

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Chapter 7 Case

SRC Holding Corporation,
f/k/a Miller & Schroeder Financial, Inc.,
and its subsidiaries,

BKY Case Nos. 02-40284 to 02-40286

Jointly Administered

Debtor.

Brian F. Leonard, Trustee,

ADV Case No. 034155

Plaintiff,

vs.

**MEMORANDUM IN OPPOSITION TO
TRUSTEE'S MOTION FOR SUMMARY
JUDGMENT**

James E. Iverson,

Defendant.

INTRODUCTION

Defendant James E. Iverson submits this memorandum in opposition and response to the Trustee's Motion for Summary Judgment. Many of the arguments necessary to respond to the Trustee's Motion have previously been made in Defendant's own Memorandum in Support of Summary Judgment. The Defendant hereby refers the Court to the Defendant's own motion papers, so as to avoid needlessly repeating arguments that have previously been made.

STATEMENT OF FACTS

The Court is referred to Defendant's Memorandum in Support of Summary Judgment for the Statement of the Facts.

ARGUMENT

I. THE RIGHTS AND DUTIES OF A MINNESOTA CORPORATION AND ITS SHAREHOLDERS, OFFICERS, AND DIRECTORS ARE GOVERNED BY MINNESOTA LAW.

A corporation organized under the laws of Minnesota is subject to those laws. The issuance and transfer of a Minnesota corporation's stock and the rights of the holder of the stock are governed by the laws of Minnesota. The rights and obligations of corporate shareholders, as well as the ultra vires character of corporate acts are determined by the laws of the state of the corporation's origin. Erickson-Hellekson-Vye Co. v. A Wells Co, 15 N.W. 2d 162 (1944). A Minnesota "corporation" is a corporation organized for profit and incorporated under or governed by the Minnesota Business Corporations Act. M.S.A §§302A.001, .011. "It has generally been stated that the mode of transferring share of stock, and the validity, and effect of transfers are governed by the laws of the state...in which the corporation was created." Fletcher Cyclopedia of the Law of Private Corporations, 12 Fletcher Cyclopedia of Private Corp § 5473 (Sept. 2003), *citing* State v. Probate Court St. Louis County, 172 N.W. 318, following (1919). Minnesota law governs the parties and transactions which are the centerpiece to the Trustee's purported claims.

Plaintiff basis its case primarily upon the assertion that there was a "forgiveness of debt" equal to \$2,001,548.00 at closing which constitutes an improper distribution to shareholders either rendering the corporation solvent or made while the corporation was insolvent. Defendants have produced uncontroverted evidence that there was no forgiveness of debt, but rather the obligations of the shareholders to MSI and MSFI were paid at closing. However, assuming *arguendo*, that the obligations were "forgiven" this would not constitute an

impermissible distribution in violation of Minnesota law. Minn. Stat. § 302A.551, codifies

Minnesota law regarding corporation distribution which states in part:

302A.551. Distributions

Subdivision 1. When permitted. (a) The board may authorize and cause the corporation to make a distribution only if the board determines, in accordance with subdivision 2, that the corporation will be able to pay its debts in the ordinary course of business after making the distribution and the board does not know before the distribution is made that the determination was or has become erroneous.

(b) The corporation may make the distribution if it is able to pay its debts in the ordinary course of business after making the distribution...

Subdivision 2. Determination presumed proper. A determination that the corporation will be able to pay its debts in the ordinary course of business after the distribution is presumed to be proper if the determination is made in compliance with the standard of conduct provided in section 302A.251 on the basis of financial information prepared in accordance with accounting methods, or a fair valuation or other method, reasonable in the circumstances. No liability under section 302A.251 or 302A.559 will accrue if the requirements of this subdivision have been met.

(M.S.A. § 302A.551).

Review of the Reporter's comments are enlightening in applying the standards of conduct for the shareholders and directors of MSI and MSFI. Plaintiff's counsel, relying upon the Affidavit of Patrick McDavitt, whom assisted the firm of Briggs & Morgan in conducting its due diligence prior to the acquisition of shares by MI Acquisition Corporation, analyzed the litigation exposure. Trustee asserts the fact that \$14,452,000.00 in claim exposure was identified. The Trustee surmises that this rendered the corporation insolvent, but blatantly ignores the opinion of counsel that the reasonable estimate of loss was \$200,000.00, with expected legal expense of \$100,000.00.

