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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

THE NATIONAL SCRIP CENTER, INC.,

No. 04-11602

Debtor(s).

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Memorandum on Motion to Dismiss

The alleged debtor in this involuntary case, The National Scrip Center, Inc., “(NSCI”) has moved for dismissal. The sole issue ripe for adjudication is whether, as a matter of law, an involuntary petition can ever be properly brought against an eleemosynary entity. This forces the court to decide an issue which has festered unresolved, at least in this circuit, since the days of the Bankruptcy Act.

Eleemosynary institutions are protected from involuntary petitions if they are not “monied corporations.” 2 **Collier on Bankruptcy** (15th Ed. Rev.) ¶ 303.02[4][b]. NSCI was incorporated under California’s California Nonprofit Public Benefit Corporation Law. NSCI argues that establishing this fact is the beginning and the end of factual issues, and mandates dismissal of the involuntary petition against it.

In some circuits, the determination of eligibility does begin and end with the alleged debtor’s status under state law; *ultra vires* acts are irrelevant. See, e.g, *Matter of Union Guarantee and Mortgage Co.*, 75 F.2d 984 (2nd Cir.1935); *Gamble v. Daniel*, 39 F.2d 447 (8th Cir.1930); *Clemons v. Liberty Savings & Real Estate Co.*, 61 F.2d 448, 450 (5th Cir.1932). In other circuits, however,

1 eligibility depends on the alleged debtor's activities, not its charter. See, e.g., *Matter of Roumanian*
2 *Workers Educational Association of America*, 108 F.2d 782, 783 (6th Cir. 1940). The Ninth Circuit has
3 not ruled on the issue.

4 After as much reflection as the exigencies of involuntary proceedings permit, the court opts to
5 follow those cases which focus on the acts of the debtor rather than its charter. More than 30 years ago,
6 the leading authority on bankruptcy law argued that the court should have broad discretion in determining
7 eligibility and should be guided largely by whether a bankruptcy proceeding is a satisfactory method of
8 liquidating the corporation under consideration. 1 **Collier on Bankruptcy** (14th Ed.), ¶ 4.05, p. 593.
9 Since liquidation of NSCI under the Bankruptcy Code seems practicable and of benefit to creditors, the
10 court will examine its activities before dismissing this case.

11 For the foregoing reasons, NSCI's motion to dismiss based purely on its status as a nonprofit
12 public benefit corporation is dismissed. This is not a ruling that the petition was properly brought
13 against NSCI or that NSCI is eligible to be an involuntary debtor, but only that the court must examine its
14 activities as well as its charter before dismissing the case. The order, which counsel for the petitioning
15 creditor shall submit forthwith, shall recite that it is made without prejudice to any further motion to
16 dismiss or argument at trial regarding NSCI's eligibility.

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18 Dated: August 6, 2004

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Alan Jaroslovsky
U.S. Bankruptcy Judge