

Tracy Hope Davis  
United States Trustee for Region 2  
Office of the United States Trustee  
201 Varick Street, Suite 1006  
New York, New York 10014  
Telephone: 212-510-0500  
William E. Curtin (WC-1974)

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

**HEARING DATE: November 20, 2013**  
**HEARING TIME: 3:00 p.m.**

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In re	:	Chapter 11
	:	
RITHIMNA REALTY LLC,	:	
	:	Case No. 13-45017 (CEC)
	:	
	:	
Debtor.	:	<u>NOTICE OF MOTION AND MOTION</u>
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PLEASE TAKE NOTICE that upon the within motion and concurrently filed memorandum of law and declaration, Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee") will move before the Honorable Carla E. Craig, Chief United States Bankruptcy Judge, in the United States Bankruptcy Court, Eastern District of New York, 271 Cadman Plaza East, Brooklyn, New York, **on November 20, 2013, at 3:00 p.m.**, or as soon thereafter as counsel can be heard, for entry of an order directing dismissal of this case or, in the alternative, conversion of this case to chapter 7, and for such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that any responsive papers should be filed with the Court and served on the United States Trustee at 201 Varick Street, Suite 1006, New York, New York 10014, to the attention of William E. Curtin seven (7) days prior to the hearing. Such papers shall conform to the Federal Rules of Civil Procedure and identify the party on whose

behalf the papers are submitted, the nature of the response, and the basis for such response.

WHEREFORE, the United States Trustee respectfully requests that this Court enter an order dismissing this case or, in the alternative, converting this case to chapter 7, or grant such other relief as the Court deems just, fair, and equitable.

Dated: New York, New York  
October 25, 2013

TRACY HOPE DAVIS  
UNITED STATES TRUSTEE  
FOR REGION 2

By:     /s/ William E. Curtin      
William E. Curtin (WC-1974)  
Trial Attorney  
201 Varick Street, Suite 1006  
New York, New York 10014  
212-510-0500

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

**Hearing Date: November 20, 2013**  
**Hearing Time: 3:00 p.m.**

-----x

In re:

Chapter 11

RITHIMNA REALTY LLC,

Case No. 13-45017 (CEC)

Debtor.

-----x

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION  
OF THE UNITED STATES TRUSTEE TO DISMISS THIS  
CHAPTER 11 CASE OR, IN THE ALTERNATIVE, TO  
CONVERT CASE TO CHAPTER 7**

**TRACY HOPE DAVIS**  
**UNITED STATES TRUSTEE**  
201 Varick Street, Suite 1006  
New York, New York 10014  
Telephone: 212-510-0500

William E. Curtin, Esq.  
Of Counsel

Tracy Hope Davis, United States Trustee for Region 2 (the “United States Trustee”), respectfully submits this memorandum in support of her motion (the “Motion”) for an order, pursuant to 11 U.S.C. § 1112(b), dismissing the chapter 11 case of Rithimna Realty LLC (the “Debtor”) or, in the alternative, converting the chapter 11 case to chapter 7. In support of the Motion, the United States Trustee represents and alleges as follows:

### **I. INTRODUCTION**

The Debtor’s case should be dismissed, under 11 U.S.C. § 1112(b), as it has no intent to reorganize and does not take its obligations as a chapter 11 debtor seriously. Since the Debtor’s case was filed on August 15, 2013, it has completely failed to comply with its obligations under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Debtor failed to appear for the initial debtor interview with the United States Trustee or attend the meeting of creditors. To date, the Debtor has not filed its August or September 2013 operating reports. The Debtor has also failed to provide the United States Trustee with proof that it has insurance in place or that it opened a debtor-in-possession bank account. The Debtor’s failure to attend the meeting of creditors, provide documents to the United States Trustee, appear at the initial debtor interview and meeting of creditors, file monthly operating reports and maintain insurance constitute cause to convert or dismiss the case under Sections 1112(b)(4)(C), (F), (G) and (H).

The Court should dismiss the Debtor’s case because dismissal is in the best interest of creditors and the estate. The Debtor does not appear to have priority or general unsecured creditors and the Debtor’s lone secured creditor will be able to exercise its state law remedies against the Debtor outside of bankruptcy.

