

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

James Michael Mulvihill  
Kathleen Marie Mulvihill  
Debtor(s).

SIGNATURE DECLARATION

Case No. 04-34446-GFK

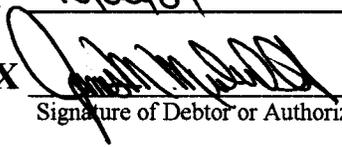
- PETITION, SCHEDULES & STATEMENTS  
 CHAPTER 13 PLAN  
 SCHEDULES AND STATEMENTS ACCOMPANYING VERIFIED CONVERSION  
 AMENDMENT TO PETITION, SCHEDULES & STATEMENTS  
 MODIFIED CHAPTER 13 PLAN  
 OTHER (Please describe: Debtors Reply to Motion For Conversion of Chap. 13 to Chap. 7 & Memorandum )

I [We], the undersigned debtor(s) or authorized representative of the debtor, *make the following declarations under penalty of perjury:*

- The information I have given my attorney and provided in the electronically filed petition, statements, schedules, amendments, and/or chapter 13 plan, as indicated above, is true and correct;
- The information provided in the "Debtor Information Pages" submitted as a part of the electronic commencement of the above-referenced case is true and correct;
- [individual debtors only] If no Social Security Number is included in the "Debtor Information Pages" submitted as a part of the electronic commencement of the above-referenced case, it is because I do not have a Social Security Number;
- I consent to my attorney electronically filing with the United States Bankruptcy Court my petition, statements and schedules, amendments, and/or chapter 13 plan, as indicated above, together with a scanned image of this Signature Declaration and the completed "Debtor Information Pages," if applicable; and
- [corporate and partnership debtors only] I have been authorized to file this petition on behalf of the debtor.

Date: 10/22/04

X

  
Signature of Debtor or Authorized Representative

James Michael Mulvihill  
Printed Name of Debtor or Authorized Representative

X

  
Signature of Joint Debtor

Kathleen Marie Mulvihill  
Printed Name of Joint Debtor

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

---

In re:

*James M. Mulvihill and  
Kathleen M. Mulvihill,*

BKY: 04-24446-GFK  
Chapter 13 Case

Debtors.

---

**DEBTOR'S REPLY TO MOTION FOR CONVERSION OF CHAPTER  
13 CASE TO CHAPTER 7 CASE AND MEMORANDUM**

TO: All parties in interest pursuant to Local Rule 9013-3

1. Debtors, James M. Mulvihill and Kathleen M. Mulvihill, oppose the motion of the Chapter 13 Trustee for the relief of Conversion of Chapter 13 Case to Chapter 7 case, and seek the dismissal of this case as a matter of right under U.S.C. § 1305(b).
2. This response is served electronically to the trustee, parties and court.
3. The U.S. Trustee's case facts as recited in paragraphs 4, 5, 6, 7, 8, 9 and 10 is not disputed.
4. The narrative of the U.S. Trustee is deficient because it lacks these relevant background facts:
  - (a) The debtors never wanted to file bankruptcy at all, but felt pressured into it by the recalcitrance and extreme aggressiveness of certain creditors who were within days of wage garnishment of Mr. Mulvihill.
  - (b) Most egregiously, the Chapter 13 Trustee neglects to mention the single most pertinent fact in its motion attempting to deny the debtors their rights to voluntarily dismiss under 11 U.S.C. § 1305(b)...they have never filed bankruptcy before.
  - (c) The debtors also do indeed live apart, and have since Mrs. Mulvihill was assaulted and harassed at her former employment, resulting in her marital difficulty, and her inability to work, with a continuing arm injury, and therefore also a lack of income.

