UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

WILLIAM C. HALPIN, JR., Chapter 7
Case No. 03-12077

Debtor.

DONALD RAHM, LAWRENCE SPRARAGEN,
JOSEPH GROSS, PHILIP PACIFICO,
VINCENT J. DALY, and DONALD HART,

Plaintiffs,

-against- Adversary No. 03-90266

WILLIAM C. HALPIN, JR.,

Defendant.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is the objection to the dischargeability of a certain debt pursuant to 11 U.S.C. § 523(a)(4) filed by Donald Rahm, Lawrence Spraragen, Joseph Gross, Philip Pacifico, Vincent J. Daly and Donald Hart (the "Plaintiffs"). The Plaintiffs seek to offset their debt, pursuant to 11 U.S.C. § 553(a), with the annuity and pension benefits of William C. Halpin, Jr. (the "Defendant" or "Debtor"). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(B), (b)(2)(I) and 1334(b).

FACTS

The Debtor filed his Chapter 7 petition on March 28, 2003, listing the Plaintiffs' claim as $39,807.44 on Schedule F (Creditors Holding Unsecured Nonpriority Claims). The Debtor was the president and sole shareholder of Halpin Mechanical & Electric, Inc. ("HM&E"), a company engaged in the electrical contracting business. (Joint Stip. of Facts ¶ 3.) HM&E filed a Chapter 7 petition on March 28, 2003, and the case was closed on February 27, 2004. The Plaintiffs are members of the International Brotherhood of Electrical Workers Local 236 ("I.B.E.W." or the "Union"), a labor organization that acts as a collective bargaining representative for employees of local electrical contractors. The Plaintiffs are also trustees of various benefit funds (the "Benefit Funds") of which the Union is a participant.[1] The Debtor, in his capacity as president of HM&E, entered into a collective bargaining agreement (the "CBA") with the Union that was effective between the parties from June 1, 2001 through and including May 31, 2004. (Joint Stip. of Facts ¶ 8.) HM&E, by and through the Debtor, was obligated to contribute certain monies toward the Benefit Funds as outlined in sections 5.16, 6.01 - 6.04, 6.13, 6.14 and 7.01 of the CBA. The Debtor failed to remit those contributions for the months of July 2002 through and including January 2003 for a total amount due of $44,452.24. (Joint Stip. of Facts ¶ 25.)

The Debtor listed his personal annuity and pension funds, also with I.B.E.W. Local 236, on Schedules B (Personal Property) and C (Property Claimed As Exempt) of his Chapter 7 petition. The Debtor claims the entire value of both funds as exempt. The parties stipulated that

[1]The Benefit Funds are comprised of:
I.B.E.W. Pension Plan and Trust, the Health and Benefit Fund and Plan, the Annuity Fund and Plan, the Apprenticeship Training Fund, and the National Electrical Benefit Fund.

as of March 30, 2005, the Defendant's annuity had an account balance of $20,439.16 and his pension would disburse a monthly payment of $1,524.25 beginning at the age of 62. (Joint Stip. of Facts ¶ 41.) On June 5, 2003, the Plaintiffs filed an objection to the Debtor exempting his annuity and pension benefits.

On September 11, 2003, the Plaintiffs commenced this adversary proceeding by filing a complaint to except their debt from discharge pursuant to 11 U.S.C. § 523(a)(4). The Plaintiffs also seek to offset their debt, pursuant to 11 U.S.C. § 553(a), against the Defendant's interest in the annuity and pension funds he is entitled to as a Benefit Fund participant. The complaint alleges the causes of action arise under the Employee Retirement Income Security Act of 1974, §301(a), as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA") and the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a) (the "Act"). (Complaint ¶ 1 & 2.) On October 10, 2003, the Defendant filed a motion to dismiss the adversary proceeding. The Defendant's motion was denied by an order of this court entered on January 12, 2004. The Defendant then filed his answer on January 23, 2004. After numerous adjournments and several attempts by the parties to settle the case, the parties and the court agreed there were no triable issues of fact. A joint stipulation of facts was filed on June 17, 2005. The parties filed their respective memoranda of law, and the matter was taken under submission on October 28, 2005.

