

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Samuel Mark Vaught, a/k/a S. Mark Vaught  
Debtor.

Case No. 04-33848

---

Patrick J. Murray, William Kozlak, Timothy Murray, Jaye Rykunyk;  
Josh E. Bassais; and Laurie Fossen, as Trustees of the Minneapolis On-  
Sale Liquor Pension Fund and of the Minneapolis Culinary Beverage  
and Miscellaneous Employers-Employees Trust Fund,  
Plaintiffs,

Chapter 7

vs.

Samuel Mark Vaught,

Debtor.

Adv 04-3375

---

**NOTICE OF HEARING AND MOTION**

TO: The Debtor, Samuel Mark Vaught, and other entities specified in Local Rule 9013-3.

1. Plaintiffs move the court for the relief requested below and give notice of hearing.
2. The Court will hold a hearing on this motion at 1:00 p.m. on November 8, 2004, in Courtroom No. 228B, at the Federal Building, at 316 North Robert Street, St. Paul, Minnesota.
3. Any response to this motion must be filed and delivered not later than November 3, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays).  
  
UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is an adversary proceeding.

5. The motion arises under Fed R. Bankr. P. 7055. This motion is filed under Fed R. Bankr. P. 9014 and Local Rule 7055-1. Movant requests that the Court enter judgment by default in favor of Plaintiffs and against Debtor.
6. For such other and further relief as the Court deems equitable.

Dated: October 21, 2004

s/ Andrew E. Staab  
Andrew E. Staab  
Attorneys for Plaintiffs  
ROSENE, HAUGRUD & STAAB, CHARTERED  
400 Robert Street North #1800  
St. Paul, MN 55101  
(651) 227-6621  
Attorney Registration #204705

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Samuel Mark Vaught, a/k/a S. Mark Vaught  
Debtor.

Case No. 04-33848

---

Patrick J. Murray, William Kozlak, Timothy Murray, Jaye Rykunyk;  
Josh E. Bassais; and Laurie Fossen, as Trustees of the Minneapolis On-  
Sale Liquor Pension Fund and of the Minneapolis Culinary Beverage  
and Miscellaneous Employers-Employees Trust Fund,  
Plaintiffs,

Chapter 7

vs.

Samuel Mark Vaught,

Debtor.

Adv 04-3375

---

**AFFIDAVIT OF NO ANSWER, IDENTIFICATION AND  
NON-MILITARY STATUS**

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF RAMSEY    )

Andrew E. Staab, being duly sworn on oath, says:

1. That the law firm of Rosene, Haugrud & Staab, Chartered represents the Plaintiffs in the action above entitled, and I am a shareholder attorney in said firm
2. That the Summons and Complaint in this action were served on Debtor/Defendant on September 15, 2004, and the Affidavit of Service is currently on file. That the time allowed by law and specified in said Summons for Defendant to answer the Complaint in this action has elapsed, that no answer or other pleading has been received by or served upon Plaintiffs or their attorneys, and Defendant has not otherwise defended in this action.
3. That the time allowed for Debtor/Defendant to answer the Complaint in this action has elapsed, and

accordingly, Debtor/Defendant is in default, pursuant to Rule 55(b)(1) of the Federal Rules of Civil Procedure and Rule 7055 of the Federal Rules of Bankruptcy Procedure.

4. That Debtor/Defendant is neither an infant nor an incompetent person.
5. That upon information and belief, Debtor/Defendant is not now in the military service of the United States, and that this Affidavit is made in compliance with the Soldiers' and Sailors' Civil Relief Act of 1940.
6. That to the best of my knowledge and belief, the following statements apply to Defendant:
  - the full name of the Defendant in said action is Samuel Mark Vaught;
  - his occupation is as follows: unknown;
  - his place of business is as follows: 764 Dayton Avenue, St. Paul, Minnesota 55104 - 6694;
  - his place of residence is as follows: 764 Dayton Avenue, St. Paul, Minnesota 55104 - 6694;
  - his post office address is as follows: 764 Dayton Avenue, St. Paul, Minnesota 55104 - 6694.
7. That Defendant Samuel Mark Vaught above-named, is not now, as I verily believe, in the military service of the United States; that this affidavit is made in compliance with the Solders' and Sailors' Civil Relief Act of 1940.

s/ Andrew E. Staab

Andrew E. Staab

Subscribed and sworn to before me

this 21st day of October, 2004.

s/ Rachel M. Harnly

Notary Public

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Samuel Mark Vaught, a/k/a S. Mark Vaught  
Debtor.

Case No. 04-33848

---

Patrick J. Murray, William Kozlak, Timothy Murray, Jaye Rykunyk;  
Josh E. Bassais; and Laurie Fossen, as Trustees of the Minneapolis On-  
Sale Liquor Pension Fund and of the Minneapolis Culinary Beverage  
and Miscellaneous Employers-Employees Trust Fund,  
Plaintiffs,

Chapter 7

vs.

Samuel Mark Vaught,

Debtor.

Adv 04-3375

---

**AFFIDAVIT ON THE MERITS AND AMOUNT DUE**

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

Jaye Rykunyk under oath declares and states:

1.       That I am a Plaintiff Trustee in this matter, and I have personal knowledge of the facts in this matter.

2.       That Plaintiffs are trustees of both the Minneapolis On-Sale Liquor Pension Fund (“Pension Fund”) and the Minneapolis Culinary Beverage and Miscellaneous Employers-Employees Trust Fund (“Health Fund”), which are express trusts organized under and pursuant to the provisions of §302(c)(5) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5). Plaintiffs are trustees of multiemployer benefit plans within the meaning of §§3(37) of the Employee Retirement Income Security Act (ERISA) and 4001(a)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

Plaintiffs are fiduciaries to the Funds.

3. That Debtor, Samuel Mark Vaught (“Vaught”) was an attorney at law licensed in the State of Minnesota, until he was indefinitely suspended from the practice of law with no right to apply for reinstatement for three (3) years (Order of the Minnesota Supreme Court dated January 7, 2002. In re Disciplinary Action Against Vaught, 637 N.W.2d 570 (Minn. 2002)). That there is currently pending a Petition for Disciplinary Action against Vaught in the Office of Lawyers Professional Responsibility.

4. That Plaintiffs are jointly listed as creditors of the Vaught, with a claims totaling \$259,261.50, and the facts supporting Plaintiffs’ claims against the Vaught are described below.

5. That the Funds retained Vaught as Fund Counsel from 1984 to January 2002.

6. That Vaught was at all times relevant, Plaintiffs’ attorney, and he represented Plaintiffs in, *inter alia*, collections matters, whereby he would collect funds due and owing Plaintiffs. One particular collections matter, the Archie’s Too, Inc. case (“Archie’s matter”), caused Plaintiffs to be concerned whether Vaught’s actions were consistent with his fiduciary duty as attorney for Plaintiffs.

7. That in 1998, Vaught commenced an action on behalf of the Plaintiffs in the United States District Court against Richard Bruce Van Tassel and Archie’s Too, Inc. (collectively referred to as “Archie’s”) for delinquent fringe benefit contributions and withdrawal liability, U.S. District Court Civil File 98-1230 DSD/JMM.

8. That on May 3, 1999, Plaintiffs and Archie’s settled the above-referenced U.S. District Court litigation by entering into a Settlement Agreement that included installment payments pursuant to a Promissory Note, and further evidenced by a Confession of Judgment. Archie’s agreed to pay the Plaintiffs the sum of \$45,000.00 payable as follows: \$5,000.00 upon execution of the Promissory Note, and \$40,000.00 by installment payments as set forth in the Promissory Note’s payment schedule.

9. That on July 1, 1999, Vaught sent to Zenith Administrators, Inc., the Plaintiffs’ third-party

administrator at that time, the sum of \$5,000.00, which represented Archie's initial payment on the Promissory Note.

10. That on December 4, 2000, Vaught filed the Confession of Judgment in the Archie's matter along with affidavits of default and amounts due and owing under the Promissory Note, in Hennepin County District Court, Civil File CJ 00-17270. In Vaught's Affidavit of Counsel executed on December 4, 2000, he stated that the remaining unpaid balance on the Promissory Note was \$30,000.00, plus unpaid accrued interest in the amount of \$1,800.00, late payment penalties in the amount of \$4,250.00, attorney fees in the amount of \$600.00 and court filing fee in the amount of \$132.00, for a judgment in the amount of \$36,732.00.

