

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions for Posting**

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**Bankruptcy Caption: In re Ted Mlsna**

Bankruptcy No.            01 B 03732

**Adversary Caption: The Remington Tech Corporation, Inc., v. Ted Mlsna**

Adversary No. 01 A 00422

**Date of Issuance: 05/31/05**

**Judge: John H. Squires**

**Appearance of Counsel:**

Attorney for Movant or Plaintiff: Brian J. Wanca

Attorney for Respondent or Defendant: Douglas Tibble

Trustee: Gina Krol

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

IN RE:	)	Bankruptcy No. 01 B 03732
	)	Chapter 7
TED MLSNA,	)	Judge John H. Squires
	)	
Debtor.	)	
	)	
<hr/>	)	
THE REMINGTON TECH	)	Adv. No. 01 A 00422
CORPORATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TED MLSNA,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

This matter comes before the Court pursuant to a Memorandum Opinion and Order dated February 15, 2005, from the United States District Court for the Northern District of Illinois, which remanded in part for further findings by this Court on one discrete issue: whether Ted Mlsna (the “Debtor”) was a party to a certain factoring agreement (the “Agreement”) in his individual capacity by executing an eighth amendment (the “Eighth Amendment”) thereto and thus bound by paragraph six of the Agreement and liable for the attorneys’ fees and costs incurred by The Remington Tech Corporation, Inc. (the “Creditor”). For the reasons set forth herein, the Court finds that the Debtor executed the Eighth Amendment to the Agreement in his individual capacity and thus became personally liable as an individual guarantor thereunder. Accordingly, the Debtor is liable for the Creditor’s attorneys’ fees and costs in the amount of

\$62,016.92 pursuant to paragraph six of the Agreement.

### **I. JURISDICTION AND PROCEDURE**

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I) and (O).

### **II. FACTS AND BACKGROUND**

Most of the relevant facts and background are contained in an Opinion this Court authored. *See Remington Tech Corp., Inc. v. Mlsna (In re Mlsna)*, Nos. 01 B 03732, 01 A 00422, 2003 WL 21785648 (Bank. N.D. Ill. July 31, 2003). Among other things, the Court found that the state court judgment awarded to the Creditor against the Debtor in the sum of \$312,849.46, plus reasonable attorneys' fees and costs, was non-dischargeable under 11 U.S.C. § 523(a)(6). On appeal, the District Court affirmed the finding of non-dischargeability, but ordered a remand for a specific finding on the issue of "whether [the Debtor] was a party to the Agreement in his individual capacity and whether he is thus bound by paragraph 6 of the Agreement." *Remington Tech Corp., Inc. v. Mlsna*, No. 03 C 7373, slip op. at 10 (N.D. Ill. Feb. 15, 2005). The Court set a status hearing on April 15, 2005, and afforded the parties the opportunity to supplement the trial record. The Creditor's attorney attended the hearing and provided a supplemental affidavit, exhibits and a brief. The Debtor did not attend the hearing or file any papers.

### **III. DISCUSSION**

The Creditor submitted an affidavit from one its attorneys, along with records that show the time incurred by the attorneys who rendered legal services on this matter, including the time expended in the prior state court litigation against the Debtor, as well as the expenses incurred. The fees and expenses sought through April 18, 2005 are \$57,775.00 and \$4,241.92, respectively, which total \$62,016.92. The Creditor also filed a brief in support of the requested fees and expenses that includes relevant exhibits and trial excerpts from the April 11, 2003 trial held in this matter.

The relevant exhibits submitted by the Creditor include a copy of the Agreement executed on August 7, 1996 by Teleresources, Inc. (“Teleresources”) through its president, Hans Herrmann (“Herrmann”). *See* Ex. A. Herrmann personally executed the Agreement as guarantor of Teleresources’ obligations to the Creditor, which included the Creditor’s attorneys’ fees and costs under paragraph six. *Id.* It is undisputed that the Debtor did not sign the original Agreement. Rather, he executed the Eighth Amendment to the Agreement on August 17, 1998. *See* Ex. B. The Eighth Amendment was signed by Herrmann in three capacities: as president of CCS/The Phone Stop; as president of Teleresources; and as guarantor. *Id.* The Debtor, however, signed the Eighth Amendment without any reference to the capacity in which he executed it. That ambiguity led to the instant dispute between the Debtor and the Creditor: whether the Debtor intended to act solely in his capacity as an officer of Teleresources when he signed the Eighth Amendment as he contends, or whether he was a signatory on the Eighth Amendment as an individual guarantor and therefore personally liable for the attorneys’ fees and expenses under paragraph six of the Agreement as the Creditor contends.

The Creditor also furnished portions of the testimony adduced at the trial. *See* Ex. C.

Herrmann testified to the circumstances surrounding the execution of the Eighth Amendment. To his understanding, both he and the Debtor acted as guarantors at the behest and understanding of the Creditor's president, Roland Kaeser. *Id.* at pp. 19-20, 23-25 & 67-68. Kaeser testified that he insisted on the Debtor signing the Eighth (and last) Amendment, and that it was intended and agreed that the Debtor would be an equal party with Herrmann. *See* Ex. D at pp. 43-44. Kaeser recalled the Debtor saying that his execution of the Eighth Amendment would not make much difference because he transferred everything into his wife's name. *Id.* at pp. 44-45. The obvious inference drawn from this admission is that the Debtor knew he was bound by the Agreement and personally liable thereunder. Further, this evidence supports the Creditor's position that the Debtor was personally liable under the Eighth Amendment which expressly stated that "[a]ll terms and conditions to the original [A]greement are without change." *See* Ex. B.

The Court finds that Kaeser's testimony is biased in favor of the Creditor, like the Debtor's self-serving testimony is biased in his own favor to support his contention that he never intended to become personally liable when he signed the Eighth Amendment to the Agreement. The Court, however, finds that Herrmann's testimony tips the weight of the evidence in favor of the Creditor's position that the Debtor became personally liable under the Agreement when he signed the Eighth Amendment. Herrmann was the former business associate who worked closely with the Debtor in the efforts to save Teleresources' business operations. He demonstrated no bias at trial in favor of or against either party. Thus, despite the ambiguity regarding the exact capacity in which the Debtor signed the Eighth Amendment, the Court concludes that the preponderance of the credible evidence supports the finding that he signed

the Eighth Amendment in his individual capacity. Accordingly, the Debtor was personally liable under the Agreement.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court finds that the Debtor was a party to the Agreement in his individual capacity by executing the Eighth Amendment thereto. Thus, he was bound by paragraph six of the Agreement and liable for the attorneys' fees and costs incurred by the Creditor. The Creditor is awarded a supplemental judgment for its reasonable attorneys' fees and costs incurred in this matter totaling \$62,016.92.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

**ENTERED:**

**DATE:** \_\_\_\_\_

\_\_\_\_\_  
**John H. Squires**  
**United States Bankruptcy Judge**

cc: See attached Service List