ARGUMENTS

The Plaintiffs postulate they have met the requirements of 11 U.S.C. § 523(a)(4).[2] The

[2] **11 U.S.C. § 523. Exceptions to Discharge**
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

Plaintiffs argue the unpaid contributions owed to the Benefit Funds for the period of July 2002 through and including January 2003 are plan assets. It is the Plaintiffs' contention that the contributions became plan assets at the time the Defendant was obligated to remit the payments. The Plaintiffs further argue that the Defendant, as president of HM&E, determined which corporate debt obligations would be paid and exercised control over the company's accounts. Pursuant to the definition under § 3(21)(A) of ERISA (29 U.S.C. § 1002(21)(A)),[3] the Plaintiffs assert the Defendant is a fiduciary.

Drawing support from the Joint Stipulation of Facts, the Plaintiffs argue that the Defendant chose to "direct funds on deposit in HM&E corporate bank accounts to the payment of himself as well as other existing corporate debt obligations." (Joint Stip. of Facts ¶ 28.) The Plaintiffs further argue the Defendant's decision not to make contributions to the Benefit Funds was a breach of his fiduciary duty under § 409(a) of ERISA (29 U.S.C. § 1109(a)),[4] thus triggering his personal liability under the statute. The Plaintiffs argue their debt should be offset,

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[3] **29 U.S.C. § 1002. Definitions**
(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (I) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, ... (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

[4] **29 U.S.C. § 1109. Liability for Breach of Fiduciary Duty**
(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

pursuant to § 553(a), by the Defendant's personal annuity and pension benefits. The Plaintiffs argue the statutory right of setoff can, in certain instances, trump the Debtor's ability to claim an exemption. Lastly, pursuant to 29 U.S.C. § 1132(g)(2), the Plaintiffs seek liquidated damages of 20% of the amounts owing to the Benefit Funds, as well as interest on all contributions owing, at a rate of prime plus two percentage points. The Plaintiffs also request reasonable attorneys' fees and costs to be determined by the court following the submission of additional pleadings.

Conversely, the Defendant contends that the unpaid contributions outstanding to the Benefit Funds did not become plan assets at the moment they were contractually due. The Defendant argues the monies do not belong to the Benefit Funds until the employer, HM&E, remits them and because the payments were not remitted, they cannot be plan assets. The Defendant asserts that language in the CBA fails to define when contributions become plan assets. The Defendant contends the contributions are nothing more than contractual payment obligations and HM&E's failure to make those payments constitutes a breach of a contract.

The Defendant also asserts that under § 3(21)(A) of ERISA, if the unpaid contributions are not found to be plan assets, then he cannot be a fiduciary. Consequently, if the Defendant is not a fiduciary, then he could not have breached his fiduciary duty nor be held personally liable. The Defendant further argues his annuity and pension benefits are exempt assets which cannot be offset. Lastly, the Defendant requests an award of costs incurred in defending the adversary proceeding, inclusive of reasonable attorneys' fees.

DISCUSSION

The Plaintiffs' complaint sets forth two causes of action objecting to the dischargeability of their debt based upon two theories: "fraud and defalcation for breach of fiduciary duty" and "conversion." (Plaintiffs' Compl. 9 & 13.) The second cause of action alleges the Defendant wrongfully converted union dues withheld from the employees' wages. The Defendant admits he failed to remit the union dues deducted from the wages of HM&E electricians and I.B.E.W. members during the months of July 2002 through and including January 2003. The parties have stipulated that $3,392.64 was not remitted by the Defendant, and the Defendant agrees to make payments to the Benefit Funds in this amount. (Joint Stip. of Facts ¶ 12 and Def.'s Mem. of Law 5.) The court accepts the admissions of the Defendant and considers the second cause of action settled. The first cause of action serves as the basis for this decision.