The reporter notes "to the extent that the corporation may be subject to asserted or unasserted contingent liabilities, the directors are required and entitled to make judgments as to the likelihood, amount in time of any recovery..."

Minn. Stat. § 302A.251 provides in pertinent part:

302A.251. Standard of Conduct

Subd. 2. Reliance. (a) A director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

(2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence;

(M.S.A. § 302A.251).

Furthermore, the Reporter's comments to M.S.A. § 302A.551 state the following:

Judgments must of necessity be made on the basis of information in the hands of the directors when a distribution is authorized, and it is not expected that they will be held responsible as a matter of hindsight for unforeseen developments. *This is particularly true with respect to assumptions as to the ability of the corporation's business to repay long-term obligations which do not mature for several years...*

(M.S.A. § 302A.551, *Reporter's Comments*).

Based upon the opinion of counsel, conducting due diligence on behalf of the purchaser of the shares of Messrs. Iverson and Wikner opined the "reasonable estimate of costs expected to be incurred to litigate or settle the respective claims" was \$300,000.00. This, together with the audited financial statements of KPMG, the internal financial reports of the corporation, and capital requirements reported to the SEC, evidence that the corporation was able to pay its debts in the ordinary course of business, regardless of the advances to MI Acquisition Corporation, or alleged distributions to the shareholders.

II. MINNESOTA DOES NOT RECOGNIZE THE "VICINITY OF INSOLVENCY" DOCTRINE.

A) The Trustee has cited no authority for the Vicinity of Insolvency doctrine's application or adoption under Minnesota Law.

The Trustee bases his contention that MSI was in the "vicinity of insolvency" on a maxim which has its recent roots in Delaware law. The Trustee concedes, however, that specific guidance concerning its application is yet to be given. More importantly, the Trustee cites no Minnesota caselaw which has applied the "vicinity" or "zone" of insolvency maxim. As such, the Trustee has provided no authority for the application of the vicinity of insolvency doctrine to these proceedings. Minnesota has not neither adopted nor applied the doctrine. The "vicinity of insolvency" doctrine is not applicable to these proceedings.

The fiduciary duties of officers, directors, and certain shareholders are owed to corporation and its shareholders. In re Northgate Computer Systems, 240 B.R. 328 (Bankr.D.Minn. 1999), Westgor v. Grimm, 318 N.W. 2d 56 (Minn. 1982). Such duties are not owed to the creditors of the corporation short of insolvency. Defendant Iverson owed no fiduciary duties to the creditors of MSI, and did not breach any fiduciary duties running towards MSI, himself, Mr. Erickson, or Mr. Wikner. The Trustee's purported fiduciary breach claims must fail.

B) The Vicinity of Insolvency doctrine cannot circumvent established Minnesota law.

The subject corporations in the present case were created under, and, as therefore governed by Minnesota law. As stated above, Defendant Iverson was properly able to rely on outside expertise concerning the distributions which are the subject matter of this case. Minn. Stat. §§ 302A.551, .251. Furthermore, Minnesota law does not recognize the zone or vicinity of insolvency doctrine. Such doctrine was created by an unpublished opinion in the State of

Delaware. A few other states, including New York, have adopted the application of such doctrine, but Minnesota has not. The Minnesota Business Corporations Act governs the questioned distributions, and dictates to whom fiduciary duties were owed. The zone of insolvency doctrine cannot be utilized by the Court to circumvent clear Minnesota law on the subject.

The fiduciary duties of officers, directors, and certain shareholders are owed to corporation and its shareholders. In re Northgate Computer Systems, 240 B.R. 328 (Bankr.D.Minn. 1999), Westgor v. Grimm, 318 N.W. 2d 56 (Minn. 1982). Such duties are not owed to the creditors of the corporation short of insolvency. See e.g., Beloit Liquidating Trust v. Grade, 677 N.W. 2d 298 (Wis., 2004) (Wisconsin Supreme Court refused to apply vicinity of insolvency doctrine and shift director and officer fiduciary duties to creditors until the company was both insolvent and no longer a going concern; the court applied Wisconsin law, not Delaware law, to determine whether the directors and officers owed and/or breached any fiduciary duties to creditors). A "duty is owed to a corporation's creditors only when the corporation is insolvent and no longer a going concern." Id. at 309. The extent of a stockholder's individual liability to creditors is determinable by the laws of the state under which a corporation is organized. Furst v. Beygeh, 257 N.W. 79 (Minn. 1934). Defendant Iverson owed no fiduciary duties to the creditors of MSI, and did not breach any fiduciary duties running towards MSI, himself, Mr. Erickson, or Mr. Wikner.