11. That on December 13, 2000, the Hennepin County District Court entered judgment in favor of Plaintiffs and against Archie's in the amount of \$36,732.00, plus post-judgment interest.

12. That on July 17, 2001, Vaught executed and filed with the Hennepin County District Court a Satisfaction of Judgment with respect to the judgment in favor of Plaintiffs and against Archie's.

13. That in January 2002, the Funds retained new Fund Counsel, Rosene, Haugrud & Staab, Chartered, to provide legal services, including obtaining from Vaught the client files related to the Funds. When voluntary steps to recover the client files were unsuccessful, Plaintiffs petitioned the Court for delivery of money and/or papers pursuant to Minnesota Statute §481.14, Ramsey County District Court, Civil File CO-02-9236.

14. That a hearing pursuant to an Order to Show Cause in the above-referenced matter was scheduled for October 25, 2002.

15. That on October 25, 2002, just prior to the Order to Show Cause hearing, Vaught turned over to Rosene, Haugrud & Staab, Chartered fourteen (14) boxes of materials which Vaught purported to be all of the client files relating to the Funds.

16. That upon review of the material in the fourteen (14) boxes, Plaintiffs learned that Vaught, while representing Plaintiffs, breached his fiduciary duty to Plaintiffs. The specifics of Vaught's breaches of his fiduciary duties are detailed below, and they focus on Vaught's retention of Plaintiffs' property, namely monies collected and retained in collections matters.

17. That on February 25, 2003, Plaintiffs personally served Vaught with a copy of the Summons and Complaint, Ramsey County District Court Civil File No. C1-03-2256. Vaught failed to appear, answer, or otherwise defend, and he was in default.

18. That at the June 9, 2003 hearing in the above-referenced Ramsey County District Court case on Plaintiffs' motion for, *inter alia*, appointment of a referee under Rule 53 of the Minnesota Rules of Civil Procedure, Plaintiffs had insufficient information to determine the extent of monies collected and retained by Vaught. Accordingly, Mr. Barry Divine, from the accounting firm of Divine, Scherzer & Brody, Ltd. was appointed Referee in this action to determine to what extent Plaintiffs' damages, if any, were in this matter.

19. That Referee Divine completed his investigation and reporting on or about April 22, 2004, and Plaintiffs scheduled a hearing in the Ramsey County District Court for entry of default judgment against Vaught to occur on July 7, 2004.

20. That although Vaught made no appearance in Plaintiffs' Ramsey County District Court matter, Plaintiffs served Vaught on June 21, 2004 with copies of the motion and supporting documents relating to Plaintiffs' motion for entry of default judgment against Vaught and in favor of Plaintiffs.

21. That on June 28, 2004, 489 days after having been personally served with the Summons and Complaint, Vaught served Plaintiffs with a copy of an unsigned and undated Answer to the Plaintiffs' Complaint in the Ramsey County District Court matter.

22. That in Vaught's Answer to Plaintiffs' Complaint, Vaught admits some of the allegations,

and he denies some of the allegations with explanations.

**REFEREE’S ACCOUNTING OF VAUGHT’S RECORDS**

23. That court-appointed Referee Barry Divine filed his report in conjunction with Plaintiffs’ motion in the Ramsey County District Court proceedings. That according to the forensic accounting done by Referee Divine, there are five sub-issues:

- a. Over-billed retainers;
- b. Unauthorized increase in hourly billing rate;
- c. Discrepancy with May 4, 2000 Invoice;
- d. Amounts collected in Archie’s matter; and
- e. Excess billing on drafting Summary Plan Description.

24. That according to first sub-issue, Vaught over-billed the Plaintiffs for retainers for December 2000 and January 2001 in the total amount of \$2,000.00.

25. That Vaught’s monthly retainer arrangement with the Plaintiffs in 2000 and 2001 was to charge the Pension Fund \$250.00 and the Health Fund \$750.00. According to Referee Divine, Vaught over-charged and collected from the Pension Fund \$500.00 and the Health Fund \$1,500.00, calculated as follows:

	<u>Pension Fund</u>	<u>Health Fund</u>
December 2000	\$250.00	\$750.00
January 2001	<u>\$250.00</u>	<u>\$750.00</u>
	\$500.00	\$1,500.00

26. That the second sub-issue is Vaught’s increased hourly billing rate shown in his January 8, 2002 Final Invoice.

27. That neither the Pension Fund nor the Health Fund authorized an hourly rate increase from \$90.00 to \$125.00, and Vaught’s increase on the January 8, 2002 Final Invoice to \$125.00 was

unauthorized.

28. That according to Referee Divine, the amount charged by Vaught on the January 8, 2002 Final Invoice in excess of the \$90.00 hourly rate is the sum of \$6,727.00.

29. That according to Referee Divine, Vaught charged the Plaintiffs on the January 8, 2002 Final Invoice for itemized work in 2000 that was already paid for in previous invoices.

30. That according to Referee Divine, a total of 25.9 hours were charged to the Plaintiffs on Vaught's January 8, 2002 Final Invoice for work performed in November 2000 and December 2000 is the sum of \$2,331.00 (25.9 hours x \$90.00\* = \$2,331.00). (\*total higher billing rate discrepancy addressed in paragraph 28 above).

31. That the third sub-issue is a discrepancy involving Vaught's May 4, 2000 invoice to Plaintiffs. According to Referee Divine, Vaught over-charged the Health Fund the sum of \$2,324.10 and the Pension Fund \$867.70.

32. That the fourth sub-issue relates to amounts collected by Vaught in the Archie's matter. Referee Divine found that Vaught collected \$54,979.23 for the Plaintiffs in the Archie's matter.

33. That upon review of Vaught's invoices and the file records, Referee Divine found the following amounts to constitute credits in 1999 and 2000 to the Plaintiffs for amounts Vaught collected in the Archie's matter:

- a. \$ 5,000.00 (July 1, 1999 direct remittance);
- b. \$ 4,042.70 (April 15, 2000 billing \$1,010.67 Pension Fund + \$3,032.03 Health Fund = \$4,042.70).
- c. \$ 6,619.92 (August 1, 2000 billing \$2,500.00 Pension Fund + \$4,199.92 Health Fund = \$6,619.92)
- d. \$ 2,500.00 (November 2000 billing Pension Fund)  
\$18,162.62 Total

34. That based on the credits stated in paragraph 33 above, there remains a balance in the

Archie's matter to address in the amount of \$36,816.61 ( $\$54,979.23 - \$18,162.62 = \$36,816.61$ ).

35. That in his January 8, 2002 Final Invoice, Vaught states that he collected the sum of \$37,479.23 in the Archie's matter, which sum Vaught sets off from the invoice amount to reflect no money due and owing.

36. That Vaught first sent the January 8, 2002 Final Invoice to the Plaintiffs' Third-Party Administrator on October 22, 2002.

37. That October 22, 2002 was only three (3) days before the hearing on the Plaintiffs' motion to compel Vaught to turn over the Plaintiffs' client files to the law firm of Rosene, Haugrud & Staab, Plaintiffs' current counsel. Ramsey County District Court File No. CO-02-9236.

38. That Vaught's January 8, 2002 Final Invoice was backdated to January 8, 2002.

39. That Vaught backdated the January 8, 2002 Final Invoice to tie out amounts Vaught had collected and retained for the Plaintiffs in the Archie's matter.

40. That the fifth sub-issue is the amount Vaught charged the Health Fund on his January 8, 2002 Final Invoice to draft a Summary Plan Description. The amount is \$7,785.50, which is 62.3 hours at an hourly rate of \$125.00.

41. That Vaught's work on drafting the Summary Plan Description for the Health Fund was limited to adapting the nearly identical Summary Plan Description drafted by Rosene, Haugrud & Staab for the Greater Metropolitan Hotel Employers-Employees Health & Welfare Fund.

42. That Vaught could have reasonably billed the Health Fund for twenty (20) hours of work on adapting the Summary Plan Description. That at an hourly rate of \$90.00, Vaught could have reasonably charged the Health Fund \$1,800.00.