A. Acting in a Fiduciary Capacity

The Plaintiffs' debt will only be excepted from discharge pursuant to 11 U.S.C. §523(a)(4) for fraud or defalcation if the Defendant was acting in a fiduciary capacity. The Plaintiffs' first cause of action, although concisely pled, has many layers. In determining whether the Defendant is an ERISA fiduciary, the court must concurrently determine if the Benefit Funds became plan assets at the time they were contractually due under the CBA.

The Second Circuit noted that Congress intended the term fiduciary to be broadly construed. "[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." *Blatt v. Marshall*, 812 F.2d 810, 812 (2d Cir. 1987), *citing,* H.R.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 5038, 5013. In *Blatt*, the Second Circuit expounded on the definition of fiduciary under § 3(21)(A) of ERISA[5] and determined that the statute "focuses on the exercise, as well as the possession, of authority or control. Thus, 'a person is a fiduciary with

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[5] *See supra* note three.

respect to a plan to the extent (I) he exercises ... any authority or control respecting ... disposition of its assets'." *Id.* at 813. The court in *Blatt* found the accounting firm principals, Marshall and Lassman, exercised authority and control over the vested retirement contributions of the plaintiff and prevented a payout to him for more than one and a half years. "Therefore, within the plain meaning of the statute, Marshall and Lassman exercised actual control respecting disposition of plan assets." *Id.* Utilizing the Second Circuit's interpretation of a fiduciary under ERISA, the court returns to the question in the instant case of when the contributions became plan assets.

1. Plan Assets

Both parties cite *U.S. v. Panepinto*, 818 F.Supp. 48 (E.D.N.Y. 1993), *aff'd* (Table), 28 F.3d 103 (2d Cir. May 31, 1994), in support of their positions. In *Panepinto*, the defendant had an ownership interest in two garment contracting corporations. The corporations entered into a collective bargaining agreement with the American Cloak & Suit Manufacturers' Association, Inc. and the International Ladies' Garment Workers' Union. The collective bargaining agreement directed how contributions would be made to the employees' benefit funds. Later the defendant created a third corporation to perform garment contracting work for manufacturing companies that were not a party to the agreement, thereby avoiding contributions to the benefit funds.

The Second Circuit affirmed the District Court's holding that, "the question of when an employer's contribution becomes an 'asset' of a plan must be determined by reference to the rights and obligations created by the underlying wage agreement." *Id*. at 51. The *Panepinto* court disagreed with the Third Circuit Court of Appeals' reasoning in, *Young v. West Coast Indus. Relations Ass'n Inc.*, 763 F.Supp. 64, (D.Del. 1991), *aff'd*, (Table), 961 F.2d 1570 (3d Cir.

April 23, 1992), which suggested that withheld employer contributions could only be considered assets if the collective bargaining agreement used the word "vested." The Second Circuit inferred that if an employer had no legal interest in the money it received and these monies were due to the benefit funds, then arguably the collective bargaining agreement would make these monies assets of the funds. *See Panepinto*, 763 F.Supp. at 51.

The court found the unpaid funds from the third corporation were assets in that "the amounts agreed upon as destined for the Funds were held in trust by the defendants for the benefit of others." *Id.* Clearly the actions of the defendants in *Panepinto*, creating a separate corporation for the specific purpose of avoiding contributions to the benefit funds, differ from the instant case. There is no evidence that the Defendant diverted monies from HM&E's corporate accounts in a maneuver to avoid contributing to the Benefit Funds. Nevertheless, the ruling in *Panepinto*, gives this court cause to review the underlying CBA in the instant case.

Contrary to the Plaintiffs' claims, the language in the CBA does not define when a contribution becomes a plan asset. Article VI of the Agreement between I.B.E.W. Local No. 236 and the Albany Electrical Contractors Association NECA Albany Chapter effective date June 1, 2001, section 6.01 entitled "fringe benefits" provides in part:

> It is agreed that in accord with the Employee Benefit Agreement of the National Electrical Benefit Fund (NEBF), as entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, and now delineated as the Restated Employees Benefit Agreement and Trust, that unless authorized otherwise by the NEBF, the individual employer will forward monthly to the NEBF's designated local collection agent an amount equal to 3% of the gross monthly labor payroll paid to, or accrued by, the employees in this bargaining unit, and a completed payroll report prescribed by the NEBF. <u>The payment shall be made by check or draft and shall constitute a debt due and owing the NEBF on the last day of each calendar month, which may be recovered by suit initiated by the NEBF or its assignee.</u>
> ....

