected to any interrogatory, or part thereof, should not be taken as an admission to the existence or truth of any facts.

ANSWERS TO INTERROGATORIES

1. Commencing January 1, 2003, and effective as of the first day of each and every month thereafter through March 1, 2004, state:

   a. Balances in all bank accounts maintained or utilized by the Plaintiff in Plaintiff's business operations, and if all monies in each account did not arise from the sale of crops, the source of such additional monies and how the balance in each account was divided between grain sale proceeds and revenues from other sources;
   b. All crops in the Debtor's possession or in inventory showing quantities of each type of crop;
   c. The Debtor's accounts receivable with specific information on the name of each account debtor, the amount owed by each account debtor and the aging of the account.

Describe with specificity all documents, correspondence, memoranda, records and/or data compilations maintained in any form or format respecting deposits in bank accounts and crops in possession or in inventory. If on a monthly or other periodic basis, the Plaintiff produced balance sheets, financial statements or inventories reflecting balances in bank accounts and/or crops in possession or in inventory, you are required to annex copies of the same to your answers hereto.

ANSWER: This request is unduly burdensome. Pursuant to Rule 33, the Debtor agrees that the Requesting Party can have access to his business records, which are located at teh Gislason & Hunter Law Office in New Ulm, Minnesota. Said records are available for inspection upon reasonable notice during regular business hours. All of the Debtor's business records are located at the Gislason office, and include scale tickets, invoices, correspondence and all other records relating to Daniel Miller and Danielson Grain in the Debtor's possession. There is a hearing currently set before the Bankruptcy Court to determine the procedures for document inspection and copying. Said hearing is set for August 24, 2004.

2. Commencing January 1, 2003, and effective as of the first day of each and every month thereafter through March 1, 2004, state all obligations owed by the Plaintiff respecting the purchase of crops from third parties. For each purchase, Plaintiff's description must include, but need not be limited to:

a. Date of purchase;
b. Name and address of seller;
c. Type of crop;
d. Quantity of crop;
e. Terms of sale;
f. Sale price or amount of obligation owed;
g. When the sale price was remitted or the obligation paid or satisfied, and if satisfaction was other than by payment, the manner in which the debt was satisfied.

Describe with specificity all documents, correspondence, memoranda, records and/or data compilations maintained in any form or format respecting the crop sales referenced in Plaintiff's response to this Interrogatory and Demand for Production of Documents. If Plaintiff on a monthly or other periodic basis produced balance sheets, financial statements or summaries with respect to grain purchases, obligations due for grain purchases, etc., you are required to annex copies of the same to your answers hereto.

ANSWER: This request is unduly burdensome. Pursuant to Rule 33, the Debtor agrees that the Requesting Party can have access to his business records, which are located at teh Gislason & Hunter Law Office in New Ulm, Minnesota. Said records are available for inspection upon reasonable notice during regular business hours. All of the Debtor's business records are located at the Gislason office, and include scale tickets, invoices, correspondence and all other records relating to Daniel Miller and Danielson Grain in the Debtor's possession. There is a hearing currently set before the Bankruptcy Court to determine the procedures for document inspection

and copying. Said hearing is set for August 24, 2004.

3. From January 1, 2003, through March 1, 2004, describe with specificity all crops delivered to and/or sold to the Plaintiff. For each delivery or sale, Plaintiff's description must include but need not be limited to:

a. Date;
b. Nature of transaction (i.e., delivery or sale);
c. Name and address of the third party delivering or selling the crops;
d. Type of crop;
e. Quantity of crop;
f. Specific terms of storage and/or sale;
g. The value of the crop delivered and/or sold, and the sale price to be paid by Plaintiff to the seller;
h. With respect to any crops sold, when checks were issued to the seller, (whether or not said checks were honored), whether any checks issued were dishonored, and dates and amounts of any payments made other than by check.