## II. STATEMENT OF FACTS

1. On August 15, 2013 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition (the “Petition”) seeking relief under chapter 11 of the Bankruptcy Code. ECF No. 1.

2. The United States Trustee has not appointed a trustee, and the Debtor remains in control and possession of its assets as a debtor-in-possession. See Declaration of William E. Curtin in Support of the United States Trustee’s Motion, dated October 25, 2013 (the “Curtin Decl.”), ¶ 3.

3. The United States Trustee was unable to form a committee of unsecured creditors. See Curtin Decl., ¶ 4.

### **Assets and Liabilities**

4. The Debtor did not file a complete set of schedules or a statement of financial affairs. ECF Doc. No. 1.

5. The Debtor did file schedules D, E, and F, which indicate that the Debtor has one secured creditor, Archer Capital Fund LP, and no priority or general unsecured creditors. ECF Doc. No. 1, Schedules D, E and F.

6. The Debtor has not yet requested that the Court set a last day to file proofs of claim and no claims have been filed in the Debtor’s case. See Curtin Decl., ¶ 7.

### **Deficiencies in Debtor’s Case**

7. On August 16, 2013, the United States Trustee sent the Debtor a letter (the “August 16<sup>th</sup> Letter”) enclosing a copy of the United States Trustee Operating Guidelines (the “Guidelines”). See Curtin Decl., ¶ 8. The Guidelines outline the requirements for debtors-in-

possession, including the obligations to open a debtor-in-possession bank account, provide proof of insurance and file monthly operating reports. Id.

8. The Debtor has failed to provide the United States Trustee with proof of insurance or the opening of a debtor-in-possession bank account. See Curtin Decl., ¶ 9.

9. As of this date, the Debtor has failed to file monthly operating reports for August 2013 and September 2013. See Curtin Decl., ¶ 10. The October 2013 monthly operating report is due on the return date of this Motion. Id.

10. The Office of the United States Trustee scheduled an initial debtor interview, in accordance with section 1116(2) of the Bankruptcy Code, for September 5, 2013 (the “Initial Debtor Interview”). The Debtor did not appear for the Initial Debtor Interview. See Curtin Decl., ¶ 11.

11. The meeting of creditors pursuant to Section 341 was held on September 23, 2013. See Curtin Decl., ¶ 12. The Debtor failed to appear for the section 341 meeting of creditors. Id.

### **III. ARGUMENT**

#### **A. There is Cause to Convert or Dismiss this Case under 11 U.S.C. § 1112(b).**

Section 1112(b) provides, in part, that:

(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1) (2010).

Section 1112(b)(4) lists provides fifteen examples of cause, including

- (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

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- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341(a); [and]
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee;

11 U.S.C. § 1112(b)(4).

The list of factors is non exclusive. In re The 1031 Tax Group, LLC, 374 B.R. 78, 93 (Bankr. S.D.N.Y. 2007). See also In re State Street Assoc., L.P., 348 B.R. 627, 639 (Bankr. N.D.N.Y. 2006) (noting in pre-BAPCPA case that amended 1112(b) contains non-exclusive factors to be considered in determining whether cause exists to convert or dismiss a case). A party need not demonstrate that all the elements of “cause” can be met. See In re TCR of Denver, LLC, 338 B.R. 494, 500 (Bankr. D. Colo. 2006). The bankruptcy court has wide discretion to determine if cause exists and how to ultimately adjudicate the case. 1031 Tax Group, 374 B.R. at 93; cf. In re C-TC 9th Ave. P’ship, 113 F.3d 1304, 1311 (2d Cir. 1997) (bankruptcy Court may dismiss Chapter 11 filing on motion or sua sponte upon a finding that the filing was in “bad faith” even without consideration of factors set out in section 1112(b).

**1. The Debtor has Failed to Provide Proof of Insurance.**

The failure to maintain appropriate insurance constitutes cause for the dismissal of the Debtor’s case. 11 U.S.C. § 1112(b)(4)(C); Derivium Capital LLC v. U.S. Trustee (In re Derivium Capital LLC), 2006 WL 1317021 (S.D.N.Y. May 12, 2006) (lack of insurance was one factor supporting court’s decision to convert case to chapter 7); In re Daniels, 362 B.R. 428

(Bankr. S.D. Iowa 2007) (attorney's failure to maintain malpractice insurance was cause to convert case to chapter 7).

