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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: C E Ramos Justice PART 53

Index Number : 603572/2002

SALOVAARA, MIKAEL

VS.

ECKERT, ALFRED C., III

SEQUENCE NUMBER : 021

PRECLUDE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/16/08

HON. CHARLES E. RAMOS J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
MIKAEL SALOVAARA

Plaintiff,

-against-

Index No.
603572/2002

ALFRED C. ECKERT III, SOUTH STREET CORPORATE RECOVERY FUND I (INTERNATIONAL), L.P., SSP (INTERNATIONAL) PARTNERS, L.P., and GREENWICH STREET CAPITAL PARTNERS, L.P.

Defendants.
----------X

Charles Edward Ramos, J.S.C.:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Mikael Salovaara ("Salovaara") seeks indemnification under the terms of the partnership agreement of South Street Corporate Recovery Fund (International), L.P., ("International"), which provides indemnification to Salovaara to "the fullest extent permitted by law" for any loss he incurs resulting from any action or inaction of Defendant Alfred C. Eckert III ("Eckert") that relates in any way to the partnership or its business or assets. This Court's decision granting Salovaara his requested indemnification was reversed by the Appellate Division, First Department. That court ruled that Salovaara can only recover indemnification for his losses from International if he proves that those losses arose out of the action or inaction of the general partner (or affiliate thereof) which "relates in any way" to International, and that action or inaction must relate to International in a "meaningful sense". (First Dep't decision, p. 709).

BACKGROUND

Eckert joined Goldman Sachs ("Goldman") in 1973 where he worked in investment banking, corporate finance, mergers and acquisitions and leveraged buyouts. (P. Ex. 121, p. 2). Salovaara joined Goldman in 1980 where he specialized in leveraged buyouts and distressed securities. Both Eckert and Salovaara became partners at Goldman in the 1980's. (P. Ex. 121, p. 2, Sal. Aff. ¶¶ 5, 9-10).

While at Goldman, Salovaara and Eckert ran a fund to invest in distressed securities known as the Water Street Recovery Fund I, L.P. This fund was a very successful venture (P. Ex. 121, p. 2; Sal. Aff. ¶¶ 10-11) and later that year, Eckert and Salovaara decided to leave Goldman in order to create their own investment banking firm. (Sal. Aff. ¶ 12; P. Ex. 121, p. 2). Salovaara and Eckert formed Greycliff Partners, Ltd., a Delaware Partnership in 1991. This partnership was later dissolved and reformed as a New Jersey General Partnership in November, 1993, under the name Greycliff Partners ("Greycliff"), with Eckert and Salovaara as equal partners. (P. Ex. 121, p. 5, Sal. Aff. ¶¶ 13-14).

In late 1991, Salovaara and Eckert also undertook to raise capital for three distressed security funds, hereafter, the "South Street I Funds" or the "SS I" Funds. (P. Ex. 121, p. 4). The South Street I Funds consisted of three funds, all of which were successful: the South Street Corporate Recovery Fund I, L.P., ("South Street I"), the South Street Corporate Recovery Fund (Leveraged), L.P. (the "Leveraged Fund"), and International.

(P. Ex. 121, p. 4; *Salovaara v Eckert*, 32 A.D.3d 708, 709 (1st Dep't 2006) ("First Dep't decision")).

South Street I and the Leveraged Fund were organized under, and governed by, Delaware law. (P. Exs. 9, p. 53; P. Ex. 11, p. 52). International was organized under, and governed by, Cayman Islands law. (P. Ex. 1, p. 53). SSP Partners, L.P., a Delaware limited partnership, was the general partner of the Leveraged Fund. (P. Ex. 13, p. 6). SSP Advisors, L.P., a Delaware limited partnership, was the general partner of South Street I. (P. Ex. 14, p. 6) (collectively, the "Delaware SSP Partnerships"). Eckert and Salovaara or their IRAs or family trusts, each owed a 50% interest in both partnerships. (Sal Aff. ¶ 21; D. Ex. MMM, pp. 1, 22; D. Ex. NNN, p. 22). The corporate general partner of both SSP Advisors and SSP Partners was SSP, Inc., a Delaware corporation. (P. Exs. 13, 14, 191). Salovaara was neither an officer nor a director of SSP. Eckert, together with Gary and Denise Hindes (the "Hindes"), were the directors of SSP, Inc. and Gary and Denise Hindes were President and Secretary, respectively, of the corporation. (Sal. Aff. ¶¶ 21-22, D. Ex. SSS, p. 596).

The general partner of International was a Cayman Islands limited partnership (SSP International, L.P.) whose general partner was in turn a Cayman Islands corporation, SSP (International), Inc., ("SSP International") (P. Exs. 8, 191; D. Ex. YYY). Salovaara and Eckert were each 50% shareholders of SSP International and were the sole directors of that corporation.

Under the terms of SSP International's Articles of Incorporation, the corporation was managed by its directors, who were required to act by a majority vote. International itself did not have any decision making officers, so actions taken by SSP International on behalf of International required agreement among both directors. (D. Ex. YYY, ¶¶ 64-68; Tr. 408-09, Sal. Aff. ¶¶ 21-22).

As stated in the Advisory Agreement between Greycliff Partners and International, Greycliff Partners served as the manager and advisor of the International. Pursuant to the Agreement, Greycliff Partners was empowered to make investment recommendations to International, within the parameters of International's investment criteria, and always subject to the approval of the general partner of International, which retained ultimate authority over decision making. It did not have authority to initiate litigation on behalf of International. (P. Ex. 3, ¶ 4(b); Tr. 232).

International had a single closing with a single investor (then Happy Valley Corp.) in July, 1992. (P. Ex. 1, p. A-20). There is no evidence that International thereafter sought new investors.

Greycliff Partners was not merely the manager of the South Street I Funds. It also sought to develop a merchant banking business and participate fully in all types of investment banking engagements, including mergers and acquisitions, workouts, financing and real estate, the raising of capital and creation of

additional funds. (P. Ex. 121, p. 4; D. Exs. AAAA, BBBB; Tr. 198-99).

Thus, Greycliff Partners was the vehicle through which Eckert and Salovaara conducted, or proposed to conduct, a wide variety of activities which went well beyond being the advisor to the three original South Street I Funds.

By the summer of 1993, Salovaara and Eckert determined that they wanted to develop a merchant banking fund that would be jointly managed by Greycliff Partners and what was then Primerica. Both Salovaara and Eckert determined that Eckert should take the lead in contacting Primerica on behalf of Greycliff Partners because Eckert had developed a relationship with Jamie Dimon ("Dimon") when Dimon had worked under Eckert during a summer internship at Goldman, and, at that time, Dimon was working at Primerica. (P. Ex. 121, p.7).

In furtherance of the proposed fund, Eckert sent a letter dated September 17, 1993 to Dimon on behalf of Greycliff Partners. In it, Eckert described draft terms for an investment fund that would be offered to investors by Greycliff and Primerica. According to the proposal, the fund would seek to meet its first funding objective in the first quarter of 1994, and to close by June 30, 1994. (D. Ex. CCCC; Tr. 211-12).

The letter contained a paragraph devoted to conflicts that the new fund might have with other funds. Nothing in that letter discussed any conflict that Salovaara or Eckert might have between the new proposed Primerica fund and the South Street I

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Funds. (D. Ex. CCCC; Tr. 212).

Salovaara testified that he and Eckert were "permitted legally" to make the Primerica proposal, and there is no evidence that Salovaara ever deemed it impermissible for Eckert and Salovaara to form funds which might compete with the South Street I Funds, so long as he had his share of the new funds. (Tr. 209).

At the same time that Eckert and Salovaara were making the Primerica proposal, Greycliff Partners was also attempting to raise money for three new funds - South Street Corporate Recovery Fund II, L.P.; South Street Corporate Recovery Fund B, L.P.; and Greycliff Leveraged Fund L.P. (collectively, "South Street II Funds" or "SS II Funds"). (P. Ex. 121, pp. 4, 19).

Primerica was interested in doing business with Eckert and offered Eckert a position in which he would head a new private equity fund which had similarities to the fund described in the Primerica proposal. This fund later became the Greenwich Street Capital Partners, L.P. Fund ("Greenwich Street"). (Tr. 218-19, P. Ex. 121, p. 8; compare D. Ex. CCCC with P. Ex. 168).

Eckert told Salovaara about the Primerica's offer and that he was going to accept it. (P. Ex. 121, p. 8).

Eckert offered Salovaara a greater share of Greycliff Partners going forward, and Salovaara responded with a demand that Eckert share his Primerica compensation with Salovaara, pursuant to an alleged oral "Umbrella Partnership" whereby Eckert and Salovaara were obligated to share all compensation. (P. Ex.

121, p. 8; Tr. 219-220).

During these negotiations, Salovaara never told Eckert that he could not take the Greenwich Street position because it would harm any Fund; rather, Eckert could leave so long as he paid Salovaara enough money.

Eckert thereafter entered into an Employment Agreement with Greenwich Street Capital Partners Inc. (which eventually became the Manager of Greenwich Street) on or about December 13, 1994. His Agreement expressly provided that he would continue to devote whatever time was necessary to fulfill his duties under the Greycliff Partners Partnership Agreement (D. Ex. TTT). The Agreement also contained an indemnification clause which specifically excluded claims relating to the South Street Funds, the SSP Partnerships and Greycliff Partners. (Id., pp. 10-11).

Salovaara commenced *Salovaara v Eckert*, MRS-C-29-94 (New Jersey Chancery Court) ("*Salovaara I*") on or about February 7, 1994, initially seeking a preliminary injunction preventing Eckert from continuing employment at Primerica, and, when his motion was denied, amending his complaint in March, 1994 to seek damages for himself. (P. Exs. 69, 72).

Shortly after Salovaara commenced *Salovaara I*, he proposed to the limited partners of South Street I that they remove the general partner of those funds and replace it with a "Dryden Road" partnership, which would have been under Salovaara's control, but not Eckert's. (Tr. 423-24, P. Ex. 121, p. 11). Salovaara did not include International in his Dryden Road effort

(Tr. 424), and there is no evidence that Salovaara ever considered taking any action with respect to that Fund or its sole investor.

Salovaara urged the investors in South Street I to continue on with new investments, while Eckert was urging the investors to cease new investments and to orderly liquidate International. (Tr. 424-25).

On May 9, 1994, Salovaara started a second action against Eckert, and others, in the United States District Court for the Southern District of New York, *Mikael Salovaara, individually and in his capacity as a fiduciary pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") and the common law, v Alfred C. Eckert III, The Travelers Inc., Greenwich Street Capital Partners, L.P., Smith Barney Shearson Inc., Sanford I. Weill, Robert F. Greenhill, James Dimon and Marc P. Weill*, Docket No. 94 Civ. 3430 (KMW) (the "*ERISA*" action). (D. Ex. H).

Three days later, Salovaara met with investors of South Street I in Dallas to discuss the Dryden Road proposal (D. Ex. D, p. 75; P. Ex. 74B, p. 547; P. Ex. 74C, pp. 787-88).

The timing of *ERISA*, and the addition of so many prominent individual defendants (all of whom were dismissed from the ERISA claims in later proceedings) suggests that Salovaara brought *ERISA* as a negotiating tactic in his dispute with Eckert, and not to redress any harm to any Fund.

Rather than voting to replace the general partner as suggested by Salovaara, the investors of South Street I voted

instead to continue the existing structure, but to cease all re-investing, with both Eckert and Salovaara to continue managing the wind-down of that Fund. (D. Ex. I, p. 4; D. Ex. J, p. 2; Tr. 224-25).

By letter dated July 21, 1994 Salovaara informed the limited partner in International that, because the "limited partners of [South Street I] have directed the general partner and advisor to that Fund to cease new investment," International, lacking "critical mass," would also cease making any new investments (P. Ex. 18). No new investments for that Fund were made after the July letter. (Tr. 224-25).

Although he sued Eckert for accepting employment with Greenwich Street, Salovaara himself accepted a position for full-time employment with the Blackstone Group, a prominent investment bank, which also managed a fund similar to Greenwich Street, in September, 1994 (having begun negotiations with Blackstone no later than May, 1994). (Tr. 226-28; D. Ex. FFFF, ¶ 13).

In the meantime, Greenwich Street had not yet accepted investors, and would not do so until November, 1994. (P. Ex. 164). Thus, Greenwich Street, which did not begin soliciting investors until 1994 (P. Ex. 168), did not compete for investors with International, which had been closed to investors since July 1992. (P. Ex. 1). As the organization of Greenwich Street, International was in a liquidation mode, and both Eckert and Salovaara had full-time jobs outside of Greycliff Partners. Consequently, the actions of Eckert in taking employment with

Primerica, and in allegedly abandoning Salovaara and Greycliff Partners, including fund-raising for the SS II Funds, did not affect International.

In February 1996, using *ERISA* as a vehicle, Salovaara, claiming that only Greycliff Partners could sell Fund investments (and not the Fund's general partner, SSP, Inc.) sought to enjoin Eckert and the Hindes from selling Bucyrus-Erie bonds held by South Street I. (D. Ex. LLLL; Tr. 452).

While International also held Bucyrus-Erie bonds, its holdings were not the subject of the dispute, because the Hindes and Eckert, while controlling SSP, Inc., did not control International, with its different, off-shore, structure.

Judge Kimba Wood denied Salovaara's motion, holding that the board of SSP, Inc. (consisting of Eckert and the Hindes), and not Greycliff Partners, ultimately had the power to dispose of South Street I's securities and that Salovaara did not have a right to enjoin the sale, and that Salovaara's position that he, through Greycliff Partners, had the ability to override SSP, Inc. was "contrary to the clear terms" of the relevant South Street I agreement. (Tr. 452, D. Ex. LLLL, p. 5).

Acting under the authority vested in them as the directors of SSP, Inc., Eckert and the Hindes caused SSP, Inc. to sell the domestic Funds' Bucyrus-Erie debt securities for 93% of par in February, 1996. (D. Ex. SSS, p. 596).

Salovaara, objected to this sale, claiming that Eckert and the Hindes were underselling the bonds, because 93% of par did

not reflect their true market value. (D. Ex. SSS). International, however, not under the control of SSP, Inc., still held its Bucyrus-Erie bonds.

On March 4, 1996, Salovaara wrote to Eckert and the Hindes, telling them that he had "in hand a cash offer" for International's Bucyrus-Erie bonds at 98% of par. Salovaara initiated the sale of the Bucyrus-Erie bonds by International, and they were sold at 98% at par. (Tr. 455, 462-63, 503, D. Exs. FFFF, p. 14, D. Ex. MMMM).

However, Salovaara failed to mention in the letter that the "cash offer" he had "in hand" was from Salovaara himself. In fact, at no point did Salovaara ever contact Eckert or the Hindes to inform them that it was he who was offering to buy the bonds. (Tr. 456-57, 463, 472).

Salovaara did not buy these bonds directly. He instead ensured that the sale would be transacted through a third party controlled by him. (Tr. 457, 471).

Prior to the March 4, 1996 letter stating that he had "in hand a cash offer" for the bonds, Salovaara had "suggested" to his wife that her mother, Patsy, buy the Bucyrus-Erie bonds from International and further "suggested" that Patsy borrow the money necessary for the purchase of the bonds from Salovaara and his wife. Accordingly, $1.5 million of Salovaara and his wife's money was wired to Patsy. (Tr. 466-468, 502-04, D. Ex. OOO).

Around the same time that the money was wired to Patsy, Salovaara called Larry Rawson ("Rawson") of Credit Research and

Trading, LLC ("CRT", the intermediary chosen by Salovaara to be the apparent purchaser of the bonds) to inform him that there may be a buyer for the Bucyrus-Erie bonds and that Rawson should expect a phone call with respect to those bonds. (Tr. 469-70, 473).

When Patsy decided not to be the "purchaser", Salovaara suggested to his wife that Maureen Wilson, the civil union partner of his wife's sister (i.e., Salovaara's sister-in-law), should buy the bonds. Apparently, Salovaara's wife conveyed this "suggestion" to her sister and/or Ms. Wilson, and Ms. Wilson obliged. (Tr. 473).

The money that had been wired from Salovaara and his wife's account to Patsy underwent another transfer, to either Ms. Wilson or Salovaara's sister-in-law, for the purpose of purchasing the Bucyrus-Erie bonds. Ms. Wilson purchased the bonds from CRT (interposed by Salovaara to disguise the true purchaser) with this money. (Tr. 454-55, 474, 504).

These transactions were shams designed to hide the fact that Salovaara was on both sides of the trade.

Salovaara then commenced a lawsuit on May 2, 1996, in the New York Southern District Court against Gary and Denise Hindes (the "*Hindes* action"). (D. Exs. EEEE, FFFF, MMMM). In the *Hindes* action, Salovaara alleged that "further evidence of the Hindes' duplicity in selling the Bucyrus-Erie securities at 93% of par" was found in the fact that "Salovaara was compelled under the circumstances to liquidate International's holdings of

Bucyrus-Erie as quickly as possible and he did so, realizing a price of 98 per cent of par". (D. Ex. EEEE, ¶ 26).

Salovaara also alleged that Jackson National, which had bought the South Street I bonds at 93% of par, was now prepared to refinance Bucyrus-Erie, so that the bonds would have been redeemed at par had they not been sold. (Id. at ¶ 27).

Salovaara did not allege that International bonds, sold at 98% of par, were now held by Salovaara's sister-in-law's roommate, using Salovaara's and his wife's money.

The first claim for relief in the *Hindes* action, stemming from the Hindes' alleged ERISA violations, sought compensatory, consequential, and punitive damages, as well as attorneys' fees and costs, for Salovaara personally, even though the Bonds had been sold by the South Street I Fund, and theoretically that Fund, and not Salovaara, would have suffered harm from selling at too low a price. (Tr. 512-513, D. Ex. FFFF, p. 15).

The second claim for relief, grounded in the Hindes' purported breach of fiduciary duty, sought compensatory, consequential, and punitive damages, as well as attorneys' fees and costs, for Salovaara, personally. (Tr. 512-513, D. Ex. FFFF, p. 24).

The third claim for relief, grounded in a prima facie tort, claimed that the Hindes intentionally inflicted damage on Salovaara personally out of animus, hostility, self-interest, and a desire to do him harm and damage. (Tr. 512-513, D. Ex. FFFF, p. 24). At the time that Salovaara brought the *Hindes* lawsuit,

he admits that he "may well have" felt animus and hostility towards Eckert. (Tr. 513).

Salovaara may have committed a fraud on the *Hindes* Court by not revealing that it was he, and not a genuine third party, who was behind the purchase of the Bucyrus-Erie bonds. At the least, his omission was material.

While the *Hindes* action was pending, Salovaara's purchase of the Bucyrus-Erie bonds came to light. On September 25, 1996, an article in the *New York Times* (the "Times Article") came out, containing a full account of the transactions that Salovaara had orchestrated to create the impression that he was not involved in the purchase of International's Bucyrus-Erie bonds at 98% of par. (D. Ex. OOO; Tr. 498-99).

At trial, Salovaara acknowledged that the general outline of the transactions set out in chart which accompanied the Times Article was accurate. (Tr. 505-04).

Almost immediately after the publication of the Times Article, Steve Schwartzman, the CEO of Blackstone, told Salovaara that he was very displeased with the article, and asked Salovaara to consider a leave of absence. Instead, Salovaara resigned from Blackstone. (Tr. 499-501).

Thus, by September, 1996, before the start of the *Salovaara I* trial in October, 1996 (P. Ex. 88), Salovaara had lost control over South Street I and the Leveraged Fund and had lost his position at Blackstone.

Salovaara believes that Eckert and Gary Hindes were

responsible for the publication of the Times Article. (Tr. 501). Having already sued the sellers of the Bucyrus-Erie bonds in the pending *Hindes* case, Salovaara next sued the buyers as well—Jackson National Life Insurance Company ("Jackson National")—in New Jersey federal court in early March, 1997. (D. Exs. SSS, GGGG).

In his complaint, Salovaara alleged that Jackson National defrauded the Hindes and Eckert into selling the bonds too cheaply. (Tr. 444-45; D. Ex. SSS, p. 599; D. Ex. GGGG).

Salovaara's complaint also alleged that he brought this case individually on his own behalf and derivatively, on behalf of the South Street I and South Street Leveraged. (Tr. 446-447; D. Exs. SSS, GGGG).

However, in July, 1999, Judge Hughes of the New Jersey District Court determined that Salovaara's interests were antagonistic to the funds he claimed to represent. As such, Salovaara was not an adequate or fair representative of the funds (South Street I and the Leveraged Fund) on whose behalf he allegedly sued. Judge Hughes dismissed the action. (D. Ex. SSS).

In a decision from the bench on March 15, 2000, Judge Alvin K. Hellerstein found that there was no evidence that the Hindes acted imprudently by selling the South Street I's Bucyrus-Erie bonds for 93% of par. The entirety of Salovaara's complaint in the *Hindes* action was dismissed. (D. Ex. OOOO).

In this action, Salovaara initially sought indemnification

from International for the costs he incurred in bringing the *Hindes* action and *Jackson National*, and claimed that he filed those lawsuits to protect the South Street Funds, including International, from potentially harmful actions taken by Eckert. (Sal. Aff. ¶ 54, Complaint in this action, dated September 30, 2002, ("Complaint"), pp. 7-8; Amended Complaint in this action, dated December 27, 2002, ("Amended Complaint"), pp. 7-8).

However, it is clear from the relief sought in the complaint of the *Hindes* action that Salovaara sought only to redress alleged harms to himself unrelated to International, by commencing litigation against Gary and Denise Hindes for their sale of South Street I Bucyrus-Erie bonds. Likewise, International was not in any way involved in the *Jackson National* case.

This Court concludes that Salovaara's testimony in this action, wherein he continued to claim, under oath, that the Bucyrus-Erie transaction described above was really on arms-length transaction, or perhaps an amazing coincidence, was untruthful. (Tr. 502-03).

Since 1994, Salovaara has brought at least the following actions, besides this one:

(1) *Salovaara v Eckert* (New Jersey Chancery) ("*Salovaara I*"),
(2) *Salovaara v Eckert* (S.D.N.Y.) (the "*ERISA* action"),
(3) *South Street Corporate Recovery Fund (International, L.P.) v Milbank Tweed Hadley and McCoy* (New York Supreme) (the "*Milbank* Tweed action"),
(4) *Salovaara v Hindes* (S.D.N.Y.),
(5) *Salovaara v Jackson National Life* (D.N.J.),
(6) *Greycliff Partners v SSP Advisors, L.P.* (New York Supreme),

(7) *Salovaara v Eckert* (1996 - New Jersey Chancery) ("*Salovaara II*")
(8) *Salovaara v Eckert* (1999 - New Jersey Chancery), and
(9) *Salovaara v SSP, Inc.* (Delaware Chancery) (Complaint, ¶¶ 40-42).

Salovaara I

In February, 1994, Salovaara filed suit against Eckert in New Jersey state court, alleging that Eckert's decision to accept the offer from Primerica amounted to a violation of an oral partnership agreement that allegedly existed between Salovaara and Eckert, and was the usurpation of an opportunity belonging to Salovaara and/or Greycliff Partners. Salovaara also alleged that Eckert's "dual affiliation" with Greycliff Partners and Primerica violated the "best efforts" clause imposed on Eckert by the Greycliff Partners Partnership Agreement. Finally, Salovaara claimed that Eckert fraudulently induced him to execute the Greycliff Partners' Partnership Agreement, and by working for Greenwich Street, violated his fiduciary duty not to compete with Greycliff Partners, as well as the implied covenant of good faith and fair dealing. (D. Ex. A).

The complaint did not allege any breach of the International partnership agreement, or of any duty owed by Eckert to that Fund. (Id.)

While the original complaint sought to enjoin Eckert's continued employment at Greenwich Street, Salovaara did not intend to benefit International by obtaining an injunction. Salovaara thought that obtaining an injunction would "enormously" enhance his negotiating position with Eckert, which had previously involved Eckert's payment of compensation to Salovaara. (Tr. 222).

After Salovaara failed to obtain an injunction, he amended

his complaint, which thereafter sought damages for himself. (D. Ex. B)

In the litigation which followed the amended complaint, there was virtually no mention of International, or harm to International. Rather, Salovaara contended that he was damaged because Greycliff's advisory business was destroyed by Eckert's actions (P. Ex. A, ¶¶ 57, 62; P. Ex. B, ¶¶ 52, 58, 63) and that fund raising for the SS II Funds, which would have profited Salovaara, was harmed by Eckert's actions (P. Ex. 121, p. 28).

Salovaara's 160 page post-trial brief only mentions International once, as a background fact (D. Ex. D, p. 21), and does not claim that Eckert's actions harmed that Fund.

In an opinion dated July 14, 1998, Judge Kenneth C. MacKenzie of the New Jersey state court dismissed Salovaara's claims based on the alleged oral partnership, finding that it did not exist. (P. Ex. 121, pp. 13-14).

Judge MacKenzie also held, after considering testimony from members of Primerica, such as Robert Greenhill (who was then the Chairman of Smith Barney), Dimon, and Marc Weill (who was then the Chief Investment Officer of Primerica), that Eckert was representing both himself and Salovaara when negotiating with Primerica, and that Primerica's decision to hire Eckert was not the result of anything Eckert did or said during the negotiations. Therefore, Eckert did not usurp any opportunity belonging to Greycliff Partners. (P. Ex. 121, p. 20-21).

The *Salovaara I* court also dismissed the claim that Eckert fraudulently induced Salovaara's execution of the Greycliff Partners Partnership Agreement. (P. Ex. 121, p. 23-24).

Judge MacKenzie found that Eckert violated the "best

efforts" clause of the Greycliff Partners Partnership Agreement, reasoning that Eckert's work with Greenwich Street necessarily would adversely impact on his best efforts duty to Greycliff Partner's fund raising efforts for the SS II Funds. (P. Ex. 121, pp. 17-20).

While the *Salovaara I* Court found that "Eckert's activities for the Greenwich Street Fund could not help to place him in competition with Greycliff's funds, it is clear that the competition referred to did not relate to International. Thus, the Court identified four areas of potential competition. These are:

> (1) Competition for "investor dollars". This competition did not involve International, which had closed to investors in July 1992, over a year before Eckert went to Primerica;
>
> (2) The potential competition between leveraged buyout funds and distressed securities funds as a "category for investor dollars", which, again, could not refer to International, which was not competing for investor dollars at any time relevant to the action;
>
> (3) An "overlap in areas where the various funds can make investments, leading to competition in this area as well." This cannot refer to International, which had ceased making investments in July, 1994, before Greenwich Street was formed in November 1994; and
>
> (4) The fact that "both Greenwich Street and Greycliff attempted to market Eckert's savvy and experience as a fund manager as a means of raising investment funds", which, again, could not refer to International, which was not raising investment funds after July 1992.
>
> (P. Ex. 121, p. 22).

While Salovaara sought over $15 million in lost profit damages based on amounts which would have been raised by the SS II Funds, the court awarded Salovaara $4 million based upon its own calculations of how much the SS II Funds would have raised

from new investors but for Eckert's conduct, and Salovaara's share of those profits. The damages awarded Salovaara had nothing to do with International, as that Fund had long closed before Eckert took a position at Primerica (P. Ex. 121 at 27-29).

The Court agreed with both Salovaara and Eckert in that dissolution of the Greycliff Partners partnership was appropriate, and ordered that it be dissolved. Judge MacKenzie appointed Salovaara as the wind-up partner. (P. Ex. 121, p. 29-30).

The decision dated July 2000 finally winding up Greycliff Partners denied Salovaara's request for his fees for winding up Greycliff Partners and held that *Salovaara I* was brought "on behalf of [Salovaara] in an effort to preserve the business of Greycliff," and not for the benefit of any Fund (P. Ex. 193, p. 3).

By the time of the Order placing Salovaara in charge of Greycliff Partners, Salovaara had long since lost control of the liquidation of South Street I and the Leveraged Fund. Salovaara has not claimed in this case that he took any action of any kind with respect to International as a result of being made winding up partner of Greycliff Partners on or about July 15, 1998. Instead, he alleged in both his original Complaint and Amended Complaint that Greycliff ceased acting as Advisor to International in 1997. (Complaint, ¶ 55; Amended Complaint, ¶ 53.), and there is no evidence that there was ever a written assignment, as required, of the advisory agreement from Greycliff

Partners Ltd. to Greycliff Partners. (Tr. 231). In any event, the only action of any kind he claims he took with respect to International was starting *Milbank* in January, 1998, which he claims he was authorized to do by reason of his position as a director at SSP International.

None of the issues litigated in *Salovaara I* had any relationship, much less a meaningful relationship, to International, and the outcome of that action, resulting in Salovaara receiving damages of $4,000,000 and being appointed winding up partner of Greycliff Partners, did not have an effect of any kind on International.

None of the bills submitted by Salovaara for his costs in *Salovaara I* referred to International.

Salovaara claims in this case that there are only 5 entries which even indirectly refer to International, out of more than 300 pages of bills. (P. Ex. 178; D. Ex. PPPP). The 5 entries proffered by Salovaara all refer to securities which were held by each of the South Street I Funds, and give no indication that the issues concerning those securities actually related to International's investments in those securities. (D. Ex. PPPP, MSNY 4963, 4965, 4967, 4969 and 4970).

Salovaara seeks reimbursement for $1,442,205.81 of bills (P. Ex. 178) from International's investors, when, on examination, those bills show no work relating, even indirectly, to International.

ERISA

Of the three funds that made up the South Street I Funds, only South Street I contained and managed money from employee benefit plans and thus only that Fund, and not International, was subject to regulations under the ERISA statute (29 U.S.C. 1002(3)). (D. Exs. I, H).

Under the ERISA statute, both Eckert and Salovaara were fiduciaries of South Street I's investors. (D. Exs. I, H). Salovaara's *ERISA* action Complaint, filed on or about May 9, 1994, alleged that Eckert breached his ERISA duties to South Street I. (D. Ex. H). The complaint also alleged certain pendent common law claims which were not actually litigated in the action. (D. Exs. H, J. and K).

The complaint did not name merely Eckert as a defendant. Rather, it named a number of individuals: Robert Greenhill, Jamie Dimon, Sanford Weill, and his son, Marc Weill, and the institutions of Smith Barney and Travelers (which later became Citibank). Salovaara accused these defendants of aiding and abetting Eckert's alleged common law and ERISA violations. (D. Ex. H).

Although the complaint in the New York action included common law claims, Judge Wood of the Southern District Court refused to consider them, staying everything other than the ERISA claims, which related to South Street I only. (D. Ex. J, 5).

Judge Wood eventually dismissed the common law claims *sua sponte*. (D. Ex. K, 9). Salovaara's attorneys spent a *de minimis* amount of time (2 hours) considering the common law claims. (D.

Ex. PPPP at MSNY 4974 (Sills Cummis invoice dated 10/14/98)).

In the summer of 1995, Salovaara moved for a preliminary injunction against the defendants in *ERISA*, alleging that Greenwich Street's investment in Marcus Cable, which operated, as part of its nationwide cable operations, a cable television business in Wisconsin, competed with South Street I's investment in Busse Communications, which operated a television station in Wisconsin. (P. Ex. 123; D. Exs. I, K). Salovaara asked the Court to remove Eckert from the management of South Street I because of this alleged conflict. (P. Ex. at 18). Salovaara did not seek any relief for International, and that Fund is not mentioned in the decision which followed. (P. Ex. 123; D. Ex. I)

Salovaara's motion for a preliminary injunction was decided in an Order dated January 16, 1996. (D. Ex. I). In deciding to grant, in part, Salovaara's motion for a preliminary injunction, Judge Wood considered a meeting of South Street I's investors that took place in May, 1994. At that meeting, the investors voted to cease re-investing. Salovaara argued to the investors that they should permit him alone to liquidate South Street I. Eckert, on the other hand, argued that he and Salovaara should jointly liquidate South Street I. The investors sided with Eckert, and voted to have both Salovaara and Eckert manage the liquidation of the domestic funds. (Tr. 413-32, D. Ex I, pp. 4).

Judge Wood found that removing Eckert would unnecessarily

interfere with South Street I's internal management and the preference of its participants. Consequently, she required Eckert to select one of three courses of action: arrange for another manager to be responsible for Greenwich Street's investment in Marcus Cable; resign his management position with the South Street I; or resign his position with Greenwich Street. (D. Ex I, p. 5).

Eckert opted to continue to manage South Street I and the Greenwich Street Fund, but terminated his involvement in the partner-management of Greenwich Street's Marcus Cable investment. (D. Ex. K, p. 5).

On March 15, 1996, the Court in *ERISA* granted, in part, Eckert's motion for summary judgment. Judge Wood found that Salovaara had not shown that Eckert harmed or was likely to harm South Street I by allegedly abandoning his obligations to work for Greycliff, since Salovaara did not allege that Greycliff actually performed more poorly in managing South Street I's investments in Eckert's alleged absence. Instead, Salovaara alleged that he deserved more compensation for himself for performing all of Greycliff's duties, a personal claim he was pursuing in *Salovaara I*, but which did not impact the performance of South Street I. Furthermore, Judge Wood found that Eckert did not wrongfully recommend to the investors in South Street I that the Fund be liquidated. However, because the parties had not completed discovery, Judge Wood did not rule on Salovaara's claim that the investments of South Street I and the Greenwich Street

Fund might compete with one another. (D. Ex. J).

The summary judgment motion decision also revealed that Salovaara's inclusion of Eckert's co-defendants in the suit was a mere tactic to embarrass and pressure Eckert to capitulate to Salovaara's demands. Judge Wood found that these individuals were not fiduciaries of South Street I, and could not by definition violate the ERISA statute, which imposes obligations only on fiduciaries of the Fund. (D. Ex. J, pp. 3-4).

Because Salovaara had not produced any evidence showing that South Street I's investments suffered any loss as a result of Eckert's involvement in Greenwich Street and Greenwich Street's investments, Eckert again moved for summary judgment.

In opposition to summary judgment, Salovaara submitted an affidavit falsely claiming he had prematurely sold a South Street I investment (Granite Broadcasting) upon Eckert's urging, which contradicted testimony he had provided in a deposition in *Salovaara II* wherein he claimed that he never followed Eckert's investment suggestions.

On May 24, 1998, Judge Wood granted Eckert's motion for summary judgment on the remaining ERISA claims, finding no evidence of any harm to South Street I, and declined to exercise jurisdiction over the common law claims which she had previously stayed, which were *sua sponte* dismissed. (D. Ex. K, p. 9).

Judge Wood also vacated the preliminary injunction because it was moot, as Greenwich Street had sold its investment in Marcus Cable. However, Judge Wood also noted that the

preliminary injunction would have been vacated even if Greenwich Street had not sold its investment in Marcus Cable, as Salovaara did not offer any evidence to support his claim that Busse Broadcasting and Marcus Cable were competitors. (D. Exs. K, L; Tr. 436-41).

Given the Court's findings about the complete invalidity of Salovaara's claims and his false affidavit, Judge Wood invited Eckert to move for sanctions and attorneys' fees. (D. Exs. K, 9, L).

On appeal, the Second Circuit reversed the District Court's award of attorneys' fees to Eckert. Its reversal was based on two factors: (1) It had not been completely clear as to whether existing law required a showing of actual competitive harm, and (2) the Court was fearful that granting attorneys' fees to a successful defendant would discourage future ERISA plaintiffs from bringing suit, contrary to the intent behind the ERISA statute. The Second Circuit also reversed the grant of Rule 11 sanctions and remanded the matter to Judge Wood for a review of the record for further consideration. The Second Circuit upheld the finding that Salovaara had submitted a false affidavit. (P. Ex. 136).

On remand, Judge Wood found that she could not assess Rule 11 sanctions because of a procedural defect in Eckert's motion; he had not provided the requisite notice to Salovaara and his counsel. However, Judge Wood expressly found once more that Salovaara had "utter[ly] disregard[ed] his obligation to make

only factually supported assertions to the court", and that he had submitted a false affidavit "in an effort to keep a dying litigation alive" and that, but for the procedural defect, Rule 11 sanctions would have been imposed on Salovaara. (D. Ex.M, pp. 12, 15).

ERISA, in which only ERISA-based claims were adjudicated, did not involve International at all.

The bills submitted by Salovaara for indemnification of his costs for *ERISA* by International do not mention International at all, and Salovaara has identified only 4 pages out of 180 pages of bills which he claims indirectly might refer to International. Those 4 pages reveal that only 2 hours was devoted to the pendent common law claims not litigated. (P. Ex. 171; D. Ex. PPPP).IV.

Milbank

The original South Street I Funds collectively owned a promissory note (known as the Fetzer note), which was guaranteed by George N. Gillett ("Gillett"). Gillett later filed for bankruptcy, and the Funds hired the law firm of Milbank Tweed Hadley McCloy, LLP ("Milbank") to represent them in the Gillett bankruptcy proceeding to collect on the Gillett guaranty of the Fetzer Note (the "Gillett Claim"). (D. Ex. R, p. 2; Tr. at 269-70).

Milbank's clients were the South Street I Funds, including International, and not the Funds' general partners, who were not parties to the Gillett bankruptcy proceeding. Thus, the Funds, and not their general partners, had the malpractice claim against

Milbank Tweed, with Salovaara alleging in this action that he had retained "Milbank to represent all of the Funds [not their general partners] in the Gillett Bankruptcy Proceeding." (P. Ex. 138, ¶ 16; Sal. Aff. ¶ 188).

Milbank committed malpractice in representing the South Street Funds in its handling of the Gillett Claim, causing all three Funds to lose the value of that claim. (P. Ex. 137, ¶¶ 26-37; P. Ex. 138, ¶¶ 41-52).

As a result, all three Funds had a potential malpractice claim against Milbank, in proportion to their percentage interest in the Gillett Claim.

International held roughly 3% of the overall claim against Milbank, while the other two South Street funds (South Street I and South Street Leveraged) held the remaining 97% of the claim. (Tr. 268-69; Cohen Aff. ¶ 8).

The actual damages resulting from Milbank's malpractice, valued at what the Gillett claim would have been worth, was, at most, "potentially as much as $2 million" for all three Funds. The value of International's malpractice claim was thus 3% of $2 million, or $60,000. (D. Ex. R, p. 6; Tr. 271).

On behalf of South Street I and South Street Leveraged, Eckert, who was President of SSP, Inc., the ultimate general partner of the two Funds, caused the law firm of Cadwalader, Wickersham, and Taft ("Cadwalader") to file a complaint against Milbank on December 1, 1997, alleging malpractice and fraud in connection with the Funds' Gillett Claim. (P. Ex. 137).

At the behest of Salovaara, Richard W. Cohen ("Cohen"), an attorney who was then a partner at Robinson Brog Leinwand Greene Genovese & Gluck, PC (and later, Lowey, Dannenberg, Cohen & Hart, PC), filed a complaint on behalf of International against Milbank on February 2, 1998, alleging the same malpractice and fraud as alleged in the earlier filed action by South Street I and South Street Leveraged (Compare D. Exs. N and O, Tr. 260-61).

There was no claim against Milbank for any action or inaction it took with respect to International's general partner.

Salovaara did not in fact have the authority to unilaterally hire counsel for International. Greycliff no longer served as the advisor to International by sometime in 1997. (Amended Complaint, ¶ 51). Even if Greycliff Partners had remained International's advisor, the Greycliff Partners Partnership Agreement and Advisory Agreement did not authorize Greycliff Partners to retain counsel on behalf of International, but only provided for hiring counsel to represent itself. (Tr. 363-64; P. Ex. 3, ¶ 3(e)).

Salovaara himself claimed to be authorized to bring an action on behalf of International by reason of his position as one of the directors of SSP International, and not by reason of his control over Greycliff Partners. (Sal. Aff. ¶ 194).

SSP International had no officers, and its two directors, Eckert and Salovaara, could only act jointly. (D. Ex. YYY, ¶¶ 64-68; Sal. Aff. ¶ 23; Tr. 406, 408). While the Articles of Association of SSP International provided that a chairman could

provide a tie-breaking vote where Salovaara and Eckert differed on decisions regarding International, no one was ever selected to hold the position of chairman. The agreement of both, acting as board members, was necessary to approve retention of counsel (Tr. 409, D. Ex. YYY, ¶ 64-68, 72).

Salovaara did not call a meeting or otherwise meet or discuss with Eckert an appointment of separate counsel for International. (Tr. 409). Salovaara was aware that Eckert had hired Cadwalader to represent South Street I and South Street Leveraged in *Milbank* before Salovaara hired Cohen to represent International. (Tr. 409-10).

Salovaara was also aware that the claims of International against Milbank were exactly the same as the claims brought by Cadwalader against Milbank on behalf of the domestic funds. (*Id.*).

Salovaara never contacted Eckert about hiring Cohen before having Cohen initiate a lawsuit against Milbank on behalf of International. (Tr. 409, 413).

Salovaara also never contacted Eckert about authorizing the Cadwalader firm to represent all three Funds. (Tr. 411).

At the time Salovaara hired Cohen and throughout Cohen's representation of International, Salovaara believed that International was an investment vehicle for the daughters of Eckert's friend and business associate, Fred Arthur Rank Packard. (Tr. 401).

At no point prior to the retention of Cohen did Salovaara

ever contact Packard (or any other representative of International) to ask or inform Packard about a) hiring counsel to represent International in *Milbank* or b) informing Packard that International only had a 3% interest in any recovery in any action against Milbank. (Tr. 405, 415).

In a letter dated August 10, 1998, Eckert expressed willingness to have the "relevant Funds . . .pay the costs to date of International's action against Milbank" (P. Ex. 151, p. 2), which then amounted to $16,169.27 (P. Ex. 36, p. 2). At the time of the letter, Salovaara had refused to discharge his attorney even after the South Street I and Leveraged Fund actions were consolidated with International action, and he refused to discharge his attorney after Eckert was appointed Liquidating Trustee. Eventually, Salovaara ran up a bill of $105,000, far above any possible recovery for International.

In December 1998, International was dissolved and its general partner was removed. On December 23, 1998, Eckert was appointed Liquidating Trustee of International. (See D. Exs. S, BB).

As Liquidating Trustee of International, Eckert had a duty to dispose of all of International's relevant assets, pursuant to International Agreement (P. Ex. 1, ¶ 11.2, Tr. 384).

On November 16, 1998, Judge Cahn consolidated the action against Milbank brought by the Delaware Funds and the action against Milbank brought by International. (P. Ex. 139).

The firm of Arkin Kaplan Rice LLP(the "Arkin Firm") replaced

the Cadwalader firm by no later than November 16, 1998. (P. Ex. 139). Salovaara never contacted Eckert after the Arkin Firm had been retained to discuss having Cohen withdraw and having Arkin assume sole representation of International in *Milbank*, despite the fact that he had no objection to that firm. (Tr. 414).

The Arkin Firm filed a consolidated complaint with all three Funds named as plaintiffs against Milbank on December 22, 1998, alleging the same malpractice and fraud malpractice claims previously alleged in the two complaints. (P. Ex. 140).

All three of the named plaintiff Funds held the same malpractice claim against Milbank, and the litigation involved identical discovery, arguments, and damage calculations as to all three Funds. (Tr. 269).

As Liquidating Trustee, Eckert notified Salovaara in writing on February 2, 1999 that it was "duplicative and economically inefficient to have two separate law firms pursuing essentially the same claims against Milbank…", and, by copy of the letter to Cohen, requested that Cohen withdraw as counsel of record for International. This letter was accompanied by a Certificate evidencing the appointment of Eckert as Liquidating Trustee. (D. Ex. S; Tr. 312-13).

Notwithstanding Eckert's notification, on February 5, 1999 Salovaara instructed Cohen to continue active participation in the consolidated action. (P. Ex. 180, MSNY 4521 (4/14/99 Invoice)).

On February 12, 1999, Stanley Arkin of the Arkin Firm

informed Cohen that Eckert had instructed Cohen to withdraw as counsel and asked Cohen to execute a Consent of Substitution of Counsel. (D. Ex. T; Tr. 313-14, 326). By letter of February 22, 1999, Cohen informed Arkin that he had been instructed by Salovaara not to withdraw from his position as attorney for International pending determination of Eckert's authority over International. (D. Ex. U; Tr. 313).

No one, including Cohen and Salovaara, ever challenged Eckert's authority as Liquidating Trustee of International before any court. (Tr. 306-07).

By early March 1999, Myers and Alberga, a Cayman Islands law firm, retained by Sills Cummis, reviewed partnership documents of International and Cayman Islands partnership law to assess the validity of Eckert's appointment as Liquidating Trustee of International. On a number of occasions in March, Myers and Alberga spoke with Salovaara's American counsel, Sills Cummis, regarding these issues, billing Salovaara $5,238.23, for which he seeks indemnification in this action. (Tr. 373-74, 376-77; P. Ex. 180, MSNY 4487-4488 (Sills Cummis Invoice dated 4/30/99), MSNY 4550 (Myers & Alberga Invoice dated 4/9/99 for "March 1999")).

Sills Cummis received advice from Cayman Islands counsel that Eckert's appointment as Liquidating Trustee was not subject to challenge, and, by no later than March 12, 1999 informed Salovaara that he was no longer co-director of International, and that Eckert in fact, was legitimately the Liquidating Trustee of

International. (Tr. 377-78, P. Ex. 180 MSNY 4487, 4488, 4550).

Nevertheless, in March, 1999, Salovaara again instructed Cohen to continue his representation of International in *Milbank*, and Cohen continued to remain in the case for nearly a year thereafter. (Tr. 367, 395-400). (P. Ex. 180 (chart showing Lowey Dannenberg Invoices dated 4/14/99-6/12/00).

Salovaara never advised, or cause to be advised, Cohen that Eckert was in fact legitimately appointed the Liquidating Trustee. (Tr. 391).

Instead, Salovaara misled Cohen into continuing to believe that there was at least a dispute over whether Eckert was the Liquidating Trustee, when in fact there was no such dispute, and allowed Cohen to unknowingly submit an affidavit in this action stating his belief that there was a legitimate dispute as to Eckert's authority to discharge him, when Salovaara knew there was no legitimate dispute. (Cohen Aff. ¶¶ 32-33; Tr. 312-16).

Even though Salovaara knew that Eckert's appointment as Liquidating Trustee was legitimate, Salovaara testified at trial that he did not know if Cohen could actually withdraw even if instructed to do so by Salovaara, although Salovaara continued to pay Cohen for a year thereafter, establishing that Cohen was not a runaway attorney, but proceeded in the mistaken belief that he still had authority to continue in the action. (Tr. 395-96; P. Ex. 180 (schedule showing payments).

Salovaara's testimony was not credible - Salovaara knew, even if Cohen did not, that there was no basis to have Cohen

continue representing International once Eckert was appointed Liquidating Trustee. Nor could Salovaara seriously believe that an attorney cannot be discharged by the party which retained him or her, or that he was obligated to continue paying Cohen's bills because Cohen could not be discharged by anyone.

Even after being advised of the appointment of Eckert, at Salovaara's direction, Cohen attended depositions—purportedly on behalf of International—despite the fact that members of the Arkin Firm were present. (Tr. 323-25).

After first becoming aware of Eckert's appointment as Liquidating Trustee, Cohen was first prepared to take a very minimal role in going forward. He decided, however, to make no such commitment, although Salovaara allowed him to submit an affidavit in this action claiming that he had committed to a reduced role based upon his draft letter, when the actual letter sent by him made no such commitment and Cohen's time records showed a continued substantial involvement. (Compare P. Ex. 143 with D. Ex. W, P. Ex. 180, MSNY 4523-34, MSNY 4536-49; Tr. 318).

Throughout the time that he was receiving conflicting instructions from Salovaara and Eckert regarding his retention in *Milbank*, Cohen understood that International would be able to participate in any recovery in *Milbank*, irrespective of his personal involvement. (Tr. 314-15).

The parties to *Milbank* ultimately settled as part of the larger settlement of disputes between them, in March 2000, and International secured $16,000 as part of the settlement. (D. Ex.

Q; Tr. 347).

Salovaara claims to have incurred fees of $105,000, for which he now seeks recovery, for an action which had a potential value of, at best, $60,000 to that Fund, and where most of the fees were incurred after International was added as a plaintiff to the consolidated action. Salovaara continued to incur fees for which he seeks recovery even after Eckert was appointed Liquidating Trustee and after Eckert, in that capacity, instructed Salovaara to cease the retention of a separate attorney for International, even though Salovaara knew that Eckert's appointment was legitimate. (P. Ex. 180; D. Exs. P, S).

Salovaara's actions in *Milbank* were undertaken in bad faith.

Greenwich Street-Eckert's Duty to Seek Indemnification

Eckert was indemnified by the Delaware SSP Partnerships for the legal fees and expenses he incurred in *ERISA*, and *Salovaara II*. (Amended Complaint, D. Ex. D) Salovaara has not challenged in this action Eckert's right to be indemnified by the SSP Partnerships for *ERISA* and *Salovaara II*, and points to no court determination in any other action holding that Eckert was not entitled to indemnification for those two actions. The Court in *Salovaara II*, however, required Eckert to return all indemnification payments for *Salovaara I* to the SSP Partnerships, although later ruling that Eckert was entitled to $360,336.51 from the SSP Partnerships for his successful defense of the oral master partnership, fraudulent inducement, and usurpation of

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corporate opportunity claims in *Salovaara I*. (D. Exs. F, G).

Because Salovaara has a prior judgment and lien against the SSP Partnerships, Eckert has not been paid any amount of the $360,336.51, and has thus received no indemnification for his costs in *Salovaara I*. (Tr. 536-37).

Any claim in this action as to Eckert's fees for *Salovaara I* is, therefore, moot.

Eckert's employment at Greenwich Street Capital Partners, Inc. ("Greenwich Street"), which became the Manager of Greenwich Street, was governed by an Employment Agreement dated December 13, 1993. (D. Ex. TTT).

The Employment Agreement contained an indemnification clause which specifically carved out any right Eckert could have to indemnification arising out of any claims that Salovaara had or would have against Eckert. (D. Ex. TTT, p. 10-11).

Greenwich Street's investors include insurance companies, pension plans, charitable foundations, corporations and individuals. (D. Ex. III, signature pages).

In an order issued by the Delaware Chancery Court in January, 2004, Salovaara won a judgment awarding him indemnification for his litigation costs from SSP Advisors, L.P. and SSP Partners, L.P. for, among other actions, his costs in *Salovaara I* and *ERISA*. (P. Ex. 49).

The judgment against SSP Partners and SSP Advisors thus includes exactly the same costs as Salovaara is suing for here, with the exception of his costs in *Milbank*. Salovaara levied

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against the bank accounts of SSP Advisors and SSP Partners, restraining almost $880,000, for many years. (Tr. 535-36).

As a partner in SSP Advisors, L.P. and SSP Partners, L.P., half of the assets in the bank accounts of these two entities belongs to Salovaara. (D. Ex MMM, NNN).

Although Salovaara can execute on the levy at any time, Salovaara chooses not to do so, as he would be taking funds from a pool of money that is already half his, and chooses instead to pursue other sources of recovery, such as the investors in International.

The Greenwich Street Partnership Agreement requires that an indemnification claim against the Greenwich Street Fund must relate to activities undertaken in connection with the Greenwich Street Partnership by a "Covered Person" while acting as a "Covered Person". (D. Ex. III, ¶ 10.6).

Under the Greenwich Street Partnership Agreement, a "Covered Person" includes an employee or officer of the Manager, and the Manager, in turn, manages the operations and investments of the Fund, subject to the ultimate control of the General Partner. (D. Ex. III, ¶¶ 2.6, 7.1). Eckert, while an employee or officer of the Manager of Greenwich Street, and, therefore a "Covered Person", was not acting as a "Covered Person" (i.e. in his capacity as an officer of the Manager) when he sought indemnification from the SSP Partnerships for his costs in *Salovaara I*.

Therefore the issue in *Salovaara II* - whether Eckert was

entitled to indemnification from the SSP Partnerships for his costs in *Salovaara I* - does not relate to Eckert's actions as a "Covered Person" of Greenwich Street, and his costs in *Salovaara II* would not have been indemnifiable by Greenwich Street. (D. Exs. E, F, G).

Similarly, Eckert would not have been entitled to indemnification from Greenwich Street for the majority of his costs in *ERISA*, as the action only involved Eckert's actions as a Covered Person to a limited degree.

ERISA was commenced on May 9, 1994, before the Greenwich Street Fund was actually formed in November, 1994. (D. Exs. H, III). *ERISA*'s early claims, that Eckert "abandoned" South Street I when he went to work for Greenwich Street, do not involve Eckert's acting as a "Covered Person" of Greenwich Street, but only his actions as an ERISA fiduciary of South Street I. (D. Ex. J).

The proceedings in *ERISA* which arguably related to Eckert's actions as a "Covered Person" related to Salovaara's motion for a preliminary injunction dated August 28, 1995 (P. Ex. 123), wherein he claimed that Eckert's an investment in Marcus Cable on behalf of Greenwich Street competed with South Street I's investment in Busse Broadcasting, which motion was decided on January 16, 1996 (P. Ex. 124).

The total amount of time and disbursements expended by Eckert's attorneys from September, 1995 through January, 1996 (when the Court decided the preliminary injunction motion (P. Ex.

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124)) totaled $182,306.65 (P. Ex. 176, invoices dated 10/5/95, 11/2/95, 10/5/95,11/13/95 and 12/11/95).

After the grant of the preliminary injunction in January, 1996, Eckert chose to recuse himself from further involvement with the Marcus Cable investment (D. Ex. K, p. 8). Thus, from the time of the preliminary injunction until the dissolution of the preliminary injunction (D. Ex. K), Eckert was not acting as a "Covered Person" with respect to the Marcus investment. While certain other investments of Greenwich Street were claimed to be competitive with investments of South Street I (see D. Ex. K), Salovaara, as plaintiff, has made no effort to quantify how much of Eckert's bills related to those issues.

The sanctions portion of *ERISA* did not involve Eckert acting as a "Covered Person" of Greenwich Street.

If Eckert were found to have had an obligation to seek indemnification from other sources from the SSP Partnerships, and if the Greenwich Street indemnification clause did not require exhaustion of other sources of indemnification, then the maximum amount of indemnification that Eckert could have sought from Greenwich Street for his defense costs relating to his actions as a Covered Person would have been no more than $182,306.65 (the amount spent on the preliminary injunction motion calculated on the basis of Eckert's bills from September, 1995 through January, 1996, (P. Ex. 124)), and Salovaara's damages, calculated as half of the amount that the SSP Partnerships paid for this indemnification, would be no more than $91,153.33, or some

fraction thereof, depending on what percentage of Eckert's indemnification from the SSP Partnerships he would have been required to share with Greenwich Street.

Salovaara's Credibility

From the outset of his testimony, Salovaara evaded questions and provided equivocal answers, even when reprimanded by this Court. Salovaara's evasiveness caused this Court to comment that it was "sick and tired" of having to hear questions repeated because Salovaara persistently gave evasive answers, causing the Court to admonish Salovaara to answer questions directly. (Tr. 180, 217, 464). This pattern began at the outset of Salovaara's cross-examination. In his direct-testimony Affidavit, Salovaara had stated that he "left Goldman" in 1991, but when asked at the beginning of his cross-examination to confirm this straightforward fact, Salovaara denied that he had "left" Goldman in 1991. (Sal Aff. ¶ 5, 12; Tr. 164-67).

Salovaara professed at trial to have no independent recollection of the month in which the South Street I investors met in Dallas and voted to cease reinvestment, despite the fact that he had submitted his direct testimony affidavit stating the date of the meeting (May, 1994), a mere 6 days before his testimony. (Compare Tr. 224 with Sal Aff. ¶ 97). Salovaara's professed lack of memory was thus not credible.

Salovaara claimed not to recall that he and Eckert jointly drafted the Primerica proposal or the content of the proposal. Instead, Salovaara could remember only that he and Eckert

"drafted something". (Tr. 205). The Primerica proposal, and the subsequent dealings between Eckert and Primerica in response to that proposal, leading to Eckert's employment by Primerica (and Salovaara's exclusion from employment), were a central feature of the *Salovaara I* lawsuit, for which Salovaara currently seeks indemnification. (D. Exs. A, B, KKKK, Tr. 182, 203-05, 211-14). Salovaara's lack of recall concerning the Primerica proposal is simply not credible.

In his direct testimony affidavit, Salovaara asserts that he sought a preliminary injunction in *Salovaara I* in order to enjoin Eckert from accepting work with Greenwich Street for the benefit the South Street Funds, including International. (Sal Aff. ¶ 152). However, Salovaara admitted at trial that if the injunction had been granted, he would have expected Eckert to have returned to Greycliff for only "a period of time", and that the injunction would have "enormously improved" his negotiating position. (Tr. 222).

In *ERISA*, Judge Wood found that the injunction benefited no one but Salovaara, that Salovaara had no evidentiary support for the preliminary injunction, and that the injunction would have been vacated on the merits had it not been vacated for mootness. (D. Ex. K, p. 8). In 1998, Judge Wood found that Salovaara sought to avoid summary judgment in *ERISA* by submitting an affidavit which contradicted his prior sworn testimony.

In this affidavit, Salovaara alleged that he relied on Eckert's advice in prematurely selling securities that

purportedly competed with an investment of the Greenwich Street Fund, when his deposition testimony stated that he never listened to Eckert's advice in making investment decisions. To this day, Salovaara maintains that his affidavit "was completely consistent" with his deposition testimony. (D. Ex. K, p. 8; Tr. 244).

Salovaara's testimony in this regard is not credible.

The testimony offered by Cohen further undermines Salovaara's credibility. In his direct-testimony Affidavit and live testimony at trial, Cohen represented that even after March, 1999, Salovaara continued to dispute Eckert's authority to remove Cohen from representing International, and that Cohen followed Salovaara's instruction to continue his representation of International. (Cohen Aff. ¶ 32; Tr. 315-16.). However, Salovaara later testified, and legal bills from Sills Cummis and the Cayman Islands firm of Myers and Alberga show, that Salovaara knew since March 1999 that Eckert was legally and factually the liquidating trustee of International. (Tr. 367, 369, 373-74, 376-77; P. Ex. 180: MSNY 4488, 4550). As this Court found, Salovaara attempted to portray himself as a "white knight," and Eckert as the "bad guy" with respect to protecting the South Street Funds during the sale of the Bucyrus-Erie bonds. (Tr. 459-60). However, Salovaara's involvement in the sham Bucyrus-Erie transaction reveals that he is not trustworthy when he claims to act in the best interest of the South Street Funds.

Salovaara went to great lengths to conceal his role in

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picking Maureen Wilson to be the front for the sham Bucyrus-Erie transaction. Salovaara testified as follows in this trial:

> Q: Let me get this straight. You in the week of March 4th, you told Larry Rawson at Credit Research that you had a buyer for him, but you didn't tell him it was your mother-in-law, right?
>
> A: I told him there may be a buyer for them.
>
> Q: And, but you didn't tell them it was your mother-in-law?
>
> A: That's correct, in the week of March 4.
>
> Q: And now by March 10, it had been decided to replace your mother-in-law with somebody else, right?
>
> A: No.
>
> Q: Well, who is Maureen Wilson?
>
> A: Maureen Wilson is the civil union partner today of my sister-in-law Mary Stewart.
>
> Q: So Maureen Wilson -- and Maureen Wilson wound up owning the bonds, right?
>
> A: Yes, she did.
>
> Q: Now, isn't it a fact that you suggested that Maureen Wilson buy these bonds?
>
> A: I suggested to my wife that Maureen Wilson might like to buy the bonds, correct.
>
> Q: And you did that -- do you remember when you did that?
>
> A: I believe I made that suggestion to my wife on or about March 10.
> (Tr. 472-73).

Even after going through great effort to secretly buy International's Bucyrus-Erie bonds—an effort that was memorialized in the New York Times—Salovaara alleges not to remember certain unfavorable findings in subsequent litigation. Salovaara could not remember that Judge Hellerstein dismissed

Salovaara's case against the Hindes. (Tr. 507-09). Likewise, after suing Jackson National derivatively and individually on the basis of this secret purchase, and being found to be an inadequate representative of the South Street I and the Leveraged Funds, Salovaara conveniently claimed during trial that he could not remember if he brought suit against Jackson National. (Tr. 444). Nevertheless, Salovaara initially sought in the instant action indemnification from International for both the *Jackson National* action and the *Hindes* action, and did not voluntarily withdraw the claim for the *Jackson National* action, which was instead dismissed by this Court in prior proceedings. (Complaint, Am. Complaint, D. Exs. OOO, SSS; Tr. 444; Order dated January 4, 2005, pp. 17-19).

Although the New Jersey Court held in the *Jackson National* action, that Salovaara was not a fair or adequate representative of the domestic Funds (due to the fact that his interests were antagonistic to the South Street Funds' interest), Mr. Salovaara testified at trial in the instant case that he believes he is a fit representative of International. (D. Ex. SSS; Tr. 715).

The First Department has ruled that Salovaara can only recover indemnification for his costs in *Salovaara I* from International if he proves that those costs arose out of the action or inaction of the general partner (or affiliate thereof) which "relates in any way" to International, and that action or inaction must relate to International in a "meaningful sense". (First Dep't decision, p. 709).

As applied to *Salovaara I*, a "meaningful sense" means that Salovaara must prove that *Salovaara I* involved something more than Salovaara's suing on his own behalf to recover for breaches of the partnership agreements between Eckert and Salovaara, and that Eckert's actions or inactions relating to International must have been at issue in more than a peripheral way. Id.

Salovaara failed to meet this standard, because the evidence introduced at trial simply confirmed that *Salovaara I* concerned Salovaara suing on his own behalf, for breaches of agreements between him and Eckert, and that International was scarcely mentioned during the course of that action.

Isolated references to International during the course of *Salovaara I*'s four years of litigation and 23 days of trial, culminating in a 30-page Opinion, do not meet the First Department's standard outlined above.

Salovaara is not entitled to indemnification from International for his costs in *Salovaara I*.

The First Department has ruled that, in order for Salovaara to be entitled to be indemnified from International for his costs in *ERISA*, Salovaara must prove that the action involved something more than claims relating to South Street I, but instead must relate to "acts or failure to act by Eckert vis-à-vis International". (Id.).

Because the only claims that were actually litigated in *ERISA* were those based on ERISA, which applied only to South Street I, and not the common law claims, the action did not

relate to any action or inaction of Eckert vis-à-vis International. Salovaara cannot be indemnified for costs that he did not incur for claims that might have been, but were not actually, litigated.

Section 10.6(a) of International Agreement prohibits indemnification for any action which violates the standards of care set forth in § 10.3(a) which requires the General Manager and its affiliates, employees, and agents (so long as they participate in the business of the Partnership, which Salovaara claims to have been doing) to "act at all times in good faith in the interests of the Partnership" (D. Ex. Y. § 10.3(a)).

Even if Salovaara could establish some right to indemnification for his costs in *ERISA*, Salovaara forfeited this right by pursuing the *ERISA* case by improper means (i.e., by submitting a false affidavit to maintain a meritless claim) and in bad faith.

Salovaara is not entitled to indemnification from International for his costs in *ERISA*.

The First Department has ruled that, in order for Salovaara to be entitled to be indemnified for his costs in *Milbank*, Salovaara must prove that he sued Eckert, as an affiliate of the general partner of International, for an action or inaction "relating to International" (Id.).

Milbank, brought against a non-affiliate of the general partner of International, by definition fails to meet the First Department standard.

Milbank was not an "agent" or "affiliate" of SSP International, International's ultimate general partner. While Eckert is an affiliate of SSP International, the alleged "inaction" of Eckert in not initially suing Milbank on behalf of International is not an "inaction" of an affiliate which would allow Salovaara to be indemnified for his costs in bringing *Milbank*, where the defendant was Milbank (not an affiliate) and where Eckert was not himself sued for his alleged failure to bring suit.

The First Department, which had been furnished the pleadings in *Milbank*, has already ruled that this action did not involve "any action or inaction on the part of Eckert" (Id.).

Eckert's not bringing an action against Milbank would not have been actionable in any event, since Eckert had no authority on his own to bring an action on his own.

Even if Eckert's alleged inaction in not suing Milbank could meet the First Department standard, Salovaara would not be entitled to be indemnified for Milbank because he did not bring *Milbank* in order to remedy any "inaction" by Eckert vis-à-vis International. Rather, he brought *Milbank* because he unreasonably distrusted Eckert and any law firm retained by Eckert, and wished to monitor Eckert's actions in the other case brought against Milbank by means of hiring his own attorney, and using International as a platform for that monitoring, even though the resulting costs to International would be disproportionate to its potential recovery.

Alternatively, Salovaara is not entitled to be indemnified by International for his costs in *Milbank* because a) he was not authorized to commence that action and/or b) he acted in bad faith in pursuing a separate action with only a minimal potential for recovery for that Fund, which he continued to pursue even after the actions were consolidated, and even after he knew that Eckert had properly instructed him to cease retention of a separate attorney. Eckert's letter of August 16, 1998, expressing a willingness for the "applicable funds" to pay Salovaara's fees "to date" (P. Ex. 151), at a time when those fees were approximately $16,000 (P. Ex. 36, p. 2) was not an agreement to pay Salovaara's fees for an unnecessary separate lawyer for International for over a year thereafter, and Salovaara's misconduct in refusing to discharge his attorney, in misleading his own attorney as to the bona fides of Eckert's appointment as Liquidating Trustee, and his misconduct in this Court in allowing Cohen to mistakenly testify as to the legitimacy of any dispute over Eckert's appointment, all serve to abrogate any duty to pay but for the $16,169.27 that was agreed to.

Salovaara is not entitled for indemnification from International for his costs in *Milbank*.

The SSP Partnership Agreements (D. Exs. MMM and NNN, §§ 10.2 and 10.4), only require that Eckert "act in a manner that does not constitute willful misconduct or bad faith in connection with the management of the business and assets of the Partnership"

(Id. at § 10.2). Eckert's decision to not seek indemnification from Greenwich Street for his costs in *Salovaara I*, *Salovaara II* and *ERISA* was not willful misconduct or taken in bad faith with respect to the SSP Partnerships.

Eckert has not recovered any indemnification payments from the SSP Partnerships for his costs in *Salovaara I*, making any claim relating to that litigation moot, but even if he were able to collect the amount awarded him in *Salovaara II*, he was only awarded his defense costs on claims which arose well before his employment at Primerica or the creation of Greenwich Street, which would not have been indemnifiable by Greenwich Street, as explained below.

Even if Eckert had a legal obligation to seek indemnification from sources other than the SSP Partnerships, Eckert would have not been entitled to indemnification from Greenwich Street for his fees. Under the Greenwich Street Agreement (D. Ex. III, ¶ 10.2), Eckert is required to use sources other than Greenwich Street to fund his indemnification payments until such other sources are exhausted, which did not happen as to the indemnification payments made to him by the SSP Partnerships. Even if the Greenwich Street Agreement did not require Eckert to exhaust other sources of indemnification, the Greenwich Street indemnification clause would only cover claims arising out of his action as a "Covered Person" of Greenwich Street, and Eckert is a "Covered Person" in his capacity as an officer or employee of Greenwich Street's Manager. (Id., ¶ 2.6,

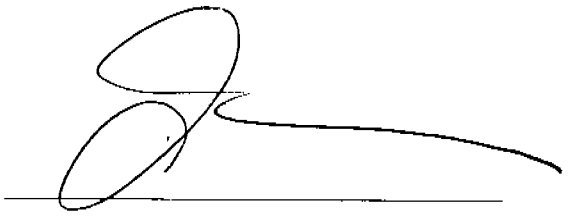
10.2). Thus, he could only seek indemnification for claims which arose out of his actions on behalf of Greenwich Street's investments or operations.

The issue in *Salovaara II* - whether Eckert was entitled to indemnification from the SSP Partnerships for his costs in *Salovaara I* (D. Ex. F) - does not relate to Eckert's actions as a "Covered Person" of Greenwich Street since his actions in seeking indemnification were not undertaken in connection with Greenwich Street's investments or operations, and his costs in *Salovaara II* would not have been indemnifiable by Greenwich Street. Likewise, Eckert would not have been entitled to indemnification from Greenwich Street for the majority of his costs in *ERISA*, as this lawsuit only involved Eckert's actions as a Covered Person to the limited degree of his causing Greenwich Street to make investments which Salovaara alleged competed with South Street I's investments. (See Findings of Fact ¶¶ 107, 112).

But for the agreed upon sum of $16,169.27, Salovaara has failed to prove entitlement to any other relief sought in this action.

Settle judgment.

Dated: October 16, 2008



J.S.C.

HON. CHARLES E. RAMOS