- (d) Mrs. Mulvihill remains unemployed to this day, and in fact is still traumatized, and physically injured, and does not anticipate being able to work for the foreseeable future. Hence the need for the funds of her financial settlement/recovery, which in fact appear substantially less than required.
  - (e) Further, the home that Mrs. Mulvihill lives in, has in fact, been for sale for more than 12 months, and only now has received an offer...one day before the scheduled hearing Sept. 15<sup>th</sup>. Debtor Mr. James Mulvhill informed counsel of that change of circumstance.
  - (f) This prospective sale would have relieved the debtors of the associated debt service of the mortgage and the home maintenance costs associated. The debtors would be either able to substantially reform their plan upward or just dismiss outright and face their creditors with the renewed capacity to repay them much more efficiently. The debtors, if allowed to dismiss, which is their right, expect 100% payment to creditors, so long as the overhead of bankruptcy is alleviated.
  - (g) Hence, the wish of the debtors to simply dismiss the case. It was never intended by them to violate any creditor's rights or bankruptcy rules, but they could not timely make an office appearance to sign the papers until the Monday after the missed 341 meeting.
5. Because the case was commenced in an abrupt, hurried fashion, due to impending, actually imminent, wage garnishments from two creditors, they filed a partial petition. The garnishments would have put all properties at risk.
6. The debtor's hurried recitation of facts pursuant to the first schedule resulted in error in Schedule A, and B. To wit: an inadvertently misstated homestead equity in the home which debtor James M. Mulvihill resides in; and an inaccurate, assumed, description of Mrs. Mulvihill's sexual harassment settlement. The debtors, upon later, more careful review of the schedules they had signed, alerted counsel to the two errors, who Amended the Schedule C accordingly to reflect the following:
- (a) upward market valuation of that homestead which they then signed Sept. 8<sup>th</sup>, 2004, (in the approximate amount of \$17,000.00) and
  - (b) the revision in the characterization of the sexual harassment suit recovery, deleting all references to apportionments in the recovery, such infliction of emotional distress, etc. It was a recovery which was made without concern by the debtor for how they were apportioned between any specific damages whatsoever, which counsel had improperly assumed in the

earliest Schedules. Lost future earnings was foremost in her decision.

7. With regard to the Movant's Paragraph 9, respondents agree with the U.S. Trustees application of *In re Johnson*, 375 F.3d 668 (8<sup>th</sup> Cir. 2004). E.g., that Minnesota debtors who share an ownership interest in more than one parcel of real estate can claim an exemption for their ownership interest in a parcel of real property they use as a residence under 11 U.S.C. § 522(d)(1), but as to the interest of another party with joint ownership, are limited to an exemption claim under 11 U.S.C. § 522(d)(5), within the monetary limits imposed by that section of the Statute. But as applied in the current case, *that does not reduce the exemption proportionately simply by fact of percentage ownership. The exemption is reasonably meant to protect flexibly to the whole extent of the limit.* And even if the Court disagrees, there is no deficiency of Kathleen Mulvihill's (d)(5) exemption to cover any exemption shortfall. Kathleen Mulvihill has essentially unused (d)(5) exemption, and has more than enough to cover the alleged gap on Mr. Mulvihill's residence. I.e., there is no non-exempt real estate asset, here, much as the U.S. Trustee strains to arrive at that conclusion in both the motion and memorandum.
8. Debtors concur with the facts of Movant's Paragraphs 10 and 11. But they expressly disagree that Mr. Mulvihill is not entitled to exempt an interest in a settlement in favor of Mrs. Mulvihill, although not a named party in the pleadings. After all, he has been the one supporting her through the entire recovery period, and even now, after that recovery. His financial position is seriously eroded along with hers, and his claim to such recovery sounds in common law as a commingled marital asset, analogous to community property.
9. Debtor's dispute the conclusion of Movant's argument in Paragraph 12. The law is correctly stated in part, that an exemption is allowed for a "payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. § 522(d)(E). Debtor's settlement **in fact** made no express apportioning "attributable to infliction of emotional distress, pain and suffering, general damages, special damages, etc." Absolutely none of those particular damages were "apportioned" in the debtor's decision-making process. Hence, the U.S. Trustee gets the situation precisely reversed...when the Trustee contends that "[t]here is no evidence in the record to show that the entire net settlement is due to lost future earnings..." This is more than merely unfounded, the schedules were expressly changed...at the instigation of the debtors themselves... to reflect the facts more accurately. In fact, there is no evidence to support

the Trustee's iteration of possible apportionment, however, plausible. The sole reason debtor Kathleen Mulvihill settled was because she needed money for her continued reasonable support, due to her continuing, and ongoing, lost earnings. Immediate and future lost earnings was why she settled. Accordingly, and contrary to the speculative posture of the Chapter 13 Trustee, debtors believe it is not non-exempt. The argument that debtors have supplied "no evidence in the record to support the conclusory statement that the funds are necessary for the support of Mrs. Mulvihill. The challenge of the Chapter 13 Trustee is simply wrong. The settlement agreement's terms require complete confidentiality, and should be sequestered pursuant to this Court.

