

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

Bankruptcy No.: 04-60106

In Re:

Daniel S. Miller,

Debtor.

In Proceeding Under
Chapter 11

**RESPONSE TO UNSECURED CREDITORS' COMMITTEE OBJECTION TO THE
DEBTOR'S PLAN**

1. The Unsecured Creditors' Committee objects to the Debtor's Plan because the Debtor has not filed tax return for tax years 1999 through 2003. This Objection is not sufficient to deny Confirmation. The Debtor has made an agreement with the IRS regarding the Returns (they will be filed within 30 days of the Effective Date). Further, the Debtor has retained the services of Paul Walsh, CPA, to prepare the Returns, and the work is in progress.

Further, the taxes owed are Priority Claims and must be paid. The taxes are what they are, and the payment owed to the IRS will not change if the Court confirms the Plan or converts the case to Chapter 7. The distribution to Unsecured Creditors will not be altered.

2. The Unsecured Creditors' Committee contends that no unimpaired class of creditors has accepted the Plan. This is false, as Class VII (Guttu) has accepted the Plan. Guttus' rights under the pre-petition contract have been altered, and this claim is impaired as a matter of law. In particular, the Guttu claim payment period has been extended and the payments

have been decreased. The existing Contract calls for a balloon payment on July 5, 2005. The Plan extends the payment period until July 1, 2006. Payments required under the original Contract were \$1,300 a month, and now they are \$1,100 a month. Obviously, the Guttu claim is impaired. As a matter of law, Guttus' secured claim had to be set forth in a separate Class, as its security was distinct from all other creditors. The Debtor's Plan has clearly met the requirements of 11 USC 1129(a)(10).

Further, the classification of Classes 8 and 9 is proper. These Creditors have secured claims as a result of mechanic's liens on specific motor vehicles which the Class 8 and 9 Creditors had in their possession on the date the Involuntary case was filed. These Creditors released their collateral for sale as a result of the Court Order permitting sale of the collateral free and clear. Class 8 and 9 Creditors have secured claims, and neither of these claimants repossessed certain property during the Chapter 11, as alleged.

3. The Plan is feasible and has been modified to meet the objection that the Plan does not specify how the remaining assets will be liquidated or collected. Feasibility is not a factor, as this is a Liquidating Plan. Even if it was, the disposition of the assets is readily performable and there is no question that it can be accomplished.

4. The Debtor's Plan has been modified to reflect the fact that the Debtor does not retain anything under the Plan that remains Property of the Estate.

5. The Debtor's Plan complies with the requirements of 11 U.S.C. 1129(B)(2)(B)(ii), or the Absolute Property Rule. This Rule states that if there is a dissenting Class, Unsecured Creditors must be provided for in full before any junior class may receive or retain any property under the Plan. In the present case., the Plan provides for a complete liquidation of all of the

property of the Estate. The property which is exempt is not property of the Estate, as it is removed from the Estate once the exemption is established. As a result, the Debtor is retaining nothing, and the Plan meets the requirement of the Absolute Priority Rule. Support for this position is in *In Re: Egan, 142 BR. 730*, which states:

“... if debtors intend to retain only *exempt* property, then they are merely retaining that which is their absolute right to retain in any event, and they are not, properly speaking, receiving or retaining “any interest that is junior to the interests” of any class of creditors, 11 U.S.C Sec. 1129(b)(2)(B), including the class of unsecured creditors.”

The Debtor in the present case is in a similar situation. The Plan is confirmable because the Absolute Priority Rule is not violated. All of the supposed power which the Debtor retains have been given up.

6. The Plan as proposed is fair and provides equitable treatment to dissenting Classes. In essence, to meet this standard, the Plan proponent must meet the requirements of the Absolute Priority Rule. The Debtor has met this standard as set forth above.

The UCC objects to the Plan principally because it believes that the Debtor has not explained the \$3,000,000 loss. This objection was relayed to all of the Creditors and was a major reason for the negative vote of the Unsecured class. The Debtor believes that the letter by the UCC Attorney was improper and prejudicial to the voting process for two reasons:

First, the issue of explanation of the loss is not a Confirmation issue, but a Discharge issue. The Liquidating Plan would go forward regardless of whether or not the Debtor receive a Discharge. The UCC claims that it has filed a Discharge Complaint under 11 USC 727. This litigation will determine whether the Debtor can explain where the assets went and whether the Debtor kept records sufficient to receive the Discharge. This action has nothing to do with 11

USC 1129, and it was improper to raise the issue to taint the vote. The result of a 727 action will not determine how the assets are distributed to the Unsecured Creditors. The Unsecured Creditors were led to believe that their vote for the Plan would be an acceptance of the Debtor's prior actions and waive any claim to object to discharge, which was not true. The UCC actions misled the Creditors.

Next, the UCC letter said that the Plan should be rejected because the Debtor retains control over the liquidation. The UCC failed to disclose that it took the position with the Debtor that the only acceptable alternative was conversion to Chapter 7. The UCC failed to disclose that the Debtor advised them that the Plan would be modified to appoint an Independent Liquidator empowered to make all decisions regarding Preferences and other collection actions. The Independent Liquidator would also be in control of the Assets. This proposal was rejected out of hand. The UCC had a duty to relay the entire situation to the Unsecured Creditors, and it failed to do so. The same is true of the objection as to fair and equitable treatment. The UCC does not want this case to be continued under Chapter 11 and instead wants it converted to Chapter 7. The Committee does not say how the creditors are benefited by a conversion when the Debtor's Plan could provide for an Independent Person to perform the duties of a Liquidator. The UCC should have advised the Class Members of this possibility.

7. The Debtor's Discharge will be governed by the Confirmation Order. The Debtor assumes that the Order will take into account the existence of Adversary Proceedings regarding Discharge and the Dischargeability of certain debts. This is not grounds to deny Confirmation.

8. The Debtor will testify regarding the averments set forth herein. The

Debtor proposes to introduce the letter from the UCC's attorney, as well as the Amended Disclosure Statement, and files and proceedings herein.

Dated this 27th day of September, 2004.

FLUEGEL, HELSETH, MCLAUGHLIN,
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