> <u>An individual employer who fails to remit as provided above shall be additionally subject to having his Agreement terminated</u> upon seventy-two (72) hours notice in writing being served by the Union, provided the individual employer fails to show satisfactory proof that the required payments have been paid to the appropriate local collection agent.
> <u>The failure of an individual employer to comply with the applicable provisions of the Restated Employees benefit Agreement and Trust shall also constitute a breach of his labor Agreement.</u>

CBA, Article VI, Section 6.01 *(emphasis added)* (Joint Stip. of Facts Ex. A.)

Although the article specifies consequences for failure to remit monies to the Benefit Funds, it stops short of saying the contributions "due and owing" are plan assets. In fact other sections of the CBA relied upon by the Plaintiffs in their memorandum of law appear to support the Defendant's position that failure to remit contributions to the Benefit Funds is a breach of a contractual payment obligation.

> Section 6.12. Notwithstanding any other provision contained in this Agreement, the parties agree that <u>any Employer who becomes delinquent in making payments to the respective trust funds shall be liable for the amount of delinquent contributions</u> plus interest on the delinquent amount at the rate of 2 percentage points over the prime rate per annum, and collective expenses, including, but not limited to legal and audit fees incurred to obtain or ascertain the amount of delinquencies.

CBA, Article VI, Section 6.12 *(emphasis added)* (Joint Stip. of Facts Ex. A.)

The Plaintiffs concede in their memorandum of law that "[n]one of the CBA or any of the other Benefit Plan documents expressly address whether contributions owing are plan assets, but none of them contain language that suggests that employer contributions owing are 'conditional or contingent.' " (Plaintiffs' Mem. of Law 34.) Notwithstanding the ruling in *Panepinto*, the Plaintiffs argue the cases decided by the Second Circuit after *Panepinto* unequivocally hold that unpaid ERISA contributions to the Benefit Funds become plan assets regardless of whether the funds were withheld from employee wages or banked by the trustee. *See U.S. v. LaBarbara,* 129

F.3d 81 (2d Cir. 1997); *U.S. v. Glick*, 142 F.3d 520 (2d Cir. 1998).

The Second Circuit in *LaBarbara* disagreed with the defendant's argument that "moneys owed to ERISA benefit plans are not assets of such plans until banked." *LaBarbara*, 129 F.3d at 88. The defendant in *LaBarbara* was engaged in an illegal practice known as "double breasting." The defendant created a shell corporation in order to divide the hours worked by the employees between the defendant's legitimate and shell corporations. In doing so, the defendant purposely did not contribute to the benefit funds for the hours logged with the shell corporation, arguably because there was no collective bargaining agreement between them. Relying on its reasoning in *Panepinto*, the Second Circuit held that wages paid to the employees by the shell corporation still had "contractual obligations to the [Benefit] Funds that constituted 'assets' of the Funds by any common definition. Certainly, an audit of the Funds would have to include such fixed obligations as assets." *Id.*

In *Glick*, the defendant was convicted of bribing the trustee of an employee welfare benefit fund. The defendant argued "the participants' contributions did not become assets of the Welfare Fund until after the contribution reached [the trustee]." *Glick*, 142 F.3d at 527. Again the Second Circuit disagreed with the defendant's argument and relying on their ruling in *LaBarbara*, concluded the contribution collected by the defendant "constitutes welfare plan assets from the time the employer parts with the monies." *Id.* Operating as the middle man between the employer and the union, the defendant in *Glick* had control over the assets. An example was his ability to set his commission, thereby satisfying the Second Circuit's definition of a fiduciary.