The Trustee's attempts to employ the Vicinity of Insolvency doctrine are misplaced. The Vicinity of Insolvency doctrine cannot be used to circumvent clear Minnesota law on the subject. In the context of the present case, the Vicinity of Insolvency doctrine is merely a red herring.

The purported wrongful conduct is specifically covered by statute which governs distributions. The Trustee's purported fiduciary breach claims must fail.

III. MSI WAS NOT IN THE VICINITY OF INSOLVENCY IN JULY OF 1997 AND DEFENDANT IVERSON OWED NO FIDUCIARY DUTIES TO CREDITORS.

The jointly-administered Bankruptcy petitions of the Debtors were filed on January 22, 2002. The stock purchase at the center of this litigation occurred in July of 1997, over four and one half years prior. Most of the Trustee's claims are premised on the contention that, at the time of the 1997 stock transfer, MSI was in the "vicinity of insolvency." The Trustee uses hindsight to concoct the contention that MSI was in the vicinity of insolvency many years prior to filing bankruptcy. In so doing, the Trustee hopes to extend the Defendant's owed fiduciary duties to the creditors of MSI. Such contention has no merit.

The Trustee makes claims that Defendant Iverson breached his fiduciary duty of loyalty as a shareholder, an officer, and a director. The Trustee claims that these breaches were of the duties owed to the creditors. It is well established that officers and directors owe the fiduciary duty of loyalty *to the corporation and its shareholders*. In re Northgate Computer Systems, 240 B.R. 328 (Bankr.D.Minn. 1999)(Emphasis Added). Certain types of shareholders can also owe fiduciary duties *to the corporation*. Westgor v. Grimm, 318 N.W. 2d 56 (Minn. 1982)(Emphasis Added.)

The Trustee, however, claims that the fiduciary duties required of Defendant Iverson were actually owed to the *creditors of the corporation*. The Trustee seems to insist that in July of 1997, over four and one half years before filing bankruptcy, at a time when MSI paid all its debts as they became due, and at a time when the assets of MSI were greater than its liabilities, the corporation was somehow insolvent or in the "vicinity" or "zone" of insolvency. If MSI was

in the vicinity of insolvency, the argument goes, then fiduciary duties were owed to the creditors of the corporation.

At the time of the 1997 stock purchase transaction, the assets of MSI were approximately \$44 million and its liabilities were \$34 million. Thus, using a balance sheet test, the corporation was solvent at the time of the transaction. Presumably, MAIC and its lender concluded there would be sufficient cash flow to pay known obligation over a period of time. MSI was able to pay its debts and obligations on an on going basis as such debts and obligations became due through the foreseeable future. In other words, MSI remained solvent for some time subsequent to the 1997 stock purchase transaction. The record shows that multiple outside accountants concur in the opinion of the solvency of MSI at the time of the subject stock purchase in 1997.

The Trustee, however, makes the bald assertion that because the eventual claims filed in this case totaled over \$150 million, ignoring the fact that such claims were filed in 2002, that MSI was somehow "well on its way down the slope of insolvency." The Trustee's position of "vicinity of insolvency" is solely premised on the retroactive application of the 2002 liabilities to the 1997 context and transaction. Such premise is faulty to say the least. The Court cannot base the solvency determination upon liabilities that arise years after the time of the determination. To do so would make the directors unintended guarantors to future creditors.

Assuming that a company is growing, then its liabilities in the future will typically be greater than its assets of its past. If future larger liabilities of a company are retroactively compared to its past asset levels, then a company which can meet all of its liabilities and whose assets are greater than its liabilities at a point in time, will be deemed, according to the Trustee, to be in the zone or vicinity of insolvency. As such, taking the Trustee's argument to its logical conclusion, the vast majority of companies that have experienced growth, are balance sheet

solvent, and meet their obligations as they become due, can, will, and should be retroactively deemed to be in the zone of insolvency. The Trustee's position would make it possible to retroactively deem most corporations to be in the "vicinity of insolvency" by applying their current levels of liabilities to their past levels of assets. Such retroactive application and hindsight would stifle most major transactions for fear that somehow the subject corporation would be deemed insolvent in the years, or even decades, to come.

MSI was both solvent at the time of the 1997 stock purchase, and remained solvent for the years following the transaction. The court should not base an insolvency, or vicinity of insolvency, determination on the fact that the company's liabilities years into the future and mostly unknown at the time of the transaction turned out to be greater than the fair value of the assets of the company four and one half year prior. Since the company was not in the vicinity of insolvency, Defendant Iverson owed fiduciary duties only to the corporation and its shareholders. Defendant Iverson owed no fiduciary duties to the past or future creditors of MSI.

IV. THE PURPORTED "EXPERT" TESTIMONY OF PROFESSOR KLEINBERGER MUST BE IGNORED.

Plaintiff has failed to establish that Professor Kleinberger is qualified to give expert opinion testimony as to whether MSI was in the "vicinity of insolvency" at the time of the 1997 stock purchase transaction, and the facts he has relied upon are not of the type reasonable relied upon in making a determination of insolvency.

Federal Rule of Evidence 702 states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an expert opinion or otherwise.

(FRE 702.)

Furthermore, Federal Rule of Evidence 703 states that:

The facts or data in the particular case upon which expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(FRE 703.)

The Trustee has attached the Affidavit of Professor Daniel S. Kleinberger as expert opinion testimony concerning the alleged breach of fiduciary duties, and whether such duties were owed to creditors at the time of the transaction in question. Professor Kleinberger's curriculum vitae is attached as Exhibit A to his Affidavit. The curriculum vitae illustrates the work professor Kleinberger has done concerning corporate governance issues. Professor Kleinberger states that he is, therefore, "qualified to give expert opinion as to corporate governance and, more particularly, whether fiduciary duties have been met by shareholders, directors and officers." Kleinberger aff. ¶ 3.

While it *may be true* that professor Kleinberger is qualified to give expert opinion testimony as to corporate governance issues, *it has not been established that Professor Kleinberger is able to give expert opinion testimony concerning accounting or financial matters.* In other words, he cannot make an opinion as to whether MSI was in the vicinity of insolvency in July of 1997. Nowhere in his affidavit or curriculum vitae does Professor Kleinberger provide any basis for his ability to make such opinion statement. Neither the Trustee nor Professor Kleinberger has demonstrated just how Professor Kleinberger is "qualified as an expert by knowledge, skill, experience, training, or education" to make solvency determinations. As such, he is not qualified to make such determination.

Furthermore, Professor Kleinberger purports to base his claim that MSI was in the vicinity of insolvency *only upon his review of the Trustee's own motion papers*. The opinion is not based on anything other than the Trustee' point of view. Such is hardly sufficient ground for the opinion that MSI was in the vicinity of insolvency at the time of the stock purchase. It is fundamental that for one to provide expert opinion as to the financial condition of a corporation at a particular point in time a thorough review of the financial records is required. Certainly more than a review of selected and incomplete documents submitted by the Plaintiff. The Trustee's own motion papers and biased arguments are not the types of facts "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject..." Again, Professor Kleinberger's opinion as to solvency of MSI should be disregarded as having no probative value.

V. DEFENDANT IVERSON'S NONCOMPETE AGREEMENT WAS SINCERE AND FOR VALUE.

The Trustee claims that there was no reason for MIAC to enter into a noncompete agreement with Defendant Iverson as part of the 1997 stock purchase. The Trustee contends that because Defendant Iverson was already subject to a noncompetition agreement, the second agreement was merely a sham. Such contention and claim is inaccurate.

The Trustee fails to recognize the value gained by committing Defendant Iverson to a new noncompetition agreement. The original noncompete agreement to which the Trustee refers was entered into subsequent to Defendant Iverson employment with MSI. Noncompete agreements are only enforceable if they are reasonable in time, reasonable in geographic area, and protect a legitimate interest of the employer. Roth v. Gamble-Skogmo Inc., 532 F. Supp. 1029 (D. Minn. 1982). Furthermore, to be enforceable, a noncompetition agreement must have independent consideration. A noncompetition agreement signed after the employee started work

is not enforceable if the employee did not receive any independent consideration for signing the agreement. Midwest Sports Mktg Inc. v. Hillerch & Bradsby of Canada Ltd, 552 N.W. 2d 254 (Minn. Ct. App. 1996). There was strong doubt among the parties whether the original non-compete agreement that bound Defendant Iverson was enforceable, as it was entered into subsequent to his employment with MSI.. As such, MIAC required a new iron-clad noncompete agreement, and was willing to pay independent consideration to consummate the agreement. As such, the new noncompete agreement was enforceable, while the original agreement was, most likely, not enforceable. The Trustee conveniently ignores this fact.