ANSWER: This request is unduly burdensome. Pursuant to Rule 33, the Debtor agrees that the Requesting Party can have access to his business records, which are located at teh Gislason & Hunter Law Office in New Ulm, Minnesota. Said records are available for inspection upon reasonable notice during regular business hours. All of the Debtor's business records are located at the Gislason office, and include scale tickets, invoices, correspondence and all other records relating to Daniel Miller and Danielson Grain in the Debtor's possession. There is a hearing currently set before the Bankruptcy Court to determine the procedures for document inspection and copying. Said hearing is set for August 24, 2004.

Dated this ___ day of August, 2004.

_____
Daniel S. Miller

Subscribed and sworn to before
me this _____ day of _____, 2004.

_____
Notary Public

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF BIG STONE)

Judeen L. Fuller, being first duly sworn upon oath deposes and says, that in said County and State, on the 10th day of August, 2004, she served the within Answers to Interrogatories upon:

Mr. Jon Brakke
Attorney at Law
Vogel Law Firm
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389

by then and there depositing a copy thereof properly enveloped, with postage prepaid and addressed to the last known address, at the Post Office in Ortonville, Minnesota, where affiant resides.

Judeen L. Fuller

Subscribed and sworn to me
this 10th day of August, 2004.

Notary Public

DAVID C. MCLAUGHLIN
NOTARY PUBLIC
My Commission Expires

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Daniel Miller d/b/a Danielson Grain, d/b/a Danielson Trucking,	)	Case No. 04-60106
Gary Hoper, Plaintiff, vs. Daniel Miller, Defendant.	)	Adversary Case No. 04-6035 **BRIEF IN SUPPORT OF MOTION OF PLAINTIFF FOR EXTENSION OF DISCOVERY DEADLINE AND DEADLINES FOR FILING FOR NONDISPOSITIVE AND DISPOSITIVE MOTIONS**

In the above-entitled action, the Plaintiff promptly initiated discovery after filing suit. The Defendant responded to Plaintiff's discovery requests by tendering all of Defendant's business records (without any attempt at specification). The records were to be made available for review at the offices of Defendant's counsel in New Ulm, Minnesota. This approach by the Defendant to discovery has already been rejected by this Court in adversary no. 04-6043. The problems with Defendant's proposal to tender records is in response to Plaintiff's discovery requests are as detailed below.

Defendant's residence and place of business at all relevant times has been East Grand Forks, Minnesota. However, Defendant states his records will be made available exclusively in a repository at the office of his counsel in New Ulm, Minnesota, a site some 300 miles from the location of Plaintiff and his counsel and Defendant's place of business.

Rule 33(d) provides that where an answer to an interrogatory may be derived or

ascertained from the business records of the served party, and the burden of deriving or ascertaining that answer is substantially the same for both parties, the served party may specify the records from which the answer may be derived or ascertained. Fed. R. Civ. P. 33(d). Defendant's suggested procedures do not meet the requirements of Rule 33's option to produce business records. Defendant has not shown that the burden of ascertaining the answers to the interrogatories is "substantially the same for both parties."

Moreover, even if the burdens were roughly equal, Defendant has not specified the records from which the answers may be learned. Rather, Defendant has merely directed Plaintiff to the totality of its business records. It is an abuse of the option to produce business records for a party to respond to an interrogatory by offering a mass of business records or by making all records available. Fed. R. Civ. P. 33 advisory committee's note. According to the motion filed by the Defendant in adversary no. 04-6043, the subject documents consist of "71 banker's boxes" for 2000-2003 plus an additional "unknown" number of boxes for previous years.

Although it may be burdensome to find the particular records that would provide answers to Defendant's requests, it cannot be said that this burden is substantially the same for both parties. Where a party and its employees have generated documents and are charged with the responsibility of maintaining them, they are clearly better able to extract the information which is needed to answer an interrogatory than the requesting party, who has no familiarity with the records. Sabel v. Mead Johnson & Co., 110 F.R.D. 553, 556 (D. Mass 1986). Here, Defendant and its agents generated these documents and the burden of locating relevant,

responsive records within the multitude of boxes is therefore significantly less for Defendant. In addition, the documents are in the possession of Defendant's counsel at a location some 300 miles from Plaintiff. In Sabel, the court found that the defendant had failed to properly invoke the business records option when, as interrogatories made by Defendants located in Massachusetts, it responded by agreeing to make available only in Indiana 154,000 pages of documents that had been prepared by defendant's employees.

Even if Defendant could show that the burdens were substantially the same for it and Defendants, there is no indication that under the suggested procedure Defendant will adequately specify which records are responsive to Plaintiff's various discovery requests. Rule 33(d) imposes a duty upon an interrogated party to specify the records in sufficient detail, such as by category and location, to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answers may be ascertained. Fed. R. Civ. P. 33(d) advisory committee's note. Here, Defendant indicates a willingness to offer his records, but there is no indication that Defendant will provide Plaintiff with any guidance whatsoever, such as through an index or catalogue. In fact, in discovery to date, Defendant has not even affirmed the existence of responsive records. He has simply referred Plaintiff to numerous boxes in an office in Southern Minnesota. This is an abuse of the business records option of Rule 33(d). Rule 33 may not be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered. Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp., 55 F.R.D. 354, 357 (W.D.Mo. 1972).

Plaintiff has only recently received Defendant's discovery responses in which Defendant tendered his records for review. It is Plaintiff's intent to attempt to informally resolve this discovery issue before seeking involvement of the Court. Extension of the discovery and motion filing deadline would be appropriate to allow the parties to attempt to settle any disagreements over discovery.

It is anticipated that in the immediate future, the Unsecured Creditors Committee will be filing an adversary action objecting to the Defendant receiving a discharge. The issues in that adversary action will to be very similar to those involved in the pending case. To allow the parties an opportunity to coordinate discovery efforts and conceivably also to permit consolidation of the cases for trial, extension of the discovery and motion filing deadlines would be appropriate. Further, if the Defendant is denied a discharge this will moot the need to try Plaintiff's claim against the Defendant.

The Unsecured Creditors Committee has retained the services of a forensic accountant. The accountant's analysis of the Defendant's business operations will be evidence relevant to the issues involved in the pending adversary action. The discovery and motion filing deadline should be extended to allow the accountant to complete her analysis.

Dated this 30th day of August, 2004.

VOGEL LAW FIRM

By:_____

Jon R. Brakke #10765
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
(701) 237-6983
ATTORNEY FOR PLAINTIFF

RE: Gary Hoper v. Daniel Miller, d/b/a Danielson Grain and d/b/a Danielson Trucking
Adversary Action No. 04-6035

STATE OF NORTH DAKOTA)
) ss
COUNTY OF CASS)

AFFIDAVIT OF SERVICE
BY MAIL

Holly A. Kittelson, being first duly sworn on oath, does depose and say: She is a resident of County of Cass, City of Fargo, State of North Dakota, is of legal age and not a party to or interested in the above entitled matter.

On August 30, 2004, your affiant served the following documents:

NOTICE OF HEARING AND MOTION OF PLAINTIFF FOR EXTENSION OF DISCOVERY DEADLINE AND DEADLINES FOR FILING FOR NON-DISPOSITIVE AND DISPOSITIVE MOTIONS; SUPPORTING BRIEF; AND PROPOSED ORDER

by placing true and correct copies in envelopes addressed as follows:

David C. McLaughlin
Attorney at Law
212 2nd St. NW
Ortonville, MN 56278

US Trustee
U.S. Courthouse
300 South 4th St., Suite 1015
Minneapolis, MN 55415

and causing them to be placed in the mail at Fargo, North Dakota with first-class postage prepaid.

Holly A. Kittelson

Subscribed and sworn to before me this 30th day of August, 2004.

(SEAL)

SHERI HEINISCH
Notary Public
State of North Dakota
My Commission Expires Dec. 22, 2005

Notary Public