The facts in *LaBarbara*, *Glick* and *Panepinto* are very distinguishable from the instant case. The Plaintiffs unfortunately rely on a series of cases in which the defendants took a very active and often illegal role to divert monies that should have been remitted to the benefit funds pursuant to the respective collective bargaining agreements. The Plaintiffs fail to substantiate how the Defendant in the instant case played a similar active and/or illegal role. Moreover, the language in the CBA fails to clarify when contributions become plan assets. Without further documentation, the court concludes the CBA does not support the Plaintiffs' theory that unpaid contributions become plan assets when they are contractually due. Nor does the court find that the Defendant withheld monies in trust, differentiated funds, or set monies aside that were apportioned for the Benefit Funds, for the profit of the Defendant or others. As such, the court finds that the unpaid contributions outstanding to the Benefit Funds are not plan assets.

2. Breaching a Fiduciary Duty

In the instant case, the Plaintiffs argue the Defendant's decision to pay himself, his mother and/or other HM&E creditors instead of remitting the money to the Benefit Funds, evinces a breach of fiduciary duty. The Plaintiffs further argue the Defendant is liable to the Benefit Funds for damages caused by his breach of fiduciary duty under § 409(a) of ERISA (29 U.S.C. § 1109(a))[6] which statutorily creates personal liability. (Plaintiffs' Mem. of Law 39.) The Plaintiffs argue that by paying other corporate creditor obligations, the Defendant diverted fund assets for his own purposes in the course of performing his fiduciary duties, thereby committing an act of fraud or defalcation under § 523(a)(4) which would except their debt from discharge. (Plaintiffs' Mem. of Law 42.) In fact the Second Circuit has held that personal liability may attach once an officer's fiduciary status is established under § 3(21)(A). *See*

[6] *See Supra* note four.

Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1242-1243 (2d Cir. 1989). The Defendant argues his decisions "were made in his representative capacity as the president of [a] fiscally challenged corporate entity." (Def.'s Mem. of Law 31.)

The Defendant's personal liability is predicated on a breach of fiduciary duty that can only occur if the Defendant meets the requirements of a fiduciary under § 3(21)(A) of ERISA. That is, if it is established there are plan assets and that the Defendant exercised authority or control over such assets. Only when both requirements are met, can this court come to the conclusion the Defendant has breached his fiduciary duty. However, having already found that the unpaid contributions were not plan assets, this court concludes the Defendant cannot be a fiduciary. The Plaintiffs have not produced sufficient evidence to establish the Defendant is a fiduciary under ERISA and as such, this court need not determine the Defendant's fiduciary or personal liability.

B. Allowance of an Offset

The Plaintiffs claim they have the ability to offset the Defendant's liability with his interest as a Benefit Fund participant under ERISA, irrespective of the Defendant's claim of exemptions under 11 U.S.C. § 522. The Bankruptcy Code recognizes and preserves the right of setoff in 11 U.S.C. § 553(a) and, in general, four conditions must be met for the concept to be invoked:

> (1) The creditor holds a "claim" against the debtor that arose before the commencement of the case;
> (2) The creditor owes a "debt" to the debtor that also arose before the commencement of the case;
> (3) The claim and debt are "mutual;" and
> (4) The claim and debt are each valid and enforceable.

Collier on Bankruptcy § 553.01[1] p. 553-7 (15th ed. rev. 2005).

The Plaintiffs also cite the exceptions to ERISA's anti-alienation provisions, 29 U.S.C. §1056(d)(4)(B)[7] as further evidence that the Defendant's benefits can be offset.

The Plaintiffs cite to *Friedlander v. Doherty,* 851 F.Supp. 515 (N.D.N.Y 1994) in support of their position that § 553(a) overrides the exemptions claimed by the Defendant for his personal annuity and pension funds. In *Friedlander,* a trustee of two ERISA benefit funds sued two former trustees for damages and an accounting of the finances of the benefit funds they were charged with safeguarding. The former trustees made unauthorized withdrawals from the pension funds and funneled monies into their personal accounts. The District Court in *Friedlander* held:

> "In light of this information, the court holds that Congress intended for the remedial provisions of § 409(a) to apply to a trustee who violates his fiduciary duties. This conclusion is in keeping with the principle goal of ERISA to protect pensioners from misuse and mismanagement of funds, while a contrary conclusion would have the opposite effect by allowing an unscrupulous trustee to invoke the protection of the anti-alienation provision, and reap a windfall at the expense of other plan beneficiaries. In short, it defies common sense to allow a breaching fiduciary to collect from the very fund he fraudulently depleted."