In the landmark case of Reading Co. v. Brown, 391 U.S. 471, 783-484, 88 S.Ct. 1759, 1766 (1968), the United States Supreme Court held that post-petition tort claims are entitled to administrative priority. Courts in the Second Circuit have held that Reading Co. v. Brown remains viable under sections 503 and 507 of the Bankruptcy Code. In In re Enron, 2003 WL 1562201, (Bankr. S.D.N.Y. March 17, 2003), the Bankruptcy Court considered whether a claim based on a post-petition conversion of a commodity is entitled to administrative expense priority. The Bankruptcy Court adopted the holding of Reading Co. v. Brown and held that, "claims based on tort resulting from the post-petition operation of a debtor's business are entitled to payment prior to payment of those creditors who were meant to benefit from the business's continued operation." Id. at \*8.

The Debtor has failed to provide the United States Trustee with proof of insurance. See Curtin Decl., ¶ 9. Therefore, there is cause to dismiss the Debtor's case under Section 1112(b)(4)(C).

**2. The Debtor Has Failed Provide Proof that It Opened a Debtor-In-Possession Bank Account.**

Section 345 of the Bankruptcy Code requires that a debtor deposit its money in a bonded bank account. 11 U.S.C. § 345. The Debtor's failure to comply with Section 345 constitutes cause for the dismissal of the case. See e.g. In re Columbia Gas Sys. Inc., 33 F.3d 294 (3d Cir. 1994) (requirement of section 345 is mandatory). Notwithstanding the United States Trustee's request, the Debtor has failed to produce documents to the United States Trustee indicating that it has opened a debtor-in-possession bank account. See Curtin Decl., ¶ 9. Therefore, there is cause to dismiss the Debtor's case under Section 1112(b)(4)(H).



### **3. The Debtor Has Failed to File Monthly Operating Reports.**

Pursuant to E.D.N.Y. LBR 2015-1, the Debtor is required to file monthly operating reports for each and every month that the Debtor is in chapter 11. See E.D.N.Y. LBR 2015-1. The reports must be filed no later than the twentieth day of the following month. Id. The Debtor's failure to file monthly operating reports demonstrates a disregard for its responsibilities as a debtor-in-possession. See In re Marvel Entertainment, Inc., 140 F.3d 463, 474 (3d Cir. 1998) (debtors have a fiduciary duty of open, honest and straightforward disclosure to the Court and creditors). The Debtor's failure to fulfill its fiduciary obligations denies creditors access to important financial information regarding the Debtor's financial affairs. "Timely and accurate financial disclosure is the lifeblood of the Chapter 11 process." In re Berryhill, 127 B.R. 427, 433 (Bankr. N.D. Ind. 1991) (failure to file operating reports constitutes cause for dismissal or conversion of chapter 11 proceeding); see also In re Roma Group, Inc., 165 B.R. 779, 780 (S.D.N.Y. 1994) (citing In re Berryhill); In re Tornheim, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995) (debtors' failure to file reports for ten months warranted conversion or dismissal).

As of this date, the Debtor has failed to file monthly operating reports for August 2013 and September 2013. See Curtin Decl., ¶ 10. The October 2013 monthly operating report is due on the return date of this Motion. Id. In this case, the Debtor's failure to timely file monthly operating reports has deprived the Court, the United States Trustee and the creditors of the ability to adequately monitor this case. The Debtor's unexcused failure to timely file these operating reports constitutes cause for the dismissal or conversion of the Debtor's case. See 11 U.S.C. § 1112(b)(4)(F).

### **4. The Debtor Failed to Appear at the Initial Debtor Interview.**

The United States Trustee conducts initial debtor interviews in all chapter 11 cases. Under Section 1112(b), the Debtor's failure to attend meetings reasonably requested by the

United States Trustee constitutes cause for conversion or dismissal. 11 U.S.C. § 1112(b)(4)(H). The Debtor failed to appear for the Initial Debtor Interview with the United States Trustee, which was scheduled for September 5, 2013. See Curtin Decl., ¶ 11. The Debtor's failure to attend the Initial Debtor Interview constitutes cause for dismissal of the Debtor's case. 11 U.S.C. § 1112(b)(4)(H).

**5. The Debtor Failed to Attend the Meeting of Creditors.**

Section 343 of the Bankruptcy Code requires the Debtor to appear and to be examined at the 341 meeting. 11 U.S.C. § 343. The Section 341 meeting of creditors in this case was noticed for and held on September 23, 2013 at 11:00 a.m., but the Debtor failed to appear. See Curtin Decl., ¶ 12. The Debtor's failure to appear at the Section 341 meeting is cause for the dismissal of the Debtor's case. 11 U.S.C. § 1112 (b)(4)(G).

**B. There are No Unusual Circumstances Establishing that Conversion or Dismissal is not in the Best Interests of Creditors and the Estate.**

Under Section 1112(b)(2), after the movant shows cause, the burden shifts to the debtor and other parties in interest to show that there are "unusual circumstances establishing that conversion or dismissal is not in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(2). See also In re Gateway Access Solutions, Inc., 374 B.R. 556, 561 (Bankr. M. D. Pa. 2007) (after the movant shows cause, the burden shifts to the debtor to prove that there are unusual circumstances under Section 1112(b)(2)).

Section 1112(b)(2) provides that:

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that --

(A) there is a reasonable likelihood that a plan will be confirmed within the time frames established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)--

(I) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. § 1112(b)(2).

There are no unusual circumstances in this case that would establish that dismissal is not in the best interests of the creditors and the estate. There is no likelihood of plan confirmation within a reasonable time and no reasonable justification for the Debtor's breach of its fiduciary duties as a debtor in possession.

**C. Dismissal is in the Best Interests of Creditors and the Estate.**

Under 11 U.S.C. § 1112(b), the Court, in its discretion, must determine whether dismissal or conversion is in "the best interest of creditors or the estate." 11 U.S.C. § 1112(b). See also In re Gonic Realty Trust, 909 F.2d 624, 626-676 (1st Cir.1990) (the Bankruptcy Court has broad discretion to convert or dismiss a chapter 11 case). Under the facts, this case should be dismissed, rather than converted. The Debtor does not appear to have priority or general unsecured creditors and the Debtor's lone disclosed secured creditor will be able to exercise its state law remedies against the Debtor outside of bankruptcy. The Court should, therefore, dismiss this case.

**IV. NOTICE**

The United States Trustee will serve the Notice of Motion and this Memorandum of Law upon the Debtor and any parties who have filed Notices of Appearance in the case. Notice

of the Motion will be sent to all creditors through the Bankruptcy Noticing Center. The United States Trustee respectfully requests that this be deemed good and sufficient notice of the motion and the hearing scheduled herein, and that no other further notice is necessary or required.

**V. CONCLUSION**

Based on the foregoing, the United States Trustee respectfully requests that the Court enter an order granting this motion and dismissing this chapter 11 case, or in the alternative, converting the case to chapter 7, and granting such other and further relief as is just and proper.

Dated: New York, New York  
October 25, 2013

TRACY HOPE DAVIS  
UNITED STATES TRUSTEE  
FOR REGION 2

By: /s/ William E. Curtin  
William E. Curtin (WC-1974)  
Trial Attorney  
201 Varick Street, Suite 1006  
New York, New York 10014  
212-510-0500

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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	:	Case No. 13-45017 (CEC)
In re	:	
	:	
RITHIMNA REALTY LLC,	:	(Chapter 11)
Debtor.	:	
	:	
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DECLARATION OF WILLIAM E. CURTIN

Pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a trial attorney in the Office of the United States Trustee for Region 2. I am assigned to this matter by my office and as such, have knowledge and information about the Chapter 11 bankruptcy case of Rithimna Realty LLC (the “Debtor”). I submit this Declaration in support of the Motion of the United States Trustee to Dismiss This Case or, in the Alternative, Convert This Chapter 11 Case to Chapter 7, pursuant to 11 U.S.C. § 1112 (the “Motion”).

2. On August 15, 2013 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition (the “Petition”) seeking relief under chapter 11 of the Bankruptcy Code. ECF No. 1.

3. The United States Trustee has not appointed a trustee, and the Debtor remains in control and possession of its assets as a debtor-in-possession.

4. The United States Trustee was unable to form a committee of unsecured creditors.

**Assets and Liabilities**

5. The Debtor did not file a complete set of schedules or a statement of financial affairs. ECF Doc. No. 1, Petition.

6. The Debtor did file schedules D, E, and F, which indicate that the Debtor has one secured creditor, Archer Capital Fund LP, and no priority or general unsecured creditors. ECF Doc.

No. 1, Schedules D, E and F.

7. The Debtor has not yet requested that the Court set a last day to file proofs of claim and no claims have been filed in the Debtor's case.

**Deficiencies in Debtor's Case**

8. On August 16, 2013, the United States Trustee sent the Debtor a letter (the "August 16<sup>th</sup> Letter") enclosing a copy of the United States Trustee Operating Guidelines (the "Guidelines"). The Guidelines outline the requirements for debtors-in-possession, including the obligations to open a debtor-in-possession bank account, provide proof of insurance and file monthly operating reports.

9. The Debtor has failed to provide the United States Trustee with proof of insurance or the opening of a debtor-in-possession bank account.

10. As of this date, the Debtor has failed to file monthly operating reports for August 2013 and September 2013. The October 2013 monthly operating report is due on the return date of this Motion.

11. The Office of the United States Trustee scheduled an initial debtor interview, in accordance with section 1116(2) of the Bankruptcy Code, for September 5, 2013 (the "Initial Debtor Interview"). The Debtor did not appear for the Initial Debtor Interview.

12. The meeting of creditors pursuant to Section 341 was held on September 23, 2013. The Debtor failed to appear for the section 341 meeting of creditors.

I declare under penalty of perjury that the information contained in this Declaration is true and correct to the best of my knowledge.

New York, New York  
October 25, 2013

/s/ William E. Curtin  
William E. Curtin

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
 In re : Chapter 11  
 :  
 RITHIMNA REALTY LLC :  
 : Case No. 13-45017 (CEC)  
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 :  
 Debtor. :  
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**ORDER DISMISSING CASE**

Upon the motion of Tracy Hope Davis, United States Trustee for Region 2, filed on October 25, 2013 to dismiss this case, pursuant to 11 U.S.C. § 1112(b), and upon the hearing held before this Court on November 20, 2013, and it appearing that appropriate notice has been given, and cause existing for the relief requested, it is

ORDERED that the case of Rithimna Realty LLC, commenced under chapter 11 of the Bankruptcy Code, be and hereby is dismissed pursuant to 11 U.S.C. § 1112(b); and it is further

ORDERED, that the Debtor pay to the United States Trustee the appropriate sum required, if any, pursuant to 28 U.S.C. § 1930, within ten (10) days of the entry of this order and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements, if any, for the relevant period.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

-----X	:	
In re	:	Chapter 11
	:	
RITHIMNA REALTY LLC	:	
	:	Case No. 13-45017 (CEC)
	:	
	:	
Debtor.	:	
-----X	:	

**CERTIFICATE OF SERVICE**

STATE OF NEW YORK    )  
                                  :    ss  
COUNTY OF NEW YORK    )

I, William E. Curtin, hereby declare, under penalty of perjury under the laws of the United States of America, and pursuant to 28 U.S.C. § 1746, that on October 25, 2013, I caused to be served a copy of the within United States Trustee’s Memorandum of Law in Support of the Motion of the United States Trustee to Dismiss this Case or, in the Alternative, Convert This Case to Chapter 7 , accompanying Notice of Motion, Declaration and Proposed Order, by regular mail upon each of the parties listed on the attached service list by depositing a true copy of same in a sealed envelope, with postage pre-paid thereon, in an official depository of the United States Postal Service within the City and State of New York.

Dated: New York, New York  
October 25, 2013

S/ William E. Curtin  
William E. Curtin



SERVICE LIST

Rithimna Realty LLC  
48-02 25th Av.  
Suite 405  
Astoria, NY 11103