43. That Vaught charged the Health Fund in excess of 42.3 hours for work on the Summary Plan Description.

44. That according to the adapted rate, (unauthorized increased rate addressed in paragraph 12 above), Vaught over-charged the Health Fund for work on the Summary Plan Description in the amount of \$3,807.00 (\$90.00 x 42.3 overstated hours = \$3,807.00).

#### **VAUGHT'S UNLAWFUL USE OF PLAN ASSETS**

45. That, contrary to the terms of the Health Fund's Trust Agreement, Vaught collected from the Health Fund the sum of \$1,063.00 for attending a educational conference in Orlando, Florida in December 1998.

46. That, contrary to the terms of the Health Fund's Trust Agreement, Vaught collected from the Health Fund the sum of \$600.00 for expenses incurred while attending the educational conference in Orlando, Florida in December 1998.

47. That Vaught, as Fund Counsel, should know that the Health Fund's payment of expenses on his behalf constitutes a violation of the Health Fund's Trust Agreement and an unlawful use of the Health Fund's assets, specifically in violation 29 U.S.C. §1103.

#### **VAUGHT'S ATTORNEY FEES IN ARCHIE'S MATTER**

48. That October 10, 1999 (the date of Archie's settlement payment payable to Vaught) is the earliest unaccounted payment illustrating Vaught's conduct of bad faith and breach of his fiduciary duty to the Plaintiffs.

49. That according to Vaught's statements (on the Archie's matter only) to the Pension Fund for services rendered between October 1, 1999 and July 31, 2001 (not including costs advanced),

Vaught billed and collected the total sum of \$5,084.75, broken down as follows:

<u>Month</u>	<u>Statement Date</u>	<u>Amount</u>
October 1999	November 15, 1999	\$45.00

November 1999	December 15, 1999	\$45.00
December 1999	January 5, 2000	\$202.50
January 2000	February 15, 2000	\$90.00
February 2000	March 15, 2000	\$45.00
March 2000	April 15, 2000	\$135.00
April – July 2000	August 1, 2000	\$159.75
August – November 2000	November 28, 2000	\$180.00
December 2000 & January 2001	January 2, 2001	\$270.00
December 2000 – July 2001	January 8, 2002	<u>\$3,192.50</u>
		<b>\$5,084.75</b>

\*Includes duplicate entries from January 2, 2001 statement.

50. That according to Vaught's statements on the Archie's matter only to the Health Fund for services rendered between October 1, 1999 and July 31, 2001 (not including costs advanced), Vaught billed and received the total sum of \$7,159.25, broken down as follows:

<u>Month</u>	<u>Statement Date</u>	<u>Amount</u>
October 1999	November 15, 1999	\$135.00
November 1999	December 15, 1999	\$135.00
December 1999	January 5, 2000	\$607.50
January 2000	February 15, 2000	\$270.00
February 2000	March 15, 2000	\$135.00
March 2000	April 15, 2000	\$135.00
April –July 2000	August 1, 2000	\$479.25
August – November 2000	November 28, 2000	\$540.00

December 2000 & January 2001	January 2, 2001	\$810.00
December 2000 – July 2001	January 8, 2002*	<u>\$3,912.50</u>
		<b>\$7,159.25</b>

\*Includes duplicate entries from January 2, 2001 statement.

**PLAINTIFFS’ ATTORNEY FEES, REFEREE FEES AND OTHER COSTS**

51. That Plaintiffs have incurred expenses as a result of the Vaught’s constructive fraud, breaches of fiduciary duties, conversion of Plaintiffs’ property, and unjust enrichment, and Vaught should be liable for Plaintiffs’ expenses, specifically Plaintiffs’ reasonable attorney fees, Referee fees, and other out of pocket expenses.

52. That the hourly rate for Rosene, Haugrud & Staab, Plaintiffs’ attorneys, is \$185.00 for attorneys, and \$75.00 for paralegal, which is a fair and reasonable rate for legal services.

53. That Plaintiffs’ attorney fees incurred through April 30, 2004 is \$23,294.80, and Vaught should be liable for Plaintiffs’ reasonable attorney fees incurred after April 30, 2004.

54. That Plaintiffs incurred Referee fees in investigating Vaught’s breaches of fiduciary duty in the amount of \$16,903.00.

55. That in order to obtain documentation for the Referee’s report, Plaintiffs paid Anchor Bank St. Paul (f/k/a The Bank of St. Paul) on December 4, 2003 the sum of \$1,200.00 to process records relating to Vaught’s personal, business IOLTA accounts. On December 19, 2003, Plaintiffs paid Anchor Bank St. Paul an additional \$750.00 for processing records fees. On January 13, 2004, Plaintiffs paid Anchor Bank St. Paul a third and final processing records fee in the amount of \$2,100.00. Plaintiffs paid Anchor Bank St. Paul a total of \$4,050.00 for processing records fees ( $\$1,200.00 + \$750.00 + \$2,100.00 = \$4,050.00$ )

56. That the total for additional costs incurred by the Plaintiffs is \$629.00, calculated as follows:

Service of Process Fee	\$130.00
Court Filing Fees	\$230.00
Subpoena Fees	\$24.00
Motion Fees	<u>\$245.00</u>
	\$629.00

57. That the total requested for costs and attorney fees and costs is the sum of \$44,631.80, calculated as follows:

\$23,294.80	Plaintiffs' attorney fees
\$16,903.00	Referee Fees
\$ 230.00	court filing fees
\$ 245.00	motion fees
\$ 130.00	service of process fee
\$ 4,050.00	bank processing records fees
\$ <u>24.00</u>	<u>subpoena fees</u>
\$44,876.80	Total

FURTHER YOUR AFFIANT SAYETH NOT.

s/ Jaye Rykunyk  
 Jaye Rykunyk

Subscribed and sworn to before me

this 19th day of October, 2004.

s/ Leanne K. Peters  
 Notary Public

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Samuel Mark Vaught, a/k/a S. Mark Vaught  
Debtor.

Case No. 04-33848

---

Patrick J. Murray, William Kozlak, Timothy Murray, Jaye Rykunyk;  
Josh E. Bassais; and Laurie Fossen, as Trustees of the Minneapolis On-  
Sale Liquor Pension Fund and of the Minneapolis Culinary Beverage  
and Miscellaneous Employers-Employees Trust Fund,  
Plaintiffs,

Chapter 7

vs.

Samuel Mark Vaught,

Debtor.

Adv 04-3375

---

**MEMORANDUM OF LAW**

Plaintiffs bring this motion for entry of default judgment against Defendant Samuel Mark Vaught (“Vaught”), specifically to except from discharge Vaught’s debt to Plaintiffs, and this Memorandum of Law will address each of Plaintiffs’ separate causes of action against Vaught.

**STATEMENT OF FACTS**

Plaintiffs pursue this adversary proceeding to seek exception from discharge Vaught’s indebtedness to Plaintiffs under 11 U.S.C. §523(a)(4). This adversary proceeding follows several months of litigation in the Ramsey County District Court, Civil File No. C1-03-2256, by Plaintiffs against Vaught for, *inter alia*, the following:

1. Breach of Fiduciary Duty;
2. Treble Damages under Minn. Stat. §§481.07 and 481.071;
3. Forfeiture of Fees;

4. Conversion; and
5. Unjust Enrichment.

Plaintiffs additionally seek recovery of their costs incurred in this matter, including Referee, bank processing and reasonable attorney fees. Plaintiffs move the Court for entry of judgment by default.

On June 10, 2003, upon Plaintiffs' motion for an Order for Reference in Ramsey County District Court, the Honorable District Judge William Leary appointed Barry Divine from the accounting firm of Divine, Scherzer & Brody to be the Referee in this matter to perform the accounting. Subsequent to the June 10, 2003 Order for Reference, Plaintiffs served with discovery requests with the purpose of aiding the accounting process. Vaught ignored Plaintiffs' discovery requests, and Plaintiffs were forced to incur additional fees by independently obtaining Vaught's records from third parties.