The assertions by the Trustee that the 1997 noncompete agreement with Defendant Iverson was valueless, was an example of self-dealing, was insincere, or that it should not have been required are inaccurate. The 1997 noncompete agreement entered into with Defendant Iverson, and the independent consideration issued therefore, was required to ensure that a binding and enforceable agreement existed.

VI. "PAYMENT" WAS PLED AS A DEFENSE REGARDLESS OF THE TRUSTEE'S VAGUE COMPLAINT.

The Trustee contends that Defendant Iverson did not plead "payment" as a defense in his answer, and that such defense should, therefore, be waived. The Trustee is incorrect for a number of reasons.

The Trustee Complaint states the following in regards to the Trustee's alleged "released Obligations":

Pursuant to the Stock Purchase Agreement, Defendant caused the Debtors to release him from certain obligations for which the Debtors received no consideration (the "Released Obligations"). The Released Obligations are detailed on Exhibit A hereto and total \$2,221,463.91.

(Trustee's Adv. Comp. ¶ 12).

In specific response to this allegation that the obligations were released, and therefore allegedly not paid, the Defendant stated the following:

As to the allegations contained in paragraph 12 of Plaintiff's Complaint, Defendant states that, pursuant to the terms of the Stock Purchase Agreement, *he paid \$2,221,463.91 to satisfy the obligations identified on Exhibit A to said Complaint, and further specifically denies the allegation that Debtors received no consideration.*

(Defendant Iverson's Answer ¶ 13).

The Defendant's Answer goes on to affirmatively state that "Plaintiff's claims are barred due to *satisfaction* and release pursuant to that certain Settlement Agreement dated December 11, 1997..." The foregoing show, that the Defendant did in fact assert payment. The payment of Defendant's obligations were withheld by MIAC at closing and is further evidenced by, among other things, the documented advance from MSI to MIAC, audited financial statements of outside accountants, and is evidenced by Defendant Iverson's receipt of a cancelled promissory note. The Trustee cannot meet his burden to prove otherwise.

The so-called "Released Obligations" were satisfied, and Defendant's Answer makes such fact very clear. The defense of payment is by no means waived. Furthermore, the lack of specificity of the Trustee's own Complaint made answering with any more particularity virtually impossible. The Trustee's contention that the defense of "payment" should be waived has no merit.

VII. THE TRUSTEE'S UNJUST ENRICHMENT CLAIM MUST FAIL.

The purported forgiveness of debt was repaid as an offset of the purchase price of the 1997 stock purchase transaction. Furthermore, MIAC remained liable to MSI for the cancelled promissory note of Defendant Iverson. Defendant Iverson received money in return for his approximate 48% interest in MSI. Furthermore, a shareholder has a right to sell his shares of a

corporation. As such, the Trustee has failed to show what money or property Defendant Iverson has *knowingly* received which would be unjust to retain.

Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of other; it must be shown that the party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully. First Nat'l Bank v. Ramier, 311 N.W. 2d 502 (Minn. 1981). The exercise of a legal right cannot render a party unjustly enriched to a party who has not been wronged thereby. Pelser v. Gingold, 8 N.W. 2d 36 (1943). Defendant Iverson exchanged his approximate 48% interest in stock for his receipt of money. All obligations were met. Furthermore, Defendant Iverson had a right to sell his ownership interest in MSI. As such, there has been no unjust enrichment. Summary judgment on the unjust enrichment count should be entered in favor of Defendant Iverson.

VIII. THE FIDUCIARY DUTY CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The Trustee claims that July 31, 1997 must be used for the calculation of the limitations period. The Trustee also claims that the alleged breach of fiduciary duties were due to the purported forgiveness of notes and advances Defendant Iverson owed to the corporations. Assuming *arguendo* that the foregoing contentions are true, then the Trustee's fiduciary duty claims are barred by the applicable statute of limitations. The alleged forgiveness of debt is by definition a distribution. M.S.A. § 302A.011. The limitations period for an illegal distribution to shareholders, directors, and officers is expressly limited to two years. M.S.A. §§ 302A 557, 559.

Minnesota statutes § 302A.011, Sudv. 10 defines "distribution" in the following way:

'Distribution' means a direct or indirect transfer of money or other property, other than its own shares, with or without consideration, or an incurrence or issuance of indebtedness, by a corporation to any shareholders in respect of its shares. A distribution may be in the form of a dividend or a distribution in liquidation, or as

consideration for the purchase, redemption, or other acquisition of its shares, or otherwise.

(M.S.A. § 302A.011, Sudv. 10.)

The alleged forgiveness of debt in return for the purchase of the corporation's shares from Defendant Iverson most certainly falls under the above definition of distribution. Furthermore, M.S.A. § 302A.557 and §559 both expressly limit all actions against shareholders and directors to two years from the date of distribution. The Trustee has stated that the date for the determination is July 31, 1997, and this action has been brought on June 13, 2003. This action has been brought beyond the applicable limitations period for the purported illegal distribution. Accordingly, any action to recover the purported illegal distribution from Defendant Iverson is time-barred.

The Trustee attempts to apply the six-year limitations period M.S.A. § 541.05 to the present action, which states in relevant part:

...the following actions shall be commenced within six-years:

(1) upon a contract or other obligation, express or implied, *as to which no other limitation period is expressly prescribed...*

(6) For relief on the ground of fraud...

(M.S.A. § 541.05)(Emphasis Added.)

Neither parts (1) or (6) are applicable to the Trustee's claims. First, the limitation period quoted above is inapplicable because M.S.A. § 302A.557 and 559 "expressly prescribe" a two-year limitations period for illegal distributions, and the Trustee's claims are centered around the alleged illegal distributions. The Trustee's fiduciary duty breaches are express and/or implied obligations, but another limitation period for the particular action is prescribed by statute. As such, the six-year limitation period for part (1) above is inapplicable.

Second, the Trustee is unable to show fraud, so part (6) of the limitation period cited above is again inapplicable. The Trustee has not and cannot show actual fraud on the part of Defendant Iverson. Furthermore, Bankr.R.7009 requires that fraud be pled with particularity, and the Trustee has failed to do so. In civil cases, failure to plead fraud with particularity justifies summary judgment against the party alleging the fraud claim. The Trustee has not shown specifically how Defendant Iverson actually intended to hinder, delay, or defraud a creditor. The Trustee's constructive fraud theories fail because the corporation remained solvent after the stock purchase transaction, and the Trustee cannot meet his burden to show that a "reasonable equivalent value" was not received by SRC Holdings Corporation. Furthermore, shareholder distribution may not be the basis of a fraudulent transfer claim. Minn. Stat. § 302A.551(d).

M.S.A. §§ 302A.557 and 559 expressly provide that actions for illegal distributions are limited to two years. The Trustee's fiduciary duty claims are truly centered on the purported illegal distributions. The express specific limitations period should be favored over the general catch-all section of M.S.A. § 541.05. The limitations period prescribed in M.S.A. § 541.05 has no application to the Trustee's claims. All of the Trustee's actions relating to the purported illegal distribution are, therefore, time-barred.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendant Iverson's Motion for Summary Judgment, the Trustee's motion for Summary Judgment should be denied on all counts.

MESSERLI & KRAMER P.A.

Dated: April 28, 2004

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Chapter 7 Case

SRC Holding Corporation,
f/k/a Miller & Schroeder Financial, Inc.,
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Debtor.

BKY Case Nos. 02-40284 to 02-40286

Jointly Administered

Brian F. Leonard, Trustee,
Plaintiff,
vs.

ADV Case No. 03-4155

James E. Iverson,
Defendant.

UNSWORN CERTIFICATE OF SERVICE

I, Tara Leupke, declare under penalty of perjury that on April 28, 2004, I mailed a copy of our Memorandum in Opposition to Trustee's Motion for Summary Judgment by first class mail, postage prepaid, to:

Matthew R. Burton
Leonard, O'Brien, Wilford, Spencer & Gale, Ltd.
100 South Fifth Street
Suite 1200
Minneapolis, MN 55402-1216

by enclosing a true and correct copy of the same in an envelope, postage prepaid, and depositing same in the United States mail.

Dated: April 28, 2004

/e/ Tara Leupke
Tara Leupke