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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division.

Mikael SALOVAARA
v.
Alfred C. ECKERT, III

No. MRS C-29-94.

July 14, 1998.

Gentlemen:

MACKENZIE, Presiding J.

***1** The Court reserved decision on September 17, 1997 following twenty-three days of trial which were spread out, in truncated fashion, over a period of ten months. Fourteen witnesses testified at trial either in person or through their pretrial depositions, and nearly 100 exhibits were admitted into the record. The following comprises the Court's findings of fact and conclusions of law. In reaching these findings, the Court implicitly assessed credibility and weighed evidence. Credibility findings are expressed specifically, as needed.

A) The Parties are in Substantial Agreement as to the Following:

Defendant Alfred C. Eckert ("Eckert") joined Goldman-Sachs ("Goldman") in 1973, becoming a partner in 1984. Plaintiff Mikael Salovaara ("Salovaara") joined Goldman-Sachs in 1980, becoming a partner in 1988. While employed by Goldman, both men gained investment banking, corporate finance, merger and acquisition ("M & A"), and leveraged buyout ("LBO") experience. Eckert founded and headed Goldman's LBO group from 1983-1991, with Salovaara joining him as co-head of the group from 1987-1991.

In 1986, Goldman started a LBO fund headed by Eckert, Salovaara and others. The Broad Street Fund did very well, returning its investors in excess of 30% compounded annually.

In late 1989, Salovaara conceived of the Water Street Corporate Recovery Fund I, LP ("Water Street"), which Goldman formed in June 1990 to invest in the "distressed" securities of financially-troubled companies, whose instability was derived primarily from over-leveraged assets. Eckert sold Goldman's upper management on Water Street Fund, which was to be run primarily by Salovaara. Goldman invested $100 million in Water Street, and raised over $683 million from outside investors. Water Street was immensely successful and induced other firms (First Boston, Morgan Stanley and others) to form distressed securities funds of their own.

In November 1990, Eckert and Salovaara began discussing withdrawing from Goldman to form their own investment banking firm, Greycliff Partners, Ltd. ("Greycliff.") Eckert negotiated an arrangement with Goldman's senior partners by which Eckert and Salovaara could leave at the end of November 1991 and pursue their ventures without violating the Goldman partnership's non-competition agreement. Eckert and Salovaara remained with Goldman for another year, leaving in November 1991.

In late 1991, Eckert and Salovaara informed both their attorney and Goldman that they intended to form and solicit investors in a group of funds that would invest in distressed securities, in addition to forming LBO and real estate funds.

Eckert and Salovaara also intended to form a merchant banking business that would include general financial advisory service.

B) The Parties Strongly Dispute the Following:

The Alleged "Umbrella Master Partnership"

According to Salovaara, when they were negotiating their withdrawal from Goldman and preparing to start their new firm, Salovaara and Eckert entered into an oral partnership that was to govern all of their business ventures for a three-year term. According to Salovaara, they agreed to pursue jointly all investment opportunities and to share equally in all remuneration. Further, Salovaara contends Eckert related the terms of the agreement to their attorneys, King & Spaulding, during a conference call on November 5, 1991.

***2** Salovaara relies on a draft agreement completed by Robert Bryant, Esq. from notes taken during a November 5, 1991 conference call with Bernadette Drankowski, Esq. ("Drankowski"). Salovaara contends he and Eckert made clear to their attorneys the substance of what he calls an "Umbrella Master Partnership". He further contends that King & Spaulding internal memos refer to the "umbrella agreement" and that Drankowski's trial testimony makes it clear she understood an agreement had been reached between the parties. Finally, Salovaara contends that a written version of the "Umbrella Partnership" agreement was prepared for his and Eckert's signatures, but that neither party signed it, not because it incorrectly described their responsibilities to each other, but because each party understood and had been performing its terms.

Eckert strongly denies the existence of such a written agreement; he contends that even if it does exist, it allowed either Eckert or Salovaara to take outside employment without sharing any compensation from such employment. Eckert relies on the notes taken by Drankowski during the course of the November 5, 1991 conference call and her testimony, to support the idea that the items discussed during the November 5, 1991 conference call did not add up to an "Umbrella Partnership." In addition, Eckert relies on the testimony of Donald Knight, Esq., the King & Spaulding attorney in charge of their proposed "South Street" investment project (and the attorney specified by Salovaara in deposition as being privy to the terms of the "Umbrella Partnership") Knight stated he was not of the opinion that discussions between Eckert and Salovaara had led to a final agreement.

Did Eckert and Salovaara Perform the Terms of the "Umbrella Partnership"?

Salovaara further suggests that his and Eckert's course of dealing with each other supports the existence of the "Umbrella Partnership." Salovaara points out that he and Eckert pursued investments together, including investments in approximately $100 million of U.S. Treasury securities, an initial public offering of Scholastic Corp, options in General Motors and Citicorp, and other investments in publicly traded companies. Further, Salovaara suggests that the record shows Salovaara and Eckert offered each other the opportunity to invest in every opportunity each man pursued separately--all, Salovaara suggests--in accordance with the "Umbrella Partnership."

In addition, Salovaara points to Eckert's own testimony to prove that Eckert remitted to Greycliff all monies he earned from outside opportunities--specifically advisory fees earned from Green Capital.

In late November 1991, Salovaara and Eckert created and solicited investors in the South Street Corporate Recovery Fund I, L.P. ("South Street 1"), the South Street Leveraged Corporate Recovery Fund, L.P., and the South Street Corporate Recovery Fund International I, L.P. (collectively, "SS1"). Subsequently, they established South Street Fund B, South Street Corporate Recovery Fund II, L.P. ("South Street 2"), and a high-yield junk bond fund, the Greycliff Leveraged Fund, 1993, L.P. ("GLF") (collectively, "SS2"). South Street 1 & 2 were both "distressed securities" funds, where investors purchase the debt securities of distressed firms that the investors believe will eventually turn profitable. ("Distressed securities" funds are sometimes referred to as "Vulture funds.")

***3** Salovaara also suggests that he and Eckert set out to, and did, establish a merchant banking and advisory business. Salovaara claims that he and Eckert hired Thomas V. Inglesby to facilitate this venture, and that Inglesby worked with both men on various merchant banking enterprises, which brought $400,000,00 to Greycliff. In late 1992 Salovaara and Eckert drafted the XYZ Plan, which Salovaara claims set forth the partners' plans for a "full-blown merchant bank and advisory business". The plan was discussed with numerous prominent people in the financial business. Salovaara claims both the establishment of the SS1 and SS2 funds *and* the attempts to start a merchant banking business, exemplify his and Eckert's abiding by the "Umbrella Partnership."

Eckert disagrees with Salovaara's contention that their actions reflect any sort of agreement to the alleged "Umbrella Partnership." According to Eckert even the distressed security business, which was governed by partnerships and corporations explicitly owned by Salovaara and him, was not really a "50/50" deal. This was because Eckert initially invested twice as much money as Salovaara. This was also the case with the XYZ Plan, which Eckert claims put all the startup costs on his shoulders. In any event, Eckert disputes that Greycliff was ever successful in setting up a general advisory business. The XYZ Plan, Eckert claims, never got off the ground, because he and Salovaara were unable to interest anyone in heading up such an operation. Indeed, Eckert points to Salovaara's own testimony to show Salovaara recognized Greycliff's failure to develop either "financial advisory" or "merger and acquisition" businesses. Further, Eckert contends that not all Greycliff activities were universally shared. Both men traded securities, options, and the like through Greycliff accounts, says Eckert, but both also traded for their own accounts, even while at Greycliff's offices--and none of the proceeds of those trades went into Greycliff's corporate coffers. Finally, Eckert claims to have devoted substantial time to Industrial Holdings, a firm in which Salovaara had no interest.

The Written Greycliff Partners Partnership Agreement

Upon leaving Goldman in late 1991, Eckert and Salovaara conducted business from offices located at 45 Rockefeller Plaza, New York, N.Y ., in space sublet from the law firm of Reboul, MacMurray, Hewitt, Maynard & Kristol. Prior to November 1993, Greycliff, then a Delaware corporation equally owned by Eckert and Salovaara, served as investment advisor to the South Street Funds and made all investment decisions on behalf of each Fund.

In 1993, Eckert and Salovaara agreed to relocate Greycliff to New Jersey, and required all four professionals affiliated with the firm (Eckert, Salovaara, Inglesby, and Owen Williams, who had been hired as a limited partner to help with the fundraising for SS2) to do so. Salovaara moved from Brooklyn to New Jersey in June of 1993, Eckert moved to New Jersey later that summer.

***4** Salovaara claims that he and Eckert agreed to terminate the original Delaware corporation, Greycliff Partners, Ltd., and form a New Jersey "Greycliff Partners" general partnership. The law firm Reboul, MacMurray handled the dissolution of the Delaware corporation and created the New Jersey general partnership. The firm was asked to draft a written New Jersey partnership agreement. Interestingly, Salovaara admits that Reboul, MacMurray were told nothing of the alleged oral "Umbrella Partnership" before they drafted the New Jersey agreement. Salovaara claims the Greycliff Partnership Agreement (the "Agreement") was signed in November, 1993, with neither partner bothering to carefully read it because there was no significant departure from the "Umbrella Partnership". Indeed, Salovaara maintains that Eckert represented to him that the Agreement did not alter their business arrangements in any respect. For the Court's purposes, the key section of the Agreement is Section 2.03, "Activities of the Partners," the "Best Efforts" clause, which reads as follows:

> Each Partner hereby agrees to use his or her best efforts in connection with the purpose and objects of the Partnership set forth in Section 1.04, and to devote to such purpose and objects such of his or her time as shall be necessary for the management of the Partnership; it being understood, however, that nothing contained in this Section 2.03 shall preclude any Partner from acting, consistent with the foregoing, as a director, officer or employee of any corporation, a trustee of any trust, as executor or administrator of any estate, a partner of any partnership or administrative official of any other business entity, or from participating in the profits derived from the investments of any corporation, trust, estate, partnership or any other business entity or person, or, from rendering investment advice and counsel to others.

Section 1.04 of the Agreement, "Purposes of the Partnership", reads in pertinent part as follows:

> The Partnership is organized for the following objects and purposes:
> (a) to act as advisor to the South Street Corporate Recovery Fund I, L.P., South Street Leveraged Corporate Recovery Fund, L.P., South Street Corporate Recovery Fund I (International), L.P., South Street Corporate Recovery Fund II, L.P., and Greycliff Leveraged Fund, 1993, L.P.;
> (b) through November 30, 1994, in each case, to act as a broker-dealer, to render financial, structural and strategic advice, and to provide other services to any person, corporation, trust, firm, partnership, public authority, or organization of any kind;
> (c) to engage in such other business, activities and transactions as the Partners may from time to time determine;

In response, Eckert does not deny that the written Agreement was drawn up and entered into, but he does offer an interesting observation. Eckert observes that Salovaara testified that when it came time for Reboul, MacMurray to draft the Agreement, Salovaara inexplicably maintained complete silence as to the existence of the oral "Umbrella Partnership." Eckert points out that Salovaara saw a draft of the Agreement and that documents from Reboul, MacMurray demonstrate that a draft of the Agreement (which contained Section 2 .03 in its final form) was sent to Salovaara and Arthur Anderson (Greycliff's accountants). Indeed, Eckert claims that Salovaara told no one that he had an all-encompassing "Umbrella Partnership" with Eckert until after the instant dispute arose, and that in his first note to Eckert on the subject he referred cryptically to "our arrangement." One wonders why Salovaara never referred to the "Umbrella Partnership" either during the drafting of the written Agreement or at the outset of the Eckert/Salovaara dispute.

Eckert's Discussions with Primerica

***5** In the Spring of 1993, the record shows Eckert and Salovaara determined that Eckert should call upon James Dimon ("Dimon") at Primerica/Smith Barney, a former colleague of theirs from Goldman-Sachs. Eckert began discussions with Dimon in August.

At Dimon's request, Salovaara and Eckert drafted a proposal for a Primerica merchant banking fund. They suggested Primerica develop a fund having a broad charter, allowing it to invest in a wide number of areas, with both Salovaara and Eckert on the Investment Committee.

Salovaara suggests that nearly everything Eckert represented to him about the discussions, *i.e.,* that Eckert was negotiating on behalf of Greycliff, that there was interest in a joint Greycliff/Primerica fund, were lies and deceptions intended to cover the fact that Eckert was really negotiating to obtain a job with Primerica.

Salovaara points to the deposition of Robert F. Greenhill, formerly President of Morgan Stanley and, at the time of his deposition, Chairman of Smith Barney. Greenhill's deposition makes it clear that he first met with Eckert in the summer of 1993 and discussed the possibility of Eckert, not Greycliff, having a role in Primerica/Smith Barney's new fund, and that Greenhill never considered a Greycliff/Primerica joint fund.

Salovaara also looks to the testimony of Marc Weill ("Weill"), Primerica's Chief Investment Officer. Salovaara claims Weill testified he informed Eckert in the summer of 1993 that Primerica was going to set up its own fund--one independent of Greycliff--and that Weill's testimony undermines Eckert's claim that Primerica was originally interested in doing two funds, but ultimately decided to pursue only one. Salovaara also claims Weill's testimony belies Eckert's claim that Primerica was planning on making a major investment in SS2.

In addition, Salovaara maintains that, in order to win a job with Primerica, Eckert misrepresented the status of Greycliff's business. Suggesting Primerica would have been much less likely to hire Eckert had it known Greycliff was actively seeking investors for the SS2 Funds, Salovaara claims Eckert misrepresented those funds as "winding down" when in fact Greycliff was still soliciting new investors for the SS2 Funds.

Eckert maintains that he honestly represented Greycliff's interests from the outset of his talks with Primerica. He also claims that it was his understanding that Primerica originally expressed interest in developing two funds, one wholly in-house and another with Greycliff involvement, but that in the internal process of deciding how to proceed, Primerica elected to pursue only the in-house fund.

Further, Eckert maintains that neither the 1993 written Agreement nor the alleged oral "Umbrella Partnership" prohibited him from discussing outside employment with Primerica, and that in any event, Primerica did not offer him employment until around Thanksgiving 1993.

Eckert's Decision

Eckert announced to Salovaara that he was accepting Primerica's offer to run Primerica's new Greenwich Street Fund the day after Thanksgiving 1993. According to Salovaara, Eckert tried to resolve the issues surrounding his simultaneous involvement with both Greycliff and Primerica, by agreeing to become a limited (as opposed to general) partner in Greycliff. Further, from that point forward, Salovaara was to receive 100% of the advisory fees, and 90% of the profit override. Salovaara declined this offer and instead asked for a percentage of profits already earned, a proposition refused by Eckert. Salovaara then claims to have encouraged Eckert to turn over his Primerica compensation to Greycliff as required by the "Umbrella Partnership." Eckert refused.

***6** Salovaara further claims that following Eckert's post-Thanksgiving announcement, Eckert made it clear that he was planning on leaving Greycliff. Salovaara looks to Inglesby's and Williams' testimonies to demonstrate that Eckert told both men he was "leaving" Greycliff. In addition, Salovaara claims Eckert's own testimony shows he ordered his secretary to ship the contents of his desk from New

Jersey to his new office in Connecticut.

Did Eckert Fail to Perform His Duties as a Partner? Did His Actions Damage Greycliff?

Salovaara also suggests that Eckert became an "absentee" partner following his decision to take the Primerica position. Salovaara relies on Inglesby's and Williams' testimonies to establish that before Thanksgiving 1993, Eckert was usually in Greycliff's offices from 9:00 a.m. to 5:00 p.m. when not traveling or on vacation. The same testimony, Salovaara claims, shows that Eckert failed to attend numerous important meetings with potential investors in Greycliff's SS2 Funds. Eckert's actions, Salovaara claims, damaged Greycliff as follows: (1) he seriously hampered Greycliff's ability to raise money from investors for SS2 and (2) Eckert's soliciting investors for Greenwich Street (the fund he heads for Primerica) directly competed with Greycliff's SS2 marketing efforts.

For his part, Eckert suggests that Salovaara's claims cannot be sustained.

First, Eckert claims that his absence from Greycliff's Morristown offices is a non-issue because managing Greycliff's affairs required very little effort on his part. Eckert testified that Salovaara supervised the day-to-day running of SS1, with Eckert serving as an advisor and "sounding board." Indeed, Eckert testified that even during the investment period he spent only about 10 hours a week tending to Greycliff's SS1 business. He claims that Salovaara's October 1996 deposition supports this contention. Eckert further claims that his role with Greycliff is verified by the testimony of both Williams and Inglesby. That testimony reveals Salovaara did not put a whole lot of time into Greycliff either, even though he was the person doing the day-to-day supervision. Further, Eckert claims that the Greycliff proposal to establish a fund in partnership with Primerica shows that both he and Salovaara had plenty of time on their hands, as both men agreed they would have sufficient time to supervise SS1, SS2 and a Greycliff/Primerica fund.

Second, as for Salovaara's charge that the announcement of Eckert's acceptance of the Primerica job hampered Greycliff's fundraising work for SS2, Eckert claims this cannot be sustained for a number of reasons: (1) There were no potential investors who were on the verge of investing in SS2 at the time Eckert's job with Primerica was announced; (2) the fundraising for SS2 was largely completed by December, 1993; (3) there was no target or goal for monies to be raised for SS2; (4) the market for distressed securities was shirking in late 1993 and early 1994; (5) the Greycliff New Jersey Partnership Agreement did not require Eckert to dedicate effort to fundraising for SS2 if he saw no profit in it; and (6) Salovaara's various legal actions against Eckert preempted any fundraising success Greycliff may have had.

***7** Third, Eckert claims his activities with respect to Greenwich Street did not compete with Greycliff's SS2 activities because Greenwich Street did not begin soliciting funds until after the start of the instant action and there were many investors available to invest in either fund, (Greycliff's SS2 Fund, or Greenwich Street Fund). Greenwich Street and SS2 were fundamentally different types of funds, and did not compete with each other for investors. Eckert looks to the January 1995 issue of *Private Equity Analyst* to support his contention that $19 billion was committed to "alternative investment" funds in 1994. He claims this establishes that there was enough money in the market for both Greenwich Street and SS2 if fundraising for SS2 had continued. Further, Eckert claims that while SS2 and Greenwich Street were both "alternative investment" funds, the SS2 funds were "distressed securities" funds and Greenwich Street is a "leveraged buyout" or "private equity" fund. As this was the case, the two types of funds were attractive to either completely different groups of investors or investors who had money to invest in different areas.

Salovaara disputes all of Eckert's arguments. On the subject of Eckert going to work for Primerica, Salovaara claims that it was not so much the hours Eckert did not spend at Greycliff that mattered, but rather the fact that he was going to work for a competing fund. According to Salovaara, in the entire history of merchant banking, no one has served as a principal to two different alternative investment funds unless they were under common management. Accordingly, maintains Salovaara, Eckert's announcement that he was taking the Greenwich Street job with Primerica and continuing on with Greycliff was greeted with confusion in the marketplace. In fact, claims Salovaara, a number of potential SS2 investors decided not to invest in SS2 because of Eckert's announcement.

In addition, Salovaara disputes Eckert's claims that there was little fundraising left to be done for SS2. First, Salovaara maintains the market for distressed securities funds remained strong through 1994, and points to reports from Frank Russel Capital, Inc. and Cambridge Associates to support his claim. Second, Salovaara claims that there were a number of investors interested in putting substantial amounts of money into SS2, and would have done so, were it not for the announcement that Eckert was taking a job with Primerica. Third, Salovaara maintains that there was a target amount to be raised for SS2, as investors were told Greycliff expected to raise $100 million to $150 million for the funds. Fourth, Salovaara asserts that, for a variety of reasons, the major fundraising for SS2 happened between August and November of 1993, and the $30 million raised in that period suggests how much could have been raised in a full year.

Finally, Salovaara maintains, despite Eckert's claims to the contrary, that SS2 and Greenwich Street were competing investment vehicles. First, the area of alternative investment investors is small. Thus, even if SS2 and Greenwich Street were not competing funds by type, they were competing funds because the pool of available investors is relatively small. Eckert's deposition testimony supports this position, and contradicts his trial testimony. Second, Salovaara disputes Eckert's claim that Greenwich Street and SS2 were not direct competitors on two points: (1) investors in this type of fund do not invest because a fund is of a particular type, but rather because of the reputation of the people running the fund-and Eckert was claiming to run funds for both Primerica and Greycliff; and (2) the "distressed securities" verses "leveraged buyout" label is a "red herring"--both SS2 and Greenwich Street invested in companies that were financially unsound because of excessive debt loads and attempted to make some sort of profit off of them.

***8** Eckert claims he not only fulfilled his requirements as a partner in Greycliff before his decision to take the Primerica job, but that he performed so well. Eckert claims Salovaara's attorneys attempted to interfere with Eckert's access to Greycliff employees, Salovaara ceased consulting Eckert with respect to SS1 and SS2 business, that Salovaara stonewalled Eckert with regard to information about what was going on with Greycliff, and that Salovaara attempted to cut Eckert out of Greycliff's business altogether through the "Dryden Road" proposal.

According to Eckert the "Dryden Road" proposal occurred when Salovaara proposed to the SS1 shareholders that a new General Partnership, called "Dryden Road" be formed to replace Greycliff as the General Partner of the SS1 funds. Charts were prepared for the shareholders showing a "current" structure where SS1 Advisors/Partners is shown as *general partner* of the funds and Greycliff is shown as *"de facto manager"* of the funds. A "suggested" structure, where Greycliff does not appear at all, shows SS1 Advisors/Partners appearing only as a *limited partner*, and a new organization, "Dryden Road" appearing as both *general partner and advisor*. The effect of this, Eckert maintains, would be to cut him completely out of the SS1 fund's administrative and override profit structure because only the general partners receive override payments.

Salovaara responds that "Dryden Road" is a subterfuge on Eckert's part. First of all, Salovaara maintains he attempted to introduce Dryden Road as an *additional* General Partner not to cut Eckert out of his override profits as a general partner, but rather to protect himself from Eckert's fiduciary irresponsibility. Second, Salovaara argues that the truth about the "Dryden Road" proposal is that the proposal was not made until months after Eckert's abandonment of Greycliff, that the SS1 documents make clear that all partners had to agree to supplant the general partner--and as Eckert was a partner, that unanimous approval was unlikely, and that the SS1 documents also make clear that even where a general partner becomes a limited partner, the partner is still entitled to override profits--so Eckert really would have suffered no loss had the Dryden Road scheme been approved, and finally that the Dryden Road proposal wasn't approved by the SS1 shareholders.

REQUESTED RELIEF

In his Complaint, Salovaara alleged: (1) Eckert violated the "best efforts" obligation imposed in the Greycliff Partners' November 1993 written partnership agreement; (2) Eckert violated the parties' oral, November 1991 Umbrella Master Partnership; (3) Eckert breached fiduciary duties in usurping a corporate opportunity and engaging in competition with Greycliff partners; and (4) Eckert committed a legal and/or equitable fraud. Salovaara sought money damages under a variety of theories: (1) entitlement to damages equalling profits not realized by Eckert's abandonment of the Partnership; (2) entitlement to damages for Eckert's usurpation of corporate opportunity; (3) entitlement to compensation for services rendered the partnership; (4) entitlement to Eckert's forfeiture of his interest in the partnership from the end of November 1993 on; and (4) entitlement to punitive damages. Possible damages under all theories run to approximately $35 million.

***9** In response, Eckert maintains (1) his actions did not deprive Greycliff of any opportunity available to it; (2) the "Umbrella Partnership" never existed, and even if it did, it violates both the New York and New Jersey Statute of Frauds; (3) the written Partnership Agreement did not require him to forgo his Primerica employment or continue marketing for SS2 "beyond the point of no return"--the two things Salovaara claims are violations of the "best efforts" clause of the Agreement; (4) Salovaara's claims for damages, as they relate to "lost overrides" are too speculative to be considered; and (5) Greycliff should be dissolved and its assets distributed.

ANALYSIS

Introduction

The Court will address the issues presented by the parties in the following order:

(1) Does the alleged oral "Umbrella Agreement" exist? If so, is it precluded under the New York and/or New Jersey Statutes of Frauds; did Eckert violate it?

(2) Did Eckert violate the "best efforts" clause of the written Agreement by either taking employment with Primerica in competition with Greycliff or by failing to aid in fundraising efforts for the SS2 funds?

(3) Did Eckert breach his fiduciary responsibilities by either usurping Greycliff's corporate opportunity or by engaging in competition with Greycliff?

(4) Did Eckert commit legal and/or equitable fraud?

(5) Did Eckert violate the implied covenant of good faith and fair dealing?

(6) Assuming Eckert did some of the things alleged above, is Salovaara entitled to damages? If so, what kind and how much?

(7) Should Greycliff be dissolved? If so, what should happen with its assets?

The Alleged Oral "Umbrella Agreement"

Does it Exist?

The Court cannot find, on this record, that there was an oral "Umbrella Agreement." Further, even if one had existed at some point, that partnership ceased to exist when the Delaware corporation, Greycliff Partners, was dissolved and the New Jersey limited partnership, Greycliff Partners, was formed with a formal written Partnership Agreement.

The Court has weighed the evidence offered to prove the existence of the alleged "Umbrella Agreement", which may be summarized as follows: (1) the Bryant draft of the Drankowski notes of the Drankowski/Eckert/Salovaara conference call of November 5, 1991; (2) King & Spaulding internal memos referring to an "Umbrella Agreement" between Salovaara and Eckert; (3) Drankowski's testimony that an agreement had been reached between Salovaara and Eckert; (4) the written agreement never signed by either party; and (5) the course of dealing between Eckert and Salovaara. The contrary evidence weighs more heavily.

First, Bryant prepared his draft of Drankowski's notes on the conference call without the knowledge or approval of either Eckert or Salovaara.

Second, while King & Spaulding internal memos refer to an "Umbrella Agreement" between Eckert and Salovaara, those same memos fail to establish of what that "agreement" consisted; indeed, the use of the term "umbrella" suggests that the agreement consisted of little more than a broad agreement to go into business together.

***10** Third, Drankowski's testimony is inconclusive. As is the case with the internal memos discussed above, Drankowski's testimony does firmly support a much broader conclusion than a conclusion that Eckert and Salovaara agreed to go into business together--not that a full-blown oral partnership agreement existed between them. Indeed, Eckert is able to refer to Drankowski's testimony just as often to suggest the "Umbrella Agreement" did not exist as Salovaara is to suggest that it did.

Fourth, both Eckert and Salovaara testified that they destroyed their copies of the written agreement without signing or even reading it. Once again, this suggests that some sort of agreement existed between the parties, but it does not prove what that agreement was, how detailed that agreement was, or even that both parties were operating with the same understanding of what the agreement was. Salovaara suggests that it was a detailed understanding of how the Partnership should operate, Eckert that it was a general agreement to share expertise and resources. Either may be true, yet neither is conclusively true.

Fifth, the course of dealing between Eckert and

Salovaara--like the failure to sign the written agreement--is ambiguous. The course of dealing between Eckert and Salovaara suggests some sort of agreement existed, but it does not prove that both parties understood that agreement in the same way. Further, either party could simply look back over their course of dealing and invent an "oral agreement." In the absence of other credible evidence to support the idea of the alleged "Umbrella Agreement", the Court should probably not engage in that sort of circular reasoning.

Moreover, in addition to the ambiguity of the evidence to support the existence of the "Umbrella Agreement", Eckert presented substantial evidence which weighed against its existence: (1) Drankowski's notes are no clearer than her testimony as to whether the parties reached a final, complete oral understanding; (2) Knight's testimony that he was of the opinion that no "final agreement" had been reached between Eckert and Salovaara; (3) the alleged "Umbrella Agreement" was never mentioned by either Eckert or Salovaara when Reboul, MacMurray were retained to draft the 1993 written Partnership Agreement; (4) Salovaara signed the 1993 written agreement even though he knew, or should have known, that it differed from the alleged "Umbrella Agreement" in not requiring each partner to remit all of his business income to the Partnership; and (5) Salovaara made no reference to the alleged "Umbrella Agreement" until after the partners had their post-Thanksgiving 1993 fallout.

Even if the alleged "Umbrella Agreement" did exist, it did not seem to control the parties' activities in the instant dispute. While this case deals with only one pair of partners (Salovaara and Eckert), it deals with two partnerships, the Delaware corporation of 1991 which was dissolved in 1993, and the New Jersey general partnership created in 1993, which has survived to the present. These were two completely different legal entities--the first established under Delaware law and headquartered in New York City; the second established under New Jersey law and headquartered in Morristown. If the alleged "Umbrella Agreement" really did exist, it only governed the parties' activities with regard to the 1991 Delaware corporation, and not the 1993 New Jersey general partnership. The 1993 New Jersey general partnership (which came into effect upon the passing of the 1991 Delaware corporation) was governed by its own written Partnership Agreement, which was signed into effect by both Eckert and Salovaara. There were two separate business arrangements, entered into at two different times, headquartered in two different places. Accordingly, even if the "Umbrella Agreement" existed, it existed under the first arrangement, at the first time, and in the first place. It ceased to exist when that first arrangement ended.

The Statute of Frauds

***11** Finally, even if the alleged "Umbrella Agreement" did exist, and it survived the passing of the Delaware corporation and the founding of the New Jersey general partnership, (neither of which, as mentioned above, can be found on this record,) it can not be enforced because it violates the New York Statute of Frauds.

New Jersey follows the *Restatement (Second) of Conflict of Laws* § 188 (1971) in settling conflict of law questions. *See* *State Farm Mutual Automobile Ins. Co. v. Estate of Simmons*, 84 *N.J.* 28, 34-37 (1980); *McCabe v. Great Pacific Century*, 222 *N.J.Super.* 397, 399-400 (App.Div.1988); *Leddy v. Harris*, 1988 *W.L.* 59239 (D.N.J.1988).

Section 188 of the Restatement, entitled "Law Governing in Absence of Effective Choice by the Parties," provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state, which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in sec. 6.

(2) The contacts to be taken into account in applying the principles of sec. 6 to determine the law applicable to an issue include:

(a) the place of contracting;

(b) the place of the negotiating of the contract;

(c) the place of performance;

(d) the location of the subject matter of the contract and

(e) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

The record is clear that, as for the alleged "Umbrella Agreement", all the contacts to be taken into account lead this Court to New York. If the alleged "Umbrella Agreement" exists: (1) it was contracted and negotiated in New York, probably at Goldman-Sachs in 1991; (2) it was performed in New York from 1991 until the move to New Jersey in June 1993; (3) the subject matter of the contract--that is, the Delaware corporation--was located in New York until it was dissolved and replaced by the New Jersey partnership; and (4) the domiciles of Eckert and

Salovaara, residences, and place of business were all New York City throughout the life of the Delaware corporation. Accordingly, the viability of the alleged "Umbrella Agreement" should be measured by the standard of New York law.

The New York Statute of Frauds, N.Y. Gen. Oblig. Law sec. 5-701 (McKinney 1971) continues the common law tradition of requiring a writing for all contracts to be performed over a period greater than one year. Salovaara claims the alleged oral "Umbrella Agreement" was to govern Salovaara's and Eckert's dealing for three years, ergo, the alleged "Umbrella Agreement" is void under the New York Statute of Frauds. [FN1] Hence, the Court concludes that Salovaara has not met the New York standard.

FN1. And it would probably be void under the New Jersey Statute of Frauds as well. Even though The New Jersey legislature has repealed that portion of its Statute of Frauds requiring a writing for contracts longer than one year, it did so on January 1, 1996, well after both the "Umbrella Agreement" was allegedly created and the dispute between Eckert and Salovaara first erupted. While there is some question as to whether New Jersey courts will apply the revised Statute retroactively, the majority of the authorities suggest that they (the courts) will not.

The "Best Efforts" Clause of the 1993 Written Agreement

What it Said

As mentioned above, Section 2.03 of the 1993 written Partnership Agreement (the "best efforts clause") reads as follows:

> ***12** *Activities of the Partners.* Each Partner hereby agrees to use his or her best efforts in connection with the purpose and objects of the Partnership set forth in Section 1.04, and to devote to such purpose and objects such of his or her time and activity as shall be necessary for the management of the affairs of the Partnership; it being understood, however, that nothing contained in this Section 2.03 shall preclude any Partner from acting consistent with the foregoing, as director, officer, or employee of any corporation, a trustee of any trust, an executor or administrator of any estate, a partner of any partnership or administrative official of any other business entity, or from participating in profits derived from the investments of any corporation, trust, estate, partnership or any other business entity or person, or, from rendering investment advice and counsel to others.

And the purpose and objects of the Partnership are set out in Section 1.04 of the Partnership Agreement, which provides in pertinent part:

> *Purposes of the Partnership.* The Partnership is organized for the following objects and purposes:
> (a) To act as advisor to the South Street Corporate Recovery Fund I, L.P., South Street Leveraged Corporate Recovery Fund, L.P., South Street Corporate Recovery Fund I (International), L.P., South Street Corporate Recovery Fund II, L.P., and Greycliff Leveraged Fund 1993, L.P.;
> (b) through November 30, 1994, in each case, to act as a broker/dealer, to render financial, structural, and strategic advice, and to provide other services to any person, corporation, trust, firm, partnership, public authority or organization of any kind;
> (c) to engage in such other businesses, activities and transactions as the Partners may from time to time determine;

How It Should Be Understood

Salovaara suggests that the above clause should be understood as requiring Eckert to continue marketing efforts for SS2, and as forbidding him from taking any actions--such as joining another alternative investment fund--that would hinder Greycliff's fund-raising and other efforts.

Eckert responds by agreeing that Partnership's purposes included acting as an advisor to the existing funds; but contends Greycliff's stated purposes did not include acting as a *fund raiser* for SS2. Further, Eckert suggests that Section 1.04(c) cannot be read as requiring both partners to continue a course of action when one of them no longer believes it is prudent to do so.

In addition, Eckert argues whatever the "purposes" of Greycliff Partners, Section 2.03 of the Partnership Agreement clearly anticipates that any of the partners would most likely find and take employment in the same general business in which Eckert and Salovaara were already engaged--running investment funds. As that is the case, if Section 2.03 is to have any meaning, the right to take employment cannot be rendered illusory by an interpretation of the "best efforts" language which prohibits either party from obtaining the very employment expressly permitted, and which they were most likely to get.

Did Eckert Violate His Best Efforts Duty

***13** First, Eckert's contention that Section 1.04 of the Partnership Agreement does not explicitly require Greycliff to act as a fund raiser for SS2 is technically correct, but legally unpersuasive. The SS2 funds, like the SS1 funds, were solely Greycliff's creation and solely Greycliff's responsibility. If Greycliff did not act to raise funds for them, who would? If Greycliff did not act to raise funds for them, what would there be to advise the funds about? To suggest that Greycliff was not bound to raise funds for SS2 simply because the Partnership Agreement does not contain explicit language on this point is just silly.

Second, Eckert's contention that one Partner was not required to continue in a course of action he had previously agreed to simply because he no longer felt that course of action to be a good one cannot be sustained either. It is undisputed that in the Spring of 1993, Eckert and Salovaara agreed to launch substantial new funds. Once Eckert and Salovaara agreed, through Greycliff, to engage in those activates, Eckert became bound to use his "best efforts" to ensure the success of those funds. It was not required that the funds actually succeed, but it was required that Eckert use his best efforts to try to secure that success. And indeed, from the creation of SS2 until Thanksgiving 1993, Eckert and Salovaara apparently used their best efforts to make SS2 a success: a dedicated salesman was engaged; attorneys were retained to draft sales documents and prospectuses; potential investors were contacted; and formal sales presentations were made all over the country. Nearly six months into the marketing effort, there was no turning back--Eckert was required to use his best efforts until the marketing effort was completed and the funds were invested. If Eckert became convinced that continued fund raising was not a good idea he should have encouraged the Partnership to rethink its position, not just walk away from the effort.

Third, Eckert's contention that Section 2.03 did not prevent him from accepting his position with Primerica would seem to be unsustainable as well. The evidence would seem to clearly suggest that Eckert's attempt to serve both Greycliff and Primerica was unprecedented (and unacceptable) in the financial business, and that it put off a number of potential investors in SS2 (and indeed, upset a few established investors in SS1). It is simply not credible to suggest that Eckert could serve both Greycliff and Primerica equally well at all times--given the nature of the alternative investment business Greycliff's and Primerica's interests would at some point have to come into conflict. Indeed, it was established at trial that Eckert contacted investors in Greycliff's SS1 funds about investing in Primerica's Greenwich Street funds--a pretty clear violation of his "best efforts" duties as an advisor to Greycliff's SS1 funds.

Salovaara makes reference to two out-of-state cases that seem on point on this issue. First, he looks to *Bloor v. Falstaff Brewing Corp.*, 601 *F.2d* 609 (2d Cir.1979). In that case, plaintiff sold the Ballantine Beer label to defendant, under a contract whereby plaintiff would continue to brew the beer and defendant would use "its best efforts to promote and maintain a high volume of sales ..." *Id.* at 610. Plaintiff claimed Defendant failed to exercise its best efforts, as its marketing campaign for Ballantine consisted of little more than informing potential purchasers that they could come to the brewery and buy the beer if they wanted to. Holding that such an effort, (or lack thereof,) was a violation of Defendant's duty to use its best efforts to promote Ballantine beer, the Court of Appeals maintained Defendant should have taken positive steps to see that "a high volume of sales" of Ballantine beer was maintained. *Id.* at 614-615.

***14** This case speaks to Eckert's responsibilities with regard to raising funds for SS2. As in *Bloor*, Eckert's conduct of essentially abandoning Greycliff's marketing effort in favor of the Greenwich Street fund, is inconsistent with his obligation to use his best efforts to market SS2. Similarly, as was the case in *Bloor*, Eckert's conduct of putting more effort into sales of Greenwich Street than into SS2 marketing efforts is also a breach of the best efforts obligation. Having agreed to launch Greycliff's second set of funds, Eckert was responsible for actively trying to secure their success.

Salovaara also looks to *PRC Realty Systems, Inc. v. Nat'l Assoc. of Realtors*, 972 *F.2d* 341 (Table), 1992 *W.L.* 183682 (4th Cir. Aug. 4, 1992). There, the National Association of Realtors ("NAR") promised to use its best efforts to market PRC's computer program designed to assist realtors in locating suitable properties for their clients. *Id.* at *1-2. After experiencing some difficulty with PRC's program, NAR developed, with others, a competing software program ("Book Plus") and promised to market it as an improvement over PRC's product. *Id.* at *3-4. Holding that NAR's marketing a competing product violated the best efforts clause in its deal with PRC, the Court of Appeals wrote:

> A "best efforts" obligation does not require [the promisor] to accomplish a given objective ... it requires [the promisor] to make a diligent, reasonable, and good faith effort to accomplish that objective ... the production and promotion of Book Plus system ... were inconsistent with the best efforts obligation made by NAR in that the actions did not constitute a diligent, reasonable and good faith effort to accomplish the goal of promoting PRC's publication business. *Id.* at *7.

This opinion addresses the idea that one person cannot lend his best efforts to two enterprises that compete in a limited marketplace, as Eckert seems to have done here. This would seem to be so because discharging one's best efforts duty to "A" necessarily requires slighting ones duty to "B." It would seem Eckert could not, as witnesses at trial testified credibly, discharge his duties to market Greenwich Street for Primerica without necessarily slighting his best efforts duty to Greycliff.

Finally, it may be true that reading Section 2.03 in the above fashion, (that it is essentially a *per se* violation for a partner to take employment involving an alternative investment fund since such employment must at some point become competitive with Greycliff interests) may have the effect of writing the right to employment under Section 2.03 out of the contract, but that is not the point here. When Eckert agreed to form the Greycliff partnership, the success of that Partnership became his paramount responsibility, not his freedom to pursue other employment. His right to pursue other employment must yield to his primary duties to the Partnership. To allow a party to say (as Eckert has tried to say here) that one is only bound to honor one's duties under an agreement as long as one finds those duties in one's self-interest, violates the fundamental basis for mutuality in a contract. It cannot be the law that the duties themselves dissolve when one's self-interest in honoring those duties disappear.

Breach of Fiduciary Duty

Usurpation of Corporate Opportunity

***15** Salovaara claims that Eckert's duties, when he began negotiating with Primerica on behalf of Greycliff, were clear: to garner a significant investment for SS2 or establish a joint merchant banking business between Primerica and Greycliff. Instead, Eckert negotiated for himself a 3-year deal with Primerica. Further, claims Salovaara, Eckert lied repeatedly to both himself and Greycliff's other professionals, informing them (without basis in fact) that Primerica would make a substantial investment in SS2. In so doing, Salovaara maintains, Eckert usurped a corporate opportunity for himself that should have gone to Greycliff.

First, Salovaara contends and the testimony is clear, that Primerica initially was interested in working with Salovaara but that Eckert never even attempted to set up a meeting between Salovaara and Primerica. This is so, Salovaara claims, even though Marc Weill (one of the people Eckert was dealing with at Primerica) requested such a meeting. Further, continues Salovaara, the trial clearly established that all of Eckert's talk about Primerica's interest in working together with Greycliff was a tissue of lies. Primerica's Greenhill's testimony clearly establishes that a Primerica-Greycliff fund was *never* a possibility.

But even more important, suggests Salovaara, the opportunity usurped by Eckert did not consist solely of merchant banking or high-yield trading opportunities with Primerica. Greycliff's most valuable assets were the business acumen of Salovaara and Eckert. Greycliff could have sold Salovaara's and Eckert's skills and experience to any willing purchaser, Primerica or whomever. Indeed, Salovaara suggests, that is just what Greycliff attempted to do when they solicited advisory and merger/acquisition business from major firms like HBO & Co. It was the skill and abilities of the Partners that attracted Primerica to Greycliff in the first place. Eckert, however, took for himself that which had been given to the Partners when he sold his labor to Primerica for his own account.

Eckert responds by suggesting that his employment with Primerica did not deprive Greycliff of any opportunity available to it. The problem with his discussions with Primerica, as Eckert explains it, was that there were really two funds in planning during the time he was talking with people at Primerica. The first was the proposed Greycliff-Primerica fund that Eckert was discussing with Primerica's Weill and Dimon, and the second was the Primerica-only fund that Greenhill was planning at the same time. The possibility of two different funds, Eckert contends, was laid out in Greycliff's written proposal to Dimon dated September 17, 1993. It was not until November 8, 1993 Eckert contends, that he was told the two-fund proposal was dead, that Greenhill's Primerica-only fund was going to be pursued, and that he was offered a job with Primerica.

Eckert maintains that prior to November 1993 he never raised the issue of employment for himself and proceeded in his discussion with Dimon and Weill on the basis that Salovaara would be involved in whatever final arrangements were made. Finally, Eckert maintains, the decision not to proceed with the Primerica-Greycliff fund and to extend a job offer only to Eckert, and not Salovaara, lay entirely with Primerica, and was influenced in no way by anything Eckert said or did. The evidence supporting this conclusion is credible.

***16** Eckert did not usurp any corporate opportunity that should have gone to Greycliff. The proofs offered at trial tend to substantiate Eckert's version of events more than they do Salovaara's. Even ignoring Eckert's own testimony as biased, the trial record supports his version of what happened during the Primerica-Greycliff negotiations. Testimony from Primerica officers Greenhill, Weill, and Dimon would seem to clearly establish (1) that a joint Primerica-Greycliff fund was under consideration (by Weill and Dimon, if not Greenhill); (2) that Eckert's negotiations with Primerica were based on a desire to have Salovaara share a role in whatever business the negotiations turned up; and (3) that the decision to hire Eckert alone was made solely by Primerica's officers, and was not influenced by Eckert's actions or representations. Accordingly, Salovaara's claim that Eckert usurped Greycliff's corporate opportunities cannot stand.

Unlawful Competition

In New Jersey, it is a basic tenet of partnership law that the relationship between partners is "one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." *Stark v. Reingold*, 18 *N.J.* 251, 261 (1955). Partners may not, therefore, individually engage in any enterprise which directly competes with the partnership. Because the partners must at all times act to promote and preserve the interests of the partnership, partners are not permitted to compete with the partnership unless the partnership agreement is clear in saying that such competition is allowed. As the former Court of Chancery has noted:

> In the absence of an express stipulation to the contrary, the parties to the contract of a co-partnership always understand, from the very nature of the relation, that all gains made either in the prosecution of the common business shall be joint property ... and a claim by one that he has the right to carry on a part of the joint business for his own advantage and to the manifest injury of his associates, is so utterly destructive of the rights and duties legally incident to the relation, that it will never be sanctioned by a court until it is clearly shown that he holds such right by the assent of his associates. *Khin v. Zickerman*, 101 *N.J. Eq.* 469, 473 (Ch.1927) (citing *Todd v. Administrators of Phillip Rafferty*, 30 *N.J. Eq.* 254 (Ch. 1878)).

As the above is the case, Salovaara contends Eckert has engaged in illegal competition with Greycliff by accepting employment with Primerica as the manager of the Greenwich Street fund, an alternative investment fund which directly competes with Greycliff's SS1 and SS2 funds.

In response, Eckert suggests that Greenwich Street did not, and does not, compete with any Greycliff funds because Greycliff funds are "distressed securities" funds, while Greenwich Street is a "leveraged buyout" fund. "Distressed securities" funds invest in the debt (often in public secondary markets) of companies distressed by excessive debt burdens. "Leveraged buyout" funds, on the other hand, make private equity investments in healthy companies, and cannot buy securities in public markets. As that is the case, Eckert concludes, Greenwich Street could not possibly compete with Greycliff's SS1 and SS2 funds.

***17** The Court is compelled to find for Salovaara on this point. The record strongly suggest that Eckert's activities for the Greenwich Street fund could not help but place him in competition with Greycliff's funds, despite the fact that they are different types of funds.

Several reasons support this conclusion: (1) the two funds will at some point compete for investor dollars as, regardless of which parties' estimate is accepted, the market for these types of funds is quite small; (2) "leveraged buyout" funds as a category compete with "distressed securities" funds as a category for investor dollars, resulting in competition between Greenwich Street and Greycliff; (3) despite the differences between the funds, there is some overlap in areas where the various funds can make investments, leading to competition in this area as well; and (4) both Greenwich Street and Greycliff attempted to market Eckert's savvy and experience as a fund manager as a means of raising investment funds. Accordingly, it would seem that Eckert breached his fiduciary duty to Greycliff by agreeing to head up the Greenwich Street fund for Primerica, as doing so brought him into competition with the funds he had previously established as a partner in Greycliff.

Legal and/or Equitable Fraud

New Jersey law recognizes three elements to the tort of fraud: "(1) material representation of a present or past fact; (2) made knowing it was false and with intent that it be relied upon; and (3) detrimental reliance incurred upon the representation." *See* *Stochastic Decisions, Inc. v. DiDomenico,* 236 *N.J.Super.* 388, 395 (App.Div.1989), *cert. denied.* 121 *N.J.* 607 (1990).

In the instant case, Salovaara contends that Eckert represented to him that executing the November 1993 written Partnership Agreement would not modify or alter the parties' obligations *inter sese* under the "Umbrella Master Agreement." Further, Salovaara suggests Eckert made this representation with the Primerica job offer in hand (or nearly so) knowing that the representation was false as he could not actively continue with Greycliff at the same time he headed up Greenwich Street for Primerica. Salovaara suggests that these actions fulfill the first two elements of the *prima facie* case of fraud.

In addition, Salovaara suggests he reasonably and detrimentally relied upon Eckert's representation. Had he known about Eckert's secret negotiations with Primerica and Eckert's intent to use the November 1993 written agreement to avoid preexisting contractual and fiduciary duties, (presumably the contractual and fiduciary duties of sharing all compensation from outside employment under the terms of the "Umbrella Agreement") Salovaara claims he would never have signed the Partnership Agreement.

Salovaara's fraud claims fail on several points. First, Salovaara's claim is predicated on the existence of the oral 1991 "Umbrella Agreement", which, as discussed above, either (1) never existed; (2) dissolved along with the 1991 Delaware corporation; or (3) violates the New York Statute of Frauds.

***18** Second, the facts presented at trial seem to establish that Eckert did not have his job offer from Primerica at the time the parties signed the written Partnership Agreement. Furthermore, even if he did have the job offer in hand at the time the Partnership Agreement was signed, it is unclear as to whether Eckert was aware he could not continue on as a partner with Greycliff and an employee with Primerica. Indeed, the evidence produced at trial seems to establish that Eckert, (wrongly, as it turns out) thought he could work in both positions. As the above would seem to be the case, Salovaara cannot establish that Eckert made a knowingly false representation about the results of signing the agreement.

Third, and most importantly, there was absolutely no reason for Salovaara to rely on Eckert's representations about the Partnership Agreement, at least as to how it squared with the alleged "Umbrella Agreement." To protect his position under the written Partnership Agreement, all he had to do was read the document before he signed it, which is not too much to expect of a man with Salovaara's experience in high finance. By his own admission, Salovaara failed to read carefully the Partnership Agreement before he executed it. As that is the case, the fact that it turned out differently than he expected it to is nobody's fault but his own.

The Implied Covenant of Good Faith and Fair Dealing

New Jersey law recognizes in every contract an implied covenant of good faith and fair dealing that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract ..." *See* *Palisades Properties Inc. v. Brunetti,* 44 *N.J.* 117, 130 (1965) (citing 4 Willingston on Contracts § 610B (3d Ed 1961)).; *Fravega v. Security Savings and Loan Ass'n,* 192 *N.J.Super.* 213 (Ch. Div.1983).