## **ARGUMENTS**

### 1. VAUGHT IS IN DEFAULT.

Rule 7055 of the Federal Rules of Bankruptcy incorporates Rule 55 of the Federal Rules of Civil Procedure. Under Rule 55(a) of the Federal Rules of Civil Procedure, "[w]hen a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Vaught has failed to appear, plead, or otherwise defend in this action, as evidenced by the attached Affidavit of No Answer, Identification and Non-Military Status. Accordingly, the Clerk of the U.S. Bankruptcy Court should enter Vaught's default.

Under Rule 55(b) of the Federal Rules of Civil Procedure, a default judgment for a sum certain may be entered by either the Clerk of Court or by the Court. Plaintiffs have calculated the sum certain to be claimed against Vaught, and the Affidavit on the Merits and Amount Due on file supports the sum certain

calculations. Under Local Rule 7055-1, the Court has the discretion to hold a hearing before entry of the default judgment against Vaught.

## 2. VAUGHT'S DEBT SHOULD BE EXCEPTED FROM DISCHARGE.

Pursuant to 11 U.S.C. §523(a), “[a] discharge under section 727 ... of this title does not discharge an individual debtor from any debt - ... (4) for fraud or defalcation while acting in a fiduciary capacity...”

The attorney-client relationship existed between Vaught and Plaintiffs, and there is an inherent fiduciary duty owed by Vaught to Plaintiffs. See Tudor Oaks Limited Partnership v. Cochrane, 124 F.3d 978, 984 (8<sup>th</sup> Cir. 1997), *cert. den'd* 118 S.Ct. 1044 (1998), citing FDIC v. Mmahat, 907 F.2d 546, 550 (5<sup>th</sup> Cir. 1990), *cert. den'd* 111 S.Ct. 1387 (1991). The facts described in the Affidavit on the Merits and Amount Due filed and served herein and described below illustrate a pattern of conduct specifically remedied by 11 U.S.C. §523(a)(4), and the Court should except the debt from discharge.

## 3. THE COURT SHOULD ENTER JUDGMENT AGAINST VAUGHT.

### **A. Vaught Breached His Fiduciary Duty to Plaintiffs.**

In its June 10, 2003 Order for Reference, the Ramsey County District Court (Hon. William Leary presiding) found that Vaught owed Plaintiffs a duty of good faith and honesty. See Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984). Additionally, the Court's June 10, 2003 Order for Reference called for an assessment of Plaintiffs' damages if there is evidence of Vaught's breaches of the duties of good faith and honesty. According to the Affidavit on the Merits and Amount Due (executed by Plaintiff Jaye Rykunyk) served and filed herewith, Vaught breached his fiduciary duty to Plaintiffs under the following acts:

1. Failing to inform Plaintiffs of collections payments from the Archie's Too, Inc. matter (“Archie's matter”);

2. Failing to remit to Plaintiffs payments received in the Archie's matter;
3. Not accounting to Plaintiffs for the payments received in the Archie's matter;
4. Failing to obtain Plaintiffs' consent to set-off the amount claimed as owing for legal services from monies collected on Plaintiffs' behalf;
5. Submitting invoices to Plaintiffs for services already paid by Plaintiffs;
6. Excessive billing for services rendered; and
7. Failing to cooperate with Plaintiffs' efforts to investigate the above-referenced matters.

Items 1 - 4 above refer to specific amounts collected but not paid to Plaintiffs in the Archie's matter. According to Referee Barry Divine, the amount collected by Vaught and not paid to Plaintiffs is the sum of \$36,816.61. Accordingly, Vaught's breach of fiduciary duty to Plaintiffs in the Archie's matter has caused Plaintiffs to be damaged in the amount of \$36,816.61.

Item 5 refers to invoices for services already paid. The amounts involve retainers and work previously billed and paid for.

Item 6 refers to excessive billing for services rendered, which includes inflated billing and charging at an hourly rate in excess of what Plaintiffs had agreed to pay Vaught. According to Referee Divine, the amount of excessive billing for the drafting of the Summary Plan Description for the Health Fund has caused the Health Plan to be damaged in the amount of \$3,807.00. Also, according to Referee Divine, the amount of the billing at a higher than agreed upon hourly rate is the sum of has caused Plaintiffs to be damaged in the amount of \$6,727.00.

Item 7 refers to Vaught's non-cooperation with Plaintiffs in their investigation of the above-referenced matters. After the June 9, 2003 hearing, Plaintiffs served Vaught with Interrogatories and Requests for Production of Documents. Vaught did not respond to either form of discovery. Accordingly, Plaintiffs were forced to independently obtain banking records and other financial documents, which

caused Plaintiffs to incur significant attorney and bank processing fees. Moreover, Vaught's non-cooperation toward Plaintiffs since early 2002 necessitated the appointment of Referee Divine. Vaught's conduct in refusing to cooperate with Plaintiffs in all facets of this matter has caused Plaintiffs to be damaged in the amount of \$44,876.80, representing Plaintiffs' attorney, referee, and bank processing fees.

**B. Plaintiffs are Entitled to Treble Damages Under Minnesota Statutes.**

State law treble damages provisions are applicable in the U.S. Bankruptcy Code application to seek exception from discharge indebtedness. See Landis v. Britt, 200 B.R. 409 (Bankr. M.D. Fla. 1996); see also In re Padgett, 235 B.R. 660 (Bankr. M.D. Fla. 1999). Vaught's egregious conduct in the Archie's matter is such to warrant an award of treble damages to Plaintiffs in this particular case to except the debt from discharge. There are two (2) statutory provisions that govern the award of treble damages in attorney-client fraud situations:

**Minn. Stat. §481.07. Penalties for deceit or collusion.** An attorney who, with intent to deceive a court or a party to an action or judicial proceeding, is guilty of or consents to any deceit or collusion, shall be guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, the attorney shall be liable to the party injured in treble damages....

**Minn. Stat. §481.071. Misconduct by attorneys.** Every attorney or counselor at law who shall be guilty of any deceit or collusion, or shall consent thereto, with intent to deceive the court or any party, or who shall delay the attorney's client's suit with a view to the attorney's own gain, shall be guilty of a misdemeanor and, in addition to the punishment prescribed by law therefore, shall forfeit to the party injured treble damages, to be recovered in a civil action.

The leading case authority on these statutes is Baker v. Ploetz, 616 N.W.2d 263 (Minn. 2000). In that case, the Minnesota Supreme Court declined to find that the statutes applied to attorney fraud committed during a real estate closing, which the Court found not to be "within the context of an action or judicial proceeding."

The Archie's matter is distinguished from the real estate closing in Baker, because Vaught's fraud occurred within the context of an active and open Court file, Hennepin County District Court File No. CJ

00-17270. Vaught, at the request of the party paying the Archie's matter indebtedness, filed with the Hennepin County District Court Administrator Civil Division a Satisfaction of Judgment without informing Plaintiffs. Moreover, Vaught represented nothing to Plaintiffs at the Board of Trustees Meetings in 1999 and 2000 regarding amounts he collected on the filing of a Satisfaction of Judgment in the Archie's matter. The filing of the Satisfaction of Judgment was within the context of an action or judicial proceeding, because Vaught filed it pursuant to Minn. Stat. §548.17 under the Minnesota Statute topic heading of "**Judicial Procedure, District Court.**" Accordingly, the amounts collected but unpaid by Vaught in the Archie's matter should be trebled under either Minn. Stat. §481.07 or §481.071.

Plaintiffs' damages regarding amounts Defendant collected in the Archie's matter to be the sum of \$36,816.61. Under Minn. Stat. §§481.07 and 481.071, Plaintiffs' damages should be \$110,449.83 (\$36,816.61 X 3 = \$110,449.83).

**C. Vaught Should Forfeit His Fees Charged to Plaintiffs.**

Vaught's breaches of fiduciary duty to Plaintiffs, particularly his conduct in the Archie's matter, necessitate a forfeiture of his fees charged. See Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986). The forfeiture should apply to the time period of Vaught's breach of fiduciary duty and bad faith toward Plaintiffs. The time period of Vaught's breach of fiduciary duty and bad faith is between October 1, 1999 and January 8, 2002. The amount of fees charged and collected by Vaught in the Archie's matter for the Pension Fund is \$5,084.75. The amount of fee charged and collected by Vaught in the Archie's matter for the Health Fund is \$7,159.25. The Court should order Vaught to forfeit fees charged to the Pension Fund in the amount of \$5,084.75 and fees charged to the Health Fund in the amount of \$7,159.25. Under 11 U.S.C. §523(a)(4), drawing a fee (or salary) in excess of what was authorized is "embezzlement." See In re McKnew, 270 B.R. 593 (Bankr. E.D. Va. 2001).

**D. Vaught Converted Plaintiffs' Property.**

Vaught's retention of amounts collected but not paid to Plaintiffs in the Archie's matter constitutes conversion of Plaintiffs' property. See Fawcett v. Heimbach, 591 N.W.2d 616 (Minn. Ct. App. 2000). Plaintiffs did not consent to Vaught's retention of the amounts collected in the Archie's matter. Vaught's attempt to characterize these funds as attorney fees to be set-off in the January 8, 2002 Final Invoice does not defeat the fact that Plaintiffs did not consent to his retention of the funds.

**E. Defendant Was Unjustly Enriched.**

In the Archie's matter, Vaught knowingly received something of value from Plaintiffs, to which he was not entitled. Additionally, the circumstances in this case are such that it would be unjust for Vaught to retain the benefit. See Schumacher v. Schumacher, 627 N.W.2d 725 (Minn. Ct. App. 2001). Vaught retained money collected in the Archie's matter in the amount of \$36,816.61. Vaught also received money from the Health Fund in the amount of \$1,663.00 for reimbursement of travel and convention expenses, in spite of the fact that Vaught as Fund Counsel is imputed to know that such use of Plan assets is unlawful. See U.S. v. Andreen, 628 F. 2d 1236 (9<sup>th</sup> Cir. 1980). Vaught was unjustly enriched with this amount. Vaught's total unjust enrichment is \$38,481.61 ( $\$36,816.61 + \$1,663.00 = \$38,481.61$ ).

**3. THE COURT SHOULD AWARD PLAINTIFFS THEIR COSTS.**

**A. Attorney Fees.**

In the Affidavit on the Merits and Amount Due; the Court is presented with sufficient evidence of Vaught's bad faith to the Plaintiffs. Vaught's bad faith continued throughout the course of Plaintiffs' attempts to transfer its client files from Vaught to Rosene, Haugrud & Staab, Chartered. Moreover, Defendant's bad faith in this case is found in Vaught's refusal to cooperate with Plaintiffs to assess the extent of Plaintiffs' damages. Vaught failed to produce documents, pursuant to Plaintiffs' Request for Production of Documents served upon him on October 2, 2003. Vaught's conduct in this case has caused Plaintiffs to incur additional attorney fees, Referee fees, subpoena fees, and bank document record

processing fees, all of which are itemized in the Affidavit of Merits and Amount Due.

Plaintiffs acknowledge the general rule that attorney fees are not awarded unless there is statutory or contractual authority. But the exception to the general rule is when there is bad faith. “The exception provides that, where a party or attorney acted in bad faith as to an issue in litigation, attorney fees can be awarded.” Barr/Nelson v. Tonto’s, Inc., 336 N.W.2d 46, 53 (Minn. 1983). Since this ruling, Minnesota’s statutes codifying this exception have been amended. See Minn. Stat. §549.211. The Court has inherent discretionary authority to award “bad faith” attorney fees. See Kellar v. Von Holtum, 605 N.W.2d 696 (Minn. 2000). See also Erickson v. Hinckley Municipal Liquor Store, 373 N.W.2d 318, 326 (Minn. Ct. App. 1585) and Anchor Gas, Inc. v. Border Black Top, Inc., 381 N.W.2d 96, 98-99 (Minn. Ct. App. 1986). Given the facts in this case, particularly Vaught’s non-cooperation directly causing Plaintiffs’ costs to increase, it would not be an abuse of this Court’s discretion to award Plaintiffs their attorney fees incurred in this matter. “[W]here attorney fees are available outside bankruptcy as a matter of law, then they are also available inside bankruptcy in a dischargeability proceeding.” In re Scheller, 265 B.R. 39, 55 (Bankr. S.D. NY 2001). Accordingly, Plaintiffs respectfully request an award of their attorney fees incurred in this matter.

**B. Referee Fees.**

Pursuant to Rule 53.01 of the Minnesota Rules of Civil Procedure, the Court ordered on June 10, 2003 that Barry Divine from the accounting firm of Divine, Scherzer & Brody be appointed referee to perform an accounting in this matter. Between June 10, 2003 and April 22, 2004, Referee Divine has reviewed several (but not all) documents from the fourteen (14) banker’s boxes delivered by Vaught to the offices of Rosene, Haugrud & Staab, Chartered on October 25, 2002. Plaintiffs have paid Referee Divine’s fees in the amount of \$16,903.00. See Affidavit on the Merits and Amount Due.

Under Rule 53.01, the Court shall fix the referee’s compensation “...to be charged upon such of the

parties...” Without re-illustrating Vaught’s non-cooperative conduct, Plaintiffs assert that it would be just and equitable to award Plaintiffs the costs incurred to compensate Referee Divine for his services to perform the accounting in this matter. “A court has the discretion to assess the cost incurred by the appointment of a referee under Rule 53.” Herr & Haydock, Minn. Practice Series 1998, Civil Rules Ann., R. 54.04, p. 234. Moreover, such fees are non-dischargeable under 11 U.S.C. §523(a)(4). See In re Gibson, 77 B.R. 829 (Bankr. CO 1987). Additional costs include bank processing, motion, service of processing and subpoena fees.

### CONCLUSION

The Court should except Vaught’s debt to Plaintiffs from discharge, and the Court should enter default judgment against Vaught. Additionally, the Court should award Plaintiffs their attorney and referee fees and costs incurred in this matter.

Dated: October 21, 2004

s/ Andrew E. Staab  
Andrew E. Staab  
Attorney for Plaintiffs  
ROSENE, HAUGRUD & STAAB, CHARTERED  
400 Robert Street North, Suite 1800  
St. Paul, MN 55101  
(651) 227-6621  
Attorney Registration #204705



**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

In re:

Samuel Mark Vaught, a/k/a S. Mark Vaught  
Debtor.

Case No. 04-33848

---

Patrick J. Murray, William Kozlak, Timothy Murray, Jaye Rykunyk;  
Josh E. Bassais; and Laurie Fossen, as Trustees of the Minneapolis On-  
Sale Liquor Pension Fund and of the Minneapolis Culinary Beverage  
and Miscellaneous Employers-Employees Trust Fund,  
Plaintiffs,

Chapter 7

vs.

Samuel Mark Vaught,

Debtor.

Adv 04-3375

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOR JUDGMENT**

Rosene, Haugrud & Staab, Chartered, by ANDREW E. STAAB, Esq., of St. Paul, Minnesota,  
appeared for Plaintiffs.

\_\_\_\_\_, appeared for Debtor/Defendant.

---

This matter came on for hearing before the Court on \_\_\_\_\_, 2004, on  
Plaintiffs' motion for default judgment.

Upon all files, records and proceedings herein, the Court makes the following:

**FINDINGS OF FACT**

1. That Defendant Samuel Mark Vaught was served with the Summons and Complaint in the present  
action on September 15, 2004.
2. That Defendant is neither an infant nor an incompetent person.

3. That Defendant has failed to appear, answer, or otherwise defend, and he is accordingly in default.
4. That Plaintiffs are trustees of both the Minneapolis On-Sale Liquor Pension Fund (“Pension Fund”) and the Minneapolis Culinary Beverage and Miscellaneous Employers-Employees Trust Fund (“Health Fund”) (collectively referred to as “the Funds”), which are express trusts organized under and pursuant to the provisions of §302(c)(5) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5). Plaintiffs are trustees of multiemployer benefit plans within the meaning of Section 3(37) and 4001(a)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). Plaintiffs are fiduciaries to the Funds.
5. That at all times material, Defendant was an attorney at law licensed in the State of Minnesota, until he was indefinitely suspended from the practice of law with no right to apply for reinstatement for three (3) years, by Order of the Minnesota Supreme Court dated January 7, 2002. In re Disciplinary Action Against Vaught, 637 N.W.2d 570 (Minn. 2002).
6. That the Funds retained Defendant as Fund Counsel from 1984 to January 2002.
7. That in January 2002, the Funds retained new Fund Counsel, Rosene, Haugrud & Staab, Chartered, to provide legal services, including obtaining from Defendant the client files related to the Funds. When voluntary steps to recover the client files were unsuccessful, Plaintiffs petitioned the Court for delivery of money and/or papers pursuant to Minnesota Statute §481.14, Ramsey County District Court, Civil File CO-02-9236.
8. That a hearing pursuant to an Order to Show Cause in the above-referenced matter was scheduled for October 25, 2002.
9. That on October 25, 2002, just prior to the Order to Show Cause hearing, Defendant turned over fourteen (14) boxes of materials which Defendant purported to be all of the client files relating to the Funds.

10. That upon review of the materials in the fourteen (14) boxes, Plaintiffs learned that Defendant, while representing Plaintiffs, may have breached his fiduciary duty to Plaintiffs with respect to, *inter alia*, Plaintiffs' collections and settlement proceeds.
11. That Defendant was at all times relevant, Plaintiffs' attorney, and he represented Plaintiffs in, *inter alia*, collections matters, whereby he would collect funds due and owing Plaintiffs. One particular collections matter, the Archie's Too, Inc. case ("Archie's matter"), caused Plaintiffs to be concerned whether Defendant's actions were consistent with his fiduciary duty to Plaintiffs.
12. That in 1998, Defendant commenced an action on behalf of the Plaintiffs in the United States District Court against Richard Bruce Van Tassel and Archie's Too, Inc. (collectively referred to as "Archie's") for delinquent fringe benefit contributions and withdrawal liability, U.S. District Court Civil File 98-1230 DSD/JMM.
13. That on May 3, 1999, Plaintiffs and Archie's settled the above-referenced U.S. District Court litigation by entering into a Settlement Agreement that included installment payments pursuant to a Promissory Note, and further evidenced by a Confession of Judgment. Archie's agreed to pay the Plaintiffs the sum of \$45,000.00 payable as follows: \$5,000.00 upon execution of the Promissory Note, and \$40,000.00 by installment payments as set forth in the Promissory Note's payment schedule.
14. That on July 1, 1999, Defendant sent to Zenith Administrators, Inc., the Plaintiffs' third-party administrator at that time, the sum of \$5,000.00, which represented Archie's initial payment on the Promissory Note.
15. That on December 4, 2000, Defendant filed the Confession of Judgment in the Archie's matter along with affidavits of default and amounts due and owing under the Promissory Note, in Hennepin County District Court, Civil File CJ 00-17270. In Defendant's Affidavit of Counsel

executed on December 4, 2000, he stated that the remaining unpaid balance on the Promissory Note was \$30,000.00, plus unpaid accrued interest in the amount of \$1,800.00, late payment penalties in the amount of \$4,250.00, attorney fees in the amount of \$600.00 and court filing fee in the amount of \$132.00, for a judgment in the amount of \$36,732.00.

16. That on December 13, 2000, the Hennepin County District Court entered judgment in favor of Plaintiffs and against Archie's in the amount of \$36,732.00, plus post-judgment interest.
17. That on July 17, 2001, Defendant executed and filed with the Hennepin County District Court a Satisfaction of Judgment with respect to the judgment in favor of Plaintiffs and against Archie's.
18. That in January 2002, the Funds retained new Fund Counsel, Rosene, Haugrud & Staab, Chartered, to provide legal services, including obtaining from Defendant the client files related to the Funds. When voluntary steps to recover the client files were unsuccessful, Plaintiffs petitioned the Court for delivery of money and/or papers pursuant to Minnesota Statute §481.14, Ramsey County District Court, Civil File CO-02-9236.
19. That a hearing pursuant to an Order to Show Cause in the above-referenced matter was scheduled for October 25, 2002.
20. That on October 25, 2002, just prior to the Order to Show Cause hearing, Defendant turned over fourteen (14) boxes of materials which Defendant purported to be all of the client files relating to the Funds.
21. That upon review of the material in the fourteen (14) boxes, Plaintiffs learned that Defendant, while representing Plaintiffs, breached his fiduciary duty to Plaintiffs. The specifics of Defendant's breaches of his fiduciary duties are detailed below, and they focus on Defendant's retention of Plaintiffs' property, namely monies collected and retained in collections matters.
22. That on February 25, 2003, Plaintiffs personally served Defendant with a copy of the Summons

and Complaint, Ramsey County District Court Civil File No. C1-03-2256. Defendant failed to appear, answer, or otherwise defend, and he was in default.

23. That at the June 9, 2003 hearing on Plaintiffs' motion for, *inter alia*, appointment of a referee under Rule 53 of the Minnesota Rules of Civil Procedure, Plaintiffs had insufficient information to determine the extent of monies collected and retained by Defendant. Accordingly, Mr. Barry Divine, from the accounting firm of Divine, Scherzer & Brody, Ltd. was appointed Referee in this action to determine to what extent Plaintiffs' damages, if any, were in this matter.
24. That Referee Divine completed his investigation and reporting on or about April 22, 2004, and Plaintiffs scheduled a hearing for entry of default judgment against Defendant to occur on July 7, 2004.
25. That although Defendant made no appearance in Plaintiffs' Ramsey County District Court matter, Plaintiffs served Defendant on June 21, 2004 with copies of the motion and supporting documents relating to Plaintiffs' motion for entry of default judgment against Defendant and in favor of Plaintiffs.
26. That on June 28, 2004, 489 days after having been personally served with the Summons and Complaint, Defendant served Plaintiffs with a copy of an unsigned and undated Answer to the Plaintiffs' Complaint.
27. That in Defendant's Answer to Plaintiffs' Complaint, Defendant admits some of the allegations, and he denies some of the allegations with explanations.

#### **REFEREE'S ACCOUNTING OF DEFENDANT'S RECORDS**

28. That court-appointed Referee Barry Divine filed his report in conjunction with Plaintiffs' motion in the Ramsey County District Court proceedings. That according to the forensic accounting done by Referee Divine, there are five sub-issues:

- a. Over-billed retainers;
- b. Unauthorized increase in hourly billing rate;
- c. Discrepancy with May 4, 2000 Invoice;
- d. Amounts collected in Archie's matter; and
- e. Excess billing on drafting Summary Plan Description.

29. That according to first sub-issue, Defendant over-billed the Plaintiffs for retainers for December 2000 and January 2001 in the total amount of \$2,000.00.
30. That Defendant's monthly retainer arrangement with the Plaintiffs in 2000 and 2001 was to charge the Pension Fund \$250.00 and the Health Fund \$750.00. According to Referee Divine, Defendant over-charged and collected from the Pension Fund \$500.00 and the Health Fund \$1,500.00, calculated as follows:

	<u>Pension Fund</u>	<u>Health Fund</u>
December 2000	\$250.00	\$750.00
January 2001	<u>\$250.00</u>	<u>\$750.00</u>
	\$500.00	\$1,500.00

31. That the second sub-issue is Defendant's increased hourly billing rate shown in his January 8, 2002 Final Invoice.
32. That neither the Pension Fund nor the Health Fund authorized an hourly rate increase from \$90.00 to \$125.00, and Defendant's increase on the January 8, 2002 Final Invoice to \$125.00 was unauthorized.
33. That according to Referee Divine, the amount charged by Defendant on the January 8, 2002 Final Invoice in excess of the \$90.00 hourly rate is the sum of \$6,727.00.
34. That according to Referee Divine, Defendant charged the Plaintiffs on the January 8, 2002 Final Invoice for itemized work in 2000 that was already paid for in previous invoices.

35. That according to Referee Divine, a total of 25.9 hours were charged to the Plaintiffs on Defendant's January 8, 2002 Final Invoice for work performed in November 2000 and December 2000 is the sum of \$2,331.00 (25.9 hours x \$90.00\* = \$2,331.00). (\*total higher billing rate discrepancy addressed in paragraph 33 above).
36. That the third sub-issue is a discrepancy involving Defendant's May 4, 2000 invoice to Plaintiffs. According to Referee Divine, Defendant over-charged the Health Fund the sum of \$2,324.10 and the Pension Fund \$867.70.
37. That the fourth sub-issue relates to amounts collected by Defendant in the Archie's matter. Referee Divine found that Defendant collected \$54,979.23 for the Plaintiffs in the Archie's matter.
38. That upon review of Defendant's invoices and the file records, Referee Divine found the following amounts to constitute credits in 1999 and 2000 to the Plaintiffs for amounts Defendant collected in the Archie's matter:
- a. \$ 5,000.00 (July 1, 1999 direct remittance);
  - b. \$ 4,042.70 (April 15, 2000 billing \$1,010.67 Pension Fund + \$3,032.03 Health Fund = \$4,042.70).
  - c. \$ 6,619.92 (August 1, 2000 billing \$2,500.00 Pension Fund + \$4,199.92 Health Fund = \$6,619.92)
  - d. \$ 2,500.00 (November 2000 billing Pension Fund)  
\$18,162.62 Total
39. That based on the credits stated in paragraph 37 above, there remains a balance in the Archie's matter to address in the amount of \$36,816.61 (\$54,979.23 - \$18,162.62 = \$36,816.61).
40. That in his January 8, 2002 Final Invoice, Defendant states that he collected the sum of \$37,479.23 in the Archie's matter, which sum Defendant sets off from the invoice amount to reflect no money due and owing.

41. That Defendant first sent the January 8, 2002 Final Invoice to the Plaintiffs' Third-Party Administrator on October 22, 2002.
42. That October 22, 2002 was only three (3) days before the hearing on the Plaintiffs' motion to compel Defendant to turn over the Plaintiffs' client files to the law firm of Rosene, Haugrud & Staab, Plaintiffs' current counsel. Ramsey County District Court File No. CO-02-9236.
43. That Defendant's January 8, 2002 Final Invoice was backdated to January 8, 2002.
44. That Defendant backdated the January 8, 2002 Final Invoice to tie out amounts Defendant had collected and retained for the Plaintiffs in the Archie's matter.
45. That the fifth sub-issue is the amount Defendant charged the Health Fund on his January 8, 2002 Final Invoice to draft a Summary Plan Description. The amount is \$7,785.50, which is 62.3 hours at an hourly rate of \$125.00.
46. That Defendant's work on drafting the Summary Plan Description for the Health Fund was limited to adapting the nearly identical Summary Plan Description drafted by Rosene, Haugrud & Staab for the Greater Metropolitan Hotel Employers-Employees Health & Welfare Fund.
47. That Defendant could have reasonably billed the Health Fund for twenty (20) hours of work on adapting the Summary Plan Description. At an hourly rate of \$90.00, Defendant could have reasonably charged the Health Fund \$1,800.00 to adapt the Summary Plan Description.
48. That Defendant charged the Health Fund in excess of 42.3 hours for work on the Summary Plan Description.
49. That according to the adapted rate, (unauthorized increased rate addressed in paragraph 32 above), Defendant over-charged the Health Fund for work on the Summary Plan Description in the amount of \$3,807.00 ( $\$90.00 \times 42.3$  overstated hours = \$3,807.00).

**DEFENDANT'S UNLAWFUL USE OF PLAN ASSETS**

50. That, contrary to the terms of the Health Fund's Trust Agreement, Defendant collected from the Health Fund the sum of \$1,063.00 for attending a educational conference in Orlando, Florida in December 1998.
51. That, contrary to the terms of the Health Fund's Trust Agreement, Defendant collected from the Health Fund the sum of \$600.00 for expenses incurred while attending the educational conference in Orlando, Florida in December 1998.
52. That Defendant, as Fund Counsel, should know that the Health Fund's payment of expenses on his behalf constitutes a violation of the Health Fund's Trust Agreement and an unlawful use of the Health Fund's assets, specifically in violation 29 U.S.C. §1103.

**DEFENDANT'S ATTORNEY FEES IN ARCHIE'S MATTER**

53. That October 10, 1999 (the date of Archie's settlement payment payable to Defendant) is the earliest unaccounted payment illustrating Defendant's conduct of bad faith and breach of his fiduciary duty to the Plaintiffs.
54. That according to Defendant's statements (on the Archie's matter only) to the Pension Fund for services rendered between October 1, 1999 and July 31, 2001 (not including costs advanced), Defendant billed and collected the total sum of \$5,084.75, broken down as follows:

<u>Month</u>	<u>Statement Date</u>	<u>Amount</u>
October 1999	November 15, 1999	\$45.00
November 1999	December 15, 1999	\$45.00
December 1999	January 5, 2000	\$202.50
January 2000	February 15, 2000	\$90.00
February 2000	March 15, 2000	\$45.00

March 2000	April 15, 2000	\$135.00
April – July 2000	August 1, 2000	\$159.75
August – November 2000	November 28, 2000	\$180.00
December 2000 & January 2001	January 2, 2001	\$270.00
December 2000 – July 2001	January 8, 2002	<u>\$3,192.50</u>
		<b>\$5,084.75</b>

\*Includes duplicate entries from January 2, 2001 statement.

55. That according to Defendant's statements on the Archie's matter only to the Health Fund for services rendered between October 1, 1999 and July 31, 2001 (not including costs advanced), Defendant billed and received the total sum of \$7,159.25, broken down as follows:

<u>Month</u>	<u>Statement Date</u>	<u>Amount</u>
October 1999	November 15, 1999	\$135.00
November 1999	December 15, 1999	\$135.00
December 1999	January 5, 2000	\$607.50
January 2000	February 15, 2000	\$270.00
February 2000	March 15, 2000	\$135.00
March 2000	April 15, 2000	\$135.00
April –July 2000	August 1, 2000	\$479.25
August – November 2000	November 28, 2000	\$540.00
December 2000 & January 2001	January 2, 2001	\$810.00
December 2000 – July 2001	January 8, 2002*	<u>\$3,912.50</u>
		<b>\$7,159.25</b>

\*Includes duplicate entries from January 2, 2001 statement.

**PLAINTIFFS' ATTORNEY FEES, REFEREE FEES AND OTHER COSTS**

- 56. That Plaintiffs have incurred expenses as a result of the Defendant's constructive fraud, breaches of fiduciary duties, conversion of Plaintiffs' property, and unjust enrichment.
- 57. That Defendant is liable for Plaintiffs' expenses, specifically Plaintiffs' reasonable attorney fees, Referee fees, and other out of pocket expenses.
- 58. That the hourly rate for Rosene, Haugrud & Staab, Plaintiffs' attorneys, is \$185.00 for attorneys, and \$75.00 for paralegal, which is a fair and reasonable rate for legal services.
- 59. That Plaintiffs' total attorney fees incurred through April 30, 2004 is \$23,294.80.
- 60. That Defendant is liable for Plaintiffs' reasonable attorney fees incurred after April 30, 2004.
- 61. That Plaintiffs incurred Referee fees in investigating Defendant's breaches of fiduciary duty in the amount of \$16,903.00.
- 62. That in order to obtain documentation for the Referee's report, Plaintiffs paid Anchor Bank St. Paul (f/k/a The Bank of St. Paul) on December 4, 2003 the sum of \$1,200.00 to process records relating to Defendant's personal, business IOLTA accounts. On December 19, 2003, Plaintiffs paid Anchor Bank St. Paul an additional \$750.00 for processing records fees. On January 13, 2004, Plaintiffs paid Anchor Bank St. Paul a third and final processing records fee in the amount of \$2,100.00. Plaintiffs paid Anchor Bank St. Paul a total of \$4,050.00 for processing records fees (\$1,200.00 + \$750.00 + \$2,100.00 = \$4,050.00)
- 63. That the total for additional costs incurred by the Plaintiffs is \$629.00, calculated as follows:

Service of Process Fee	\$130.00
Court Filing Fees	\$230.00
Subpoena Fees	\$24.00
Motion Fees	<u>\$245.00</u>

\$629.00

64. That the total requested for costs and attorney fees and costs is the sum of \$44,631.80, calculated as follows:

\$23,294.80	Plaintiffs' attorney fees
\$16,903.00	Referee Fees
\$ 230.00	court filing fees
\$ 245.00	motion fees
\$ 130.00	service of process fee
\$ 4,050.00	bank processing records fees
\$ <u>24.00</u>	<u>subpoena fees</u>
\$44,876.80	Total

### CONCLUSIONS OF LAW

1. That at all times relevant, the Funds and Defendant were in an attorney-client relationship, and Defendant owed a strict fiduciary duty to the Funds. Defendant was required to act at all times honestly and in good faith.
2. That between 1984 and January 2002, in accordance with their attorney-client relationship, Defendant, *inter alia*, collected for and on behalf of Plaintiffs certain monies in collections matters.
3. That Defendant failed to fulfill his fiduciary obligations to Plaintiffs and breached his duties to Plaintiffs in various ways, including by:
  - a. not informing Plaintiffs of receipt of collections payments in the Archie's matter;
  - b. not remitting to Plaintiffs payments received in the Archie's matter;
  - c. not accounting to Plaintiffs for the payments received in the Archie's matter;
  - d. not obtaining consent from Plaintiffs to set-off the amount claimed as owing for legal services from monies collected on behalf of the Funds;

- e. submitting an invoice to Plaintiffs for services already paid for by the Funds;
  - f. excessive billing for services rendered; and
  - g. failing to cooperate with Plaintiffs' efforts to investigate the above matters.
4. That as a direct and proximate result of Defendant's breaches of his fiduciary duties, Plaintiffs have been damaged.
  5. That Plaintiffs' damages as a result Defendant's breach of fiduciary duty in the Archie's matter are \$36,816.61, representing amounts Defendant collected on the Archie's matter on Plaintiffs' behalf and retained by Defendant.
  6. That in the Archie's matter, Defendant intentionally deceived the Funds by failing to submit the payments he collected to the Funds.
  7. That as a result of Defendant's intentional deception, Plaintiffs have been damaged in the amount of \$36,816.61.
  8. That the Defendant's fraud in the Archie's matter occurred during an "action or judicial proceeding" under Minn. Stat. §§481.07 and 481.071.
  9. That pursuant to Minn. Stat. §§481.07 and 481.071, Defendant is liable to Plaintiffs for treble damages in the amount of Plaintiffs' losses as a result of Defendant's deception.
  10. That Plaintiffs' damages as a result Defendant's deception in the Archie's matter are \$36,816.61, and when multiplied by three, Plaintiffs' damages under Minn. Stat. §§481.07 and 481.071 are in the amount of \$110,449.83 ( $\$36,816.61 \times 3 = \$110,449.83$ ).
  11. That Defendant's bad faith is further reflected in his billing practices to Plaintiffs, specifically the following:
    - a. Overbilled retainers to the Pension Fund in the amount of \$500.00;
    - b. Overbilled retainers to the Health Fund in the amount of \$1,500.00;

- c. Unauthorized increasing in hourly billing rate in the amount of \$6,727.00 (total for both Funds);
  - d. Overbilled amounts for itemized work in November 2000 and December 2000 in the amount of \$2,331.00 (total for both Funds);
  - e. Overbilled amount on May 4, 2000 invoice to Health Fund in the amount of \$2,324.10;
  - f. Overbilled amount on May 4, 2000 invoice to Pension Fund in the amount of \$867.70; and
  - g. Overbilled amount charged the Health Fund in the amount of \$3,807.00 for work on the Summary Plan Description.
12. That as a result of Defendant's breach of fiduciary duty and bad faith, Defendant must forfeit his attorney fees charged to Plaintiffs in the Archie's matter for the time period of his breach of fiduciary duty and bad faith toward Plaintiffs.
13. That during the time period of Defendant's breach of fiduciary duty and bad faith toward Plaintiffs, Defendant charged Plaintiffs attorney fees (not including costs advanced) in the Archie's matter as follows:
- \$5,084.75 to the Pension Fund Pension; and
  - \$7,159.75 to the Health Fund.
14. That Defendant's bad faith obligates Defendant to forfeit to Plaintiffs the amounts stated in #13 above to Plaintiffs.
15. That Defendant exercised control over the payments collected in the Archie's matter Defendant's exercise of control over the Plans' assets was contrary to the Funds' interests in the Funds' assets. According, Defendant converted Plaintiffs' funds.
16. That Plaintiffs' damages as a result of Defendant's conversion are in the amount of \$36,816.61.
17. That Defendant knowingly received and retained money due and owing Plaintiffs in the Archie's matter and for educational conference expenses in December 1998. That Defendant applied a

portion of the money received and retained in the Archie's matter to the January 8, 2002 Final Invoice. That Defendant knowingly applied the money to duplicate or false entries stated on the January 8, 2002 Final Invoice.

18. That it would be unjust for Defendant to retain the money collected in the Archie's matter, and for educational conference expenses in December 1999 and Defendant was unjustly enriched in the amount of \$38,479.61 ( $\$36,816.61 + \$1,663.00 = \$38,479.61$ ).
19. That Defendant obtained money from Plaintiffs by false pretenses and by false representations.
20. That Defendant's conversion of Plaintiffs' money constitutes defalcation while acting in a fiduciary capacity.
21. That Defendant's conversion of Plaintiffs' money in the Archie's matter constitutes embezzlement from Plaintiffs.
22. That Defendant's bad faith toward Plaintiffs necessitates an award of Plaintiffs' attorney fees and costs related to this matter
23. That the total requested for costs and attorney fees and costs is the sum of \$44,876.80, calculated as follows:

\$23,294.80	Plaintiffs' attorney fees
\$16,903.00	Referee Fees
\$230.00	court and filing fees
\$245.00	Motion fees
\$130.00	service of process fee
\$56.74	postage
\$4,050.00	bank fees
<u>\$24.00</u>	<u>subpoena fees</u>
\$44,876.80	Total

24. That the above-described actions constitute Defendant's indebtedness to Plaintiffs "for fraud or defalcation while acting in a fiduciary capacity," within the meaning of 11 U.S.C. §523(a)(4).

25. That Defendant's above-described indebtedness to Plaintiff is excepted from discharge, pursuant to 11 U.S.C. §523(a)(4).
26. That Plaintiffs are entitled to a judgment against Defendant, pursuant to Rule 7055 of the Federal Rules of Bankruptcy.

Based on the foregoing, IT IS HEREBY ORDERED:

**ORDER**

1. That the Plaintiffs are awarded judgment in their favor against the Defendant, as follows:
  - a. for Defendant's breach of fiduciary duty: \$36,816.61;
  - b. for treble damages under Minn. Stat. §481.07 & 481.071: \$110,449.83; and
  - c. for conversion of Plaintiffs' money: \$36,816.61.
2. That judgment in the amount of \$7,631.10 shall be entered in favor of the Health Fund and against Defendant, for the following:

\$1,500.00	Overbilled Retainers (December 2000 and January 2001)
\$2,324.10	Overbilled amount on May 4, 2000 invoice
<u>\$3,807.00</u>	Excessive billing for work on Summary Plan Description
\$7,631.10	Total
3. That judgment should in the amount of \$1,367.70 in favor of the Pension Fund and against Defendant for the following:

\$ 500.00	overbilled Retainers (December 2000 and January 2001)
<u>\$ 867.70</u>	overbilled amount on May 4, 2000 invoice.
\$1,367.70	Total
4. That judgment in the amount of \$9,058.00 should be entered in favor of Plaintiffs and against

Defendant for the following:

\$2,331.00	overbilled amounts on January 8, 2002 Final Invoice for work performed in November 2000 and December 2000.
<u>\$6,727.00</u>	for charging an unauthorized higher billing rate on January 8, 2002 Final Invoice.
\$9,058.00	Total

5. That judgment shall be entered in favor of Plaintiffs and against Defendant, representing in the attorney fees Defendant billed and collected in the Archie's matter in the following amounts:

\$5,084.75 to the Pension Fund;  
\$7,159.75 to the Health Fund.

6. That judgment shall be entered in favor of the Plaintiffs in the amount of \$44,876.80, representing attorney fees, Referee fees, bank process fees incurred in prosecuting this matter.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: \_\_\_\_\_, 2004

---

Gregory F. Kishel  
United States Bankruptcy Judge