10. Respondents do not dispute the simply factual paragraphs of 13, 14, 15, 16, 17 and 18.
11. Debtors object entirely to paragraph 19 of the Motion of the Chapter 13 Trustee. There existed no non-exempt assets.
12. Debtors object entirely to paragraph 20 of the Motion of the Chapter 13 Trustee. It presumes that dissipation of assets is the objective of the debtors herein. It presumes that the debtors are not also concerned, out of enlightened self-interest, for the best interests of their creditors. Such presumptions may be warranted with serial filers and multiple conversions...as in *Molitor v. Eidson (In re Molitor)*, 76 F3d 218 (8<sup>th</sup> Cir. 1996). The Mulvihills, by contrast, have never filed before, didn't want to this time, and when they noticed flawed schedules, endeavored to see them corrected for the sake of full disclosure, and finally, when presented with a final opportunity to make creditors whole if they could only dismiss and do their own "liquidation"...sought to do so. Only to be thwarted...and punished... by what appears to be a grasping Trustee's Office.
13. Paragraph 21 accurately states 11 U.S.C. § 1307(c) regarding request of a party in interest for conversion of a case under Chapter 13 to Chapter 7, or dismissal it, whichever is in the best interests of creditors and the estate, *for cause...*
14. The Trustee is apparently, in Paragraph 22, claiming to be that party, and speculatively implying without specifying that there is the prerequisite "cause" to do so. There is not.
15. And there is also no factual legal basis in this case for the over-reach of the Chapter 13 Trustee to seek to deny the debtors their right to an elective option of dismissal. That element of debtor's election was expressly put into the Code in a number of ways: Under 11 U.S.C. §1307(a), the debtor

may convert a Chapter 13 case to a Chapter 7 at any time. Under 11 U.S.C. §1307(b), the debtor has the right, if the Chapter 13 case had not been converted from another Chapter under §§ 706, 1112, or 1208, to the dismissal of the case at any time.

16. It is only in the 8th Circuit, where some dispute exists as to a debtor's right to dismiss when faced with a motion to convert. Most reviewing Circuit Courts have held that a Chapter 13 debtor's right to voluntary dismissal under §1307(b) is absolute. See *In re Nina Marie Barbieri*, 199 F.3d 616 (2<sup>nd</sup> Cir. 1999), *In re Patton*, 209 B.R. 98 (Bankr. E.D. Tenn. 1997) and *In re Harper-Elder*, 184 B.R. 403 (Bankr. D.D.C. 1995). These Courts note that Section 1307(b) unambiguously requires that if a debtor “at any time” moves to dismiss a case that has not previously been converted, the court “shall” dismiss the action. The term “shall,” as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court. See *Anderson v. Yungkau*, 329 U.S. 482,485 (1947).
17. The Chapter 13 Trustee mistakenly relies upon *Molitor* for an over-broad “trump” of all 1305(b) motions, and appears to be attempting to disregard the fact-specifics essential to limiting that holding. See discussion in *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996). *Molitor* held that §1307(c) (authorizing conversion for cause) curtails a right to voluntary dismissal. *Molitor* held that a court could convert a Chapter 13 to 7, notwithstanding a prior request for dismissal, *if the case was filed in bad faith*. The court held that multiple Chapter 13 petitions to stay foreclosure sales constituted bad faith justifying the conversion.. The maxim, that hard cases make bad law is proved in *Molitor*. In *Molitor* you had multiple conversions, and an express design to continue to defeat, not repay, creditors. In this case, the Mulvihills have never filed for bankruptcy before. They didn't start in Chapter 7, convert to 13, etc. They started into Chapter 13, and only under extreme duress, and at the bitter extremity. They were scheduling to repay what they could. And they were assertively correcting schedules. Then when finally a late opportunity to actually cure their debts materialize prior to the 341 Meeting, the Mulvihills sought to voluntarily dismiss their Chapter 13 petition, and take this action knowingly forfeiting the protections of the automatic stay. This is a recognized quid pro quo for the debtor's 'election'. See, e.g., *Martir Lugo v. De Jesus Saez (In re De Jesus Saez)*, 721 F.2d 848, 851 (1<sup>st</sup> Cir. 1983); *In re Doherty*, 229 B.R. 461, 463 (Bankr. E.D. Wash. 1999); *Harper-Elder*, 184 B.R. at 407; *In re Merritt*, 39 B.R. 462, 464 (Bankr. E.D. Pa. 1984). And it is interesting that the Chapter 13 Trustee belabors the best interest of the creditors herein, when these same creditors will have their full remedies available under Minnesota law as soon as the case is dismissed. The comparative yield to the creditors is purely speculative on their part, as between voluntary dismissal and coerced Chapter 7. And

even so, the best law, the most applicable to the current case with the Mulvihills, is that of *In re Barbieri*, 199 F.3d 616 (2<sup>nd</sup> Cir. 1999), where there was a property owner with a similar opportunity to reposition itself advantageously for all concerned by selling property. The Trustee has not proven that a proper “cause” exists for conversion under any circumstances. No bad faith. No best interests of creditors. But the Chapter 13 Trustee has made unfounded surmises that are somewhat demeaning. The Mulvihills have made a legitimate and sensible decision to dismiss, wherein all creditors should benefit. Furthermore, they are entitled to their dignity, and their dismissal should not be denied further.

WHEREFORE, the Debtors move the court for an order dismissing this case forthwith.

Ross & Associates, P.A.

Dated: October 21, 2004

Signed: /e/ Paul Elliot Ross #0204213  
Counsel for Chapter 13 Debtors  
Valley Professional Building  
287 Marschall Road, Suite 203-A  
Shakopee, Minnesota 55379  
(952) 448-3333

## VERIFICATION OF DEBTORS

We, the undersigned debtors, respondents in the named proceedings, and Applicants for Dismissal, declare under penalty of perjury that the foregoing is true and correct.

Executed: October, 22, 2004  
and

Signed: /e/James M. Mulvihill

Executed: October, 22, 2004

Signed: /e/Kathleen M. Mulvihill

I, Paul Elliot Ross, counsel of the Chapter 13 Debtors, respondents and Applicants for Dismissal, further declare under penalty of perjury that the foregoing is true and correct, to the best of his knowledge.

Executed: October 22, 2004

Signed: /e/ Paul Elliot Ross

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

---

In re:

*James M. Mulvihill and  
Kathleen M. Mulvihill,*

BKY: 04-24446-GFK  
Chapter 13 Case

Debtors.

---

**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Paul E. Ross, of Ross & Associates, P.A., representative of debtors herein, declare that on October 22, 2004, I served the attached DEBTOR'S REPLY TO MOTION FOR CONVERSION OF CHAPTER 13 CASE TO CHAPTER 7 CASE AND MEMORANDUM, and proposed Order for Dismissal, on the individuals listed below, in the manner prescribed.

**By facsimile transmission:**

United States Trustee  
612-664-5516

Jasmine Z. Keller;  
Chapter 13 Standing Trustee  
612-338-4529

William J. Egan Esq.  
(952) 836-2771

**By Personal Service**

James M. Mulvihill  
921 South Elm Street  
Belle Plaine, MN 56011

Kathleen M. Mulvihill  
20529-485<sup>th</sup> Street  
McGregor, MN 55760

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October, 22, 2004.

/e/ Paul Elliot Ross

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

---

In re:

*James M. Mulvihill and  
Kathleen M. Mulvihill,*

BKY: 04-24446-GFK  
Chapter 13 Case

Debtors.

---

**ORDER DISMISSING CHAPTER 13 CASE**

At St. Paul, \_\_\_\_\_, 2004.

The above-entitled matter came before the undersigned United States Bankruptcy Judge on the Application of the Chapter 13 Debtors to Dismiss their case pursuant their right of election to so dismiss under 11 U.S.C. § 1305(b).

Appearances were noted in the minutes.

Upon the verified motion and attachments, the arguments of counsel, all of the files, records and proceedings herein, and upon findings of fact and conclusions of law, if any, read into the record.

IT IS ORDERED:

The Debtor's Application to Dismiss is GRANTED; this Chapter 13 case is forthwith dismissed.

---

Gregory F. Kishel  
Chief United States Bankruptcy Judge