Id. at 522.

Unfortunately, the case relied upon by the Plaintiffs presupposes that a defendant has been found to have breached his fiduciary duty. Having previously ascertained that the Defendant is not a

[7] **29 U.S.C. § 1056. Form and Payment of Benefits**
(d) Assignment or alienation of plan benefits.
(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if -
....
(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan,

fiduciary under ERISA and, as such, he could not have breached a fiduciary duty, the Plaintiffs' request for offset is denied.

C. Attorney Fees and Costs

Both parties requested reasonable attorneys' fees and costs associated with this adversary proceeding. The Defendant does not support his request with case law or a specific code section. The Plaintiffs cite to 29 U.S.C. § 1132(g)(2)[8] to substantiate their request for fees and costs. This section makes the award of attorneys' fees and costs mandatory in successful actions to collect withdrawal liability arrears. Moreover, 29 U.S.C. § 1132(g)(1) limits section (g)(2) to actions by a participant, beneficiary or fiduciary. The code section provides:

> (g)(1) In any action under this title (other that an action described in paragraph 2) by a *participant, beneficiary, or fiduciary,* the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1) *(emphasis added).*

As the court has previously stated, without a finding that the Defendant was a fiduciary, 29

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[8] **29 U.S.C. § 1132. Civil Enforcement**
(g) Attorney's fees and costs; awards in actions involving delinquent contributions.
(2) In any action under this title by fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan -
(A) the unpaid contributions,
(B) interest on the unpaid contributions,
(C) an amount equal to the greater of -
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
(E) such other legal or equitable relief as the court deems appropriate.

U.S.C. § 1132(g)(2) is inapplicable. That being said, this court will entertain whether a discretionary award of attorneys' fees and/or costs under § 1132(g)(1) to the Plaintiffs would be appropriate.

The Second Circuit in *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300 (2d Cir. 1996), identified five factors that the courts should consider before awarding attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g)(1). The court outlined the five factors as:

> "(1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action sought to confer a common benefit on a group of plan participants."

Id. at 309.

In the instant case, the facts do not support a finding of bad faith against the Defendant and given the lack of significant assets found by the Chapter 7 Trustee, the Defendant's ability to satisfy an award of attorneys' fees appears unlikely. Turning to the third factor, the court did not find that there was any attempt by the Debtor to harm or hinder creditors. Presumably the Debtor was endeavoring to use his best business judgment in deciding which obligations to pay in attempts to keep a financially strapped business afloat and out of bankruptcy. While the court obviously found merit in the Debtor's opposition to the Plaintiffs' first cause of action, having ruled in his favor, the Defendant willingly conceded the Plaintiffs' second cause of action supporting its merit. As to the fifth factor, it appears the Plaintiffs brought their action for the common benefit of the Fund participants. Weighing the five factors, the court concludes an award of attorneys' fees to the Plaintiff is not justified based on the facts of the case and the current status of the law. While the Plaintiffs may have been entitled to reasonable attorneys' fees and cost as to the second cause of action conceded by the Defendant, the court has no specific knowledge that the parties agreed to such terms. Nevertheless, this court cannot resolve the inherent conflict that the Defendant will be able to collect annuity and pension benefits from the very same Benefit Fund that brought this complaint.

CONCLUSION

Based upon all the foregoing, the court (1) denies the Plaintiffs' objection to discharge of their debt based upon fraud and defalcation while acting in a fiduciary capacity pursuant to 11 U.S.C. § 523(a)(4); (2) accepts the Defendant's admission of liability for union dues withheld in the amount of $3,392.64 and deems this debt non-dischargeable; and (3) denies the Plaintiffs' and Defendant's request for attorneys' fees and costs associated with this adversary proceeding.

It is so ORDERED.

Dated:7/26/06

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge