

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)
)
Daniel S. Miller,)
)
Debtor.)
)
_____)

Bankruptcy No. 04-60106
Chapter 11 Bky.

**NOTICE OF HEARING ON MOTION BY UNSECURED CREDITOR'S COMMITTEE
TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7**

TO: DANIEL S. MILLER, ALL CREDITORS AND OTHER PARTIES OF INTEREST:

The unsecured creditor's committee, by and through its attorney, has made a Motion to Convert this case from Chapter 11 to Chapter 7. On June 8, 2004 at 1:30 p.m. before the Honorable Dennis D. O'Brien, the United States Bankruptcy Judge, Courtroom No. 228A, United States Bankruptcy Court for the District of Minnesota, U.S. Courthouse, 316 North Roberts Street, St. Paul, Minnesota, a hearing will be held to determine whether this case should be converted.

Any response to the unsecured creditor's committee's Motion to Convert must be filed and delivered to the Clerk of District Court not later than June 3, 2004, 3 days before the time set for hearing, or served and filed by mail not later than May 27, 2004, 7 days before the time set for the hearing. Unless a response opposing the motion is timely filed and delivered/served, the Court may grant the motion without a hearing. See local Bankruptcy Rule 9006-1.

Dated this ____ day of _____, 2004.

Clerk of U.S. Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)	Bankruptcy No. 04-60106
)	
Daniel S. Miller,)	Chapter 11 Bky.
Debtor.)	
_____)	

**NOTICE OF HEARING AND MOTION BY THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS TO CONVERT CASE FROM CHAPTER 11 TO
CHAPTER 7**

The Official Committee of Unsecured Creditors, by and through its attorney, Kip M. Kaler respectfully requests that the Court convert this Chapter 11 case to Chapter 7, pursuant to 11 U.S.C. §1112(b). In support of this motion, the unsecured creditor's committee states and alleges:

1. Official Committee of Unsecured Creditors moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 1:30 p.m. on June 8, 2004 in Courtroom No. 228A, United States Bankruptcy Court for the District of Minnesota, U.S. Courthouse, 316 North Roberts Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than June 3, 2004 which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than May 27, 2004 which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§157

and 1334, Fed. R.Bankr.P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The involuntary petition commencing this chapter 11 case was filed on February 3, 2004 and relief was ordered on February 19, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §1112(b) and Federal Rule of Bankruptcy Procedure 1014 and Local Rules 1017-2 and 9013-1.

6. The Unsecured Creditor's Committee requests that the bankruptcy court convert this case to a case under chapter 7, pursuant to 11 U.S.C. §1112(b) for cause, including but not limited to those causes identified in subpart (b)(1) and (b)(2).

7. The Debtor intends to liquidate virtually all of the assets of this bankruptcy estate and pay creditors. The Debtor stated at his 341 meeting that it is his intention to retain only his exempt property, the farm real estate which is presently under a CRP contract with Farm Service Agency, and a tractor-trailer to work as a trucker.

8. The Debtor's principal business prior to the filing of the bankruptcy was a grain broker. As a result of that operation of that business the Debtor has incurred over \$4,000,000 in debts to grain sellers. The Debtor has no means to make a significant payment to these creditors and does not intend to reorganize in such a manner as to provide any meaningful payment to them other than through liquidation of the remaining nonexempt assets.

9. Within a few years prior to the filing of the bankruptcy the Debtor has purchased a parcel of real estate which he occupies as his homestead, but transferred an undivided one-half interest in that to his female friend who occupies the property with him. She has made no payment towards the purchase of the property, yet is described

as a one-half interest owner of the property. The estate should investigate whether a cause of action exists to recover the interest in the property transferred to this person.

10. The Debtor has not filed state or federal income tax returns since 1999.

11. Approximately 3 ½ years ago the Debtor hired Rod Rinderkecht and his wife Nancy, who were to provide bookkeeping and accounting services to the business. The Debtor is unaware of any financial statements for the business as a result of that accounting or bookkeeping work since the employment of Mr. and Mrs. Rinderkecht. The Debtor testified at the 341 meeting that Nancy's last day of employment with him was going to be April 8, 2004 and that Rod was starting a new job with Ross Seed no later than May 1st, 2004. The Debtor indicated at the 341 meeting he had no idea how he was going to prepare his unfiled tax returns.

12. The Debtor has employed Michael Dove, attorney at law, as special counsel. Mr. Dove's job is to oversee liquidation of the remaining grain inventory, recovery of preferential transfers occurring within the 90 days preceding the filing of the bankruptcy, and investigate and collect executory contracts. The principal portion of the executory contracts were agreements for purchase of grain by the Debtor from various farmers. The value of those contracts to this bankruptcy estate may be the difference between the contracted purchase price of that grain and the market price of the grain at this time.

13. The Debtor has proposed an auction sale of most of the vehicles and machinery scheduled in his schedule B-23 and 27, but not all. The Debtor has not indicated any intended disposition of the remaining vehicles not listed for sale, office equipment, or farming equipment. The Debtor has attempted to claim \$13,000 of the

farming equipment as exempt despite the fact he is not and has not been in the recent past, a farmer. The Debtor has indicated that pursuant to the Order entered by this Court authorizing the sale of part of the personal property, an auction sale will be conducted of that equipment in mid to late June.

14. The Debtor has made a motion to sell the real estate with fixtures which served as his primary business location. That sale is expected to be completed by July 15, 2004.

15. The Debtor was asked at the 341 meeting what the source of his losses were that would create a \$3,000,000 to \$4,000,000 deficiency in his assets. He was unable to explain what had happened. The Debtor was unable to explain why he was unable to obtain any meaningful financial information from his bookkeeper/accountant who has been employed for the last 3 ½ years. The debtor does not have any cash-flow statements, financial statements or other financial documents regarding any of the critical financial aspects of his operations.

16. From the Debtor's testimony at the 341 meeting, it is apparent that he wishes to retain the farmland described in the bankruptcy which has equity in excess of \$70,000 and one of the trucks and trailers which would likely include equity to the bankruptcy estate of \$10,000 or more. The Debtor has not indicated the sources of income that would enable him to repay this debt in a reasonable period of time, should he be allowed to retain those assets. The Debtor testified that he intends to operate as a trucker.

17. Other than the Debtor's role in liquidating the personal property and real

Estate that are presently pending sale, the Debtor has no significant contributory value in a reorganization of this bankruptcy estate. The grain assets are subject to numerous claims, which will undoubtedly result in some litigation. Further, special counsel is likely to pursue recovery of various executory contracts which will require the Debtor to act as a witness, but beyond that he should have little contribution.

18. At the commencement of this case, the Debtor scheduled a bank account with value of \$108,928. The Debtor testified at the 341 meeting that the attorneys permitted him to take \$20,000 to put into an operating account. Since the filing of the bankruptcy the Debtor has collected various accounts receivable relating to trucking operations and has deposited those into the operating account. As of the 341 meeting, April 6, 2004, the Debtor had only \$1,600 left. He could not say at that time how much income he had deposited into the account over and above the original \$20,000 deposit.

19. The Debtor's continued operation of this bankruptcy estate will undoubtedly result in continuing loss or diminution of the estate, causing less assets to be available for payment to creditors. There is no likelihood of rehabilitation in that it is the Debtor's intent to retain a portion of the farmland for himself and a tractor and trailer to operate as a trucker in order to support himself. The farmland the Debtor seeks to retain is currently under a CRP contract with Farm Service Agency. That parcel of land is readily saleable and is not necessary to the Debtor's future as a trucker.

20. The Debtor will be unable to effectuate a plan of reorganization. The unsecured creditor's committee will not support a plan which allows the Debtor to retain the farmland and pay creditors over an extended period of time permitting him to retain

that property. That property is not necessary for reorganization and has no value to the Debtor other than as a investment with possible future returns to him individually.

21. The unsecured creditor's committee believes that it is in the best interest of the creditors and all parties of interest that this case be converted to Chapter 7.

22. The unsecured creditor's committee will present to the Court the 341 transcript as evidence in support of this motion. Additionally, the Unsecured Creditor's Committee will request that the Debtor testify at the hearing on this motion.

THEREFORE, the Official Committee of Unsecured Creditors, by and through their attorney, respectfully requests that the Court issue an Order converting this Chapter 11 case to a case under Chapter 7, and that the Court grant such other and further relief as it deems fair and just.

Dated this 3rd day of May 2004.

/e/ Kip M. Kaler
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Committee
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(701) 232-8757
MN Attorney No. 133255

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:) Bankruptcy No. 04-60106
)
Daniel S. Miller,) Chapter 11 Bky.
Debtor.)
_____)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THE UNSECURED
CREDITOR’S COMMITTEE TO CONVERT THIS CASE FROM CHAPTER 11 TO
CHAPTER 7**

Section 1112(b) permits the Bankruptcy Court to dismiss or convert a case for cause. 11 U.S.C. §1112(b). The Bankruptcy Code does not define “cause”, but subsection (b) provides a non-exhaustive list of ten examples of cause. 7 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, ¶1112.04[1] (15TH ed. 1997). A bankruptcy court has broad discretion in deciding whether to dismiss or convert a Chapter 11 case. *Lumber Exchange Bldg., Ltd. v. Mutual Life Ins. Co. (In re Lumber Exchange Bldg., Ltd.)*, 968 F.2d 647, 648 (8th Cir. 1992).

The portions of 11 U.S.C. § 1112(b) relevant to the present case include the following:

Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee.., and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including –

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;

11 U.S.C. §1112(b).

The Committee alleges that cause exist to convert this case to chapter 7, including the 2 itemized causes. In general, the Committee alleges that the Debtor will not be able to nor would he want to reorganize. The vast majority of assets are being liquidated. Cash is not an asset that should be retained and reorganized; it must be paid to creditors. The Debtor has no idea why he lost \$3-4,000,000; he does not plan to continue that business. The Debtor's records are a mess. He has not had any meaningful financial reports for several years at least. He has not filed tax returns since 1999. These things must be completed to determine what losses occurred and if they might be recouped. The tax returns must be completed to determine the amount of those priority claims. The Debtor has proven that he is incapable to accomplishing these things.

The Debtor is starting over, trying to retain a truck and trailer and operate as a trucker. To keep those limited assets, he should merely find financing for those limited assets and allow creditors to expeditiously liquidate and pay themselves. To reorganize contemplates a significant contribution on his part to overcome the absolute priority rule. See generally, In re Lumber Exchange Limited Partnership, 125 B.R. 1000 (Bankr.D.Minn. 1991).

Continuing loss to or diminution of the estate.

The requirement under Section 1112(b)(1) is two-fold: (1) there must be a continuing diminution of the estate; and (2) absence of a reasonable likelihood of rehabilitation. 7 COLLIER ¶ 1112.04[5][a], at 1112-30 & n. 34 (citing *In re Citi-Toledo Partners*, 170 B.R. 602, 606 (Bankr.N.D.Ohio 1994) & 124 Cong. Rec. 32,406 (1978). The first inquiry is satisfied if the debtor incurred continuing losses after the bankruptcy

petition was filed. *In re Schriock Const. Inc.*, 167 B.R. 569, 575 (Bankr.D.N.D. 1994).

The second inquiry relates to whether the debtor can stop the losses and put the debtor on “solid financial footing within a reasonable amount of time.” 7 Collier, ¶ 1112.04[5][a], at 1112-30.

The Debtor turned most of the money on hand over to Michael Dove. The Debtor did retain \$20,000 deposited into presumably his Debtor-in-possession operating account. Since the filing of the bankruptcy the Debtor has collected various accounts receivable associated with the trucking operation. At the 341 meeting, approximately 2 months after the involuntary filing, the Debtor could not say how much he received or added to that account. The Debtor could say that there was only \$1,600 left at that time. There is no reason to believe the Debtor does not continue to operate at a significant deficit. The business of the Debtor has for all practical purposes ceased. The Debtor’s ongoing attempts at “reorganization” and the incurrence of attorney’s fees in that attempt, will constitute significant administrative expenses and is highly unlikely to generate any valuable result. Further, the official committee of unsecured creditors continues to respond to this bankruptcy case through their own efforts and the efforts of their attorney which will similarly be an administrative expense. If this case is converted to chapter 7 and a trustee appointed, for the most part all of these expenses could be eliminated and further deficit spending by the Debtor eliminated.

Inability to effectuate a plan.

A Plan of Reorganization cannot be approved if it is not feasible. Similarly the case should be converted from Chapter 11 to Chapter 7 if the Debtor is unable to effectuate a plan. Feasibility is one of the tests for confirmation of a plan. The

feasibility test “is firmly rooted in predictions based on objective fact”. In re Clarkson, 767 F.2d 417, 420 (8th Cir. 1985). The Eighth Circuit further described the pertinent facts.

Pertinent factors to be considered include the business’s earning power, the sufficiency of the capital structure, economic conditions, managerial efficiency, and whether the same management will continue to operate the company [citation omitted].

Looking at these factors, the Debtor has no chance of success. The Debtor’s former business is gone. The Debtor has demonstrated no earning power. The Debtor’s capital structure is based solely upon liquidation of assets which should be used to pay creditors. Economic conditions does not indicate that a one-truck Debtor will generate any significant profit for repayment of debt. The Debtor’s managerial efficiency and mandatory financial information has been lacking for a number of years and there is no suggestion that that can be corrected. The Debtor, without the bookkeeper/accountant he has had for the last several years, cannot hope to successfully “reorganization” by himself.

The Debtor testified at the 341 meeting that he intends to liquidate the vast majority of all assets and run a one-truck operation. There is no reason to believe that that one-truck operation can do anything more than support the Debtor and nothing more than his ordinary living expenses. Reorganization is not possible even if the Debtor wanted to.

The Debtor’s effort to expeditiously and efficiently liquidate the significant assets is commendable. If this case is converted the Committee requests that the planned liquidation continue. However, certain problems do exist. First of all the Debtor is not liquidating all of the assets in what might be the most efficient liquidation of those

assets. The Debtor has retained significant vehicles, office equipment, farming machinery, and other nonexempt personal property. At the 341 meeting the Debtor was requested to liquidate and turnover the nonexempt portion of life insurance policies, but as of yet failed to do so. The Debtor has been requested to provide certain documentation regarding insurance policies, annuities, and retirement plans so that those assets might be determined to be exempt property, but the Debtor has been unable to do so.

The liquidation of the assets is best accomplished through a professional. Conversion of this case to Chapter 7 is inevitable. There is no reason to delay that inevitability. Delay of conversion of this case will result in significant administrative expenses and is highly unlikely to generate any additional assets for distribution to creditors.

CONCLUSION

The official committee of unsecured creditors requests that this case be converted to Chapter 7. It is the committee's position that upon the conversion to a Chapter 7 the bankruptcy trustee shall forthwith continue with the Court Order's authorizing the sale of the personal property and real estate as previously approved by the Bankruptcy Court. Similarly special counsel for the bankruptcy estate, Michael Dove should remain in his position and continue to work on those things for which he was specifically employed; special counsel merely has a new principal to whom to report.

Dated this 3rd day of May 2004.

/e/ Kip M. Kaler

Kip M. Kaler

KALER DOELING LAW OFFICE

Attorney for Unsecured Creditors

Committee

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)
)
Daniel S. Miller,)
)
Debtor.)
)
_____) **ORDER**

The Court having before it a Motion to Convert this case from Chapter 11 to Chapter 7 and having conducted a hearing on the motion with the parties appearing as noted on the record and the court having stated its findings of fact and conclusions of law on the record to the extent necessary and finding that it is appropriate under the circumstances of this case be converted; and

THEREFORE;

IT IS THE ORDER OF THE COURT that this case shall be converted to Chapter 7.

IT IS THE FURTHER ORDER OF THE COURT that the Order authorizing the disposition of the grain assets (docket No. 4468967), Order authorizing sale of personal property (docket No. 4490157), and Order authorizing sale of real estate (docket No. 4490154) shall continue effective with the authority previously granted the Debtor in possession to the Chapter 7 trustee.

Dated this ____ day of _____, 2004.

Honorable Dennis D. O'Brien
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)
)
Daniel S. Miller,)
)
Debtor.)
)
_____) **CERTIFICATE OF SERVICE**

Kip M. Kaler of Fargo, ND, swears that on May 3, 2004, he mailed in first class postage-paid envelopes and deposited same in the post office at Fargo, ND, a

**NOTICE OF HEARING AND MOTION BY THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS TO CONVERT CASE FROM CHAPTER 11 TO
CHAPTER 7,
MEMORNADUM OF LAW IN SUPPORT OF MOTION BY THE UNSECURED
CREDITOR'S COMMITTEE TO CONVERT THIS CASE FROM CHAPTER 11 TO
CHAPTER 7,
and proposed ORDER**

to the parties listed below:

SEE ATTACHED

/e/ Kip M. Kaler _____
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