Predictably enough, Salovaara claims Eckert's conduct of abandoning Greycliff in favor of Primerica, usurping Greycliff's opportunities, and threatening to destroy Greycliff, all establish Eckert violated the implied covenant of good faith and fair dealing found in the parties' Partnership Agreement.

It would seem that Salovaara's claims on this point are correct, but superfluous. It has already been established that Eckert violated his best efforts duty under the 1993 written Partnership Agreement and by engaging in competition with Greycliff, has violated his fiduciary duty to the Partnership. As these are true, it is almost axiomatic that Eckert violated the implied covenant of good faith and fair dealing.

In summary, then, the Court has reached the following legal conclusions:

(1) that Eckert did not breach the alleged "Umbrella

Agreement" as that agreement either did not exist, went out of existence with the 1991 Delaware corporation, or violates the New York Statute of Frauds;

(2) that Eckert did violate the "best efforts" clause of section 2.03 of the 1993 written Partnership Agreement, both by ceasing to actively promote Greycliff's SS2 funds and by accepting a leadership position with Primerica's Greenwich Street fund which competed with Greycliff's various funds;

***19** (3) that Eckert did not violate his fiduciary duty to Greycliff by usurping a corporate opportunity that should have been Greycliff's with regard to the Greycliff-Primerica negotiations-but that Eckert did violate his fiduciary duty not to compete with Greycliff when he accepted Primerica's offer to head up the Greenwich Street fund;

(4) that Eckert did not engage in fraud by inducing Salovaara to execute the 1993 written Partnership Agreement;

(5) that Eckert did violate the implied covenant of good faith and fair dealing by reason of his activities under points (2) and (3), above.

Damages

Salovaara seeks damages from Eckert under a variety of theories: (1) damages equalling profit not realized by Eckert's "abandonment of the Partnership"; (2) damages for Eckert's usurpation of corporate opportunity; (3) compensation for services rendered to the Partnership; (4) Eckert's forfeiture of his interest in the Partnership from November 1993 on; and (5) punitive damages. Four of these theories may be discussed (and dispensed with) fairly directly.

Damages for Usurpation of Corporate Opportunity

As noted above, since the Court has found that Eckert did not usurp any corporate opportunity from Greycliff, no damages may be awarded under such a theory.

Compensation for Services Rendered the Partnership

Salovaara suggests that he was responsible for administrative services rendered to the Partnership that would have been shared by the parties but for Eckert's abandonment of the Partnership. As a result, Salovaara seeks compensation for advisory fees earned by all of the South Street Funds following Eckert's breach.

However, there are serious impediments to this claim of damages. First, Salovaara relies upon non-New Jersey law. Indeed, the only New Jersey case cited stands for the proposition that, absent an explicit agreement to the contrary, a partner is not entitled to any services rendered a partnership. *Condon* does not support plaintiff's damage claim. *See* *Condon v. Moran*, 11 *N.J.Super.* 221, 224 (App.Div.1951).

Second, even if New Jersey law encouraged the idea that partners might be entitled to compensation for services rendered to a partnership, the within matter does not merit such compensation. Testimony at trial established that Salovaara was responsible for most of the day-to-day administration of Greycliff's business even when Eckert was still a partner. Even then, the day-to-day responsibilities were not demanding. Accordingly, Eckert's absence from Greycliff's offices did not place an increased administrative burden on Salovaara.

Forfeiture of Eckert's Share of the Partnership From November 1993

Salovaara suggests that, as a measure of damages for a partner's breach of trust, courts have awarded damages equalling a forfeiture of the breaching partner's partnership interest. For a variety of reasons, this court will not award damages according to Salovaara's "Forfeiture" suggestion. As will be discussed under punitive damages, *infra*, Eckert's actions appear ill-advised rather than ill-willed. There is minimal evidence to support an egregious breach of trust by Eckert. There is no New Jersey law cited to support Salovaara's position. This Court will not rely on cases from Washington, California, and Oklahoma.

Punitive Damages

***20** Under New Jersey law, a breach of contract will not ordinarily support a claim for punitive damages, but a claim for punitive damages may lie where the breaching party owed a fiduciary duty to a non-breaching party and motivation of breaching party was his own self interest. *See* *Sandler v. Lawn-A-Mat Chemical and Equipment Corp.*, 141 *N.J.Super.* 437 (App.Div.1976), *cert. denied* 71 *N.J.* 503 (1976); *Kocse v. Liberty Mutual Insurance Co.*, 152 *N.J.Super.* 371 (Law Div.1977). However, in this case, such damages would seem to be inappropriate. While it is true Eckert breached Section 2.03 of the written Partnership Agreement and his fiduciary duty by engaging in competition with Greycliff, it seems that his actions were more ill-advised than ill-intended. As mentioned above, Salovaara's claims that Eckert intentionally misrepresented his position in the Greycliff-Primerica negotiations, to both Salovaara and the people he was negotiating with at Primerica, were not supported by the credible evidence at trial. In the absence of a clear demonstration of such malicious intent, an award of punitive damages would seem unfairly vindictive.

Damages Equalling Profit Not Realized by Eckert's "Abandonment of the Partnership"

Under New Jersey law, a non-breaching partner's "lost profits" is a proper measure of damages in an action for breach of contract, including partnership agreements. *See* *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 129 *N.J.* 479, 497-99 (1992) (lost profits are consequential damages and may be recovered in an action for breach of contract.) Further, New Jersey courts recognize that lost profits are difficult to prove with mathematical precision. Realizing the practical problems facing a "lost profits" plaintiff, New Jersey courts, (and federal courts construing New Jersey law,) have rejected arguments from tortfeasors that proving damages with mathematical precision is necessary. Instead, a plaintiff need only establish such damages with a reasonable degree of certainty. *See* *Lightning Lube, Inc. v. Witco Corp.*, 4 *F .3d* 1153, 1176 (3d Cir.1993); *Merrit Logan Inc. v. Fleming Companies, Inc.*, 901 *F.2d* 349, 357-59 (3d Cir.1990); *Perini*, *supra*, at 509; *Viviano v. CBS, Inc.*, 251 *N.J.Super.* 113, 129 (App.Div.1991) *cert. denied*, 127 *N.J.* 565 (1992); *Perth Amboy Iron Works, Inc. v. American Home Assurance Co.*, 226 *N.J.Super.* 200, 224 (App.Div.1988), *aff'd*, 118 *N.J.* 249 (1990).

In proving lost profits with "reasonable certainty" New Jersey courts have adopted the "yardstick" theory of damages. Under this theory, a plaintiff may prove lost profits by reliance on certain yardsticks, such as the past performance of a business, or the success of comparable businesses. *See* *Paris of Wayne, Inc. v. Richard A. Hajjar Agency*, 174 *N.J.Super.* 310, 317 (App.Div.1980), *cert. denied* 85 *N.J.* 454 (1980); *Hodgson v. Applegate*, 55 *N.J.Super.* 1, 17 (App.Div.1958), *aff'd*, 31 *N.J.* 29 (1959).

***21** However, this Court can not accept the plaintiff's damage formula flowing from Eckert's breach of the Greycliff Partnership Agreement. Simply stated Salovaara asserts damages are calculated as the amount of override payments he would have earned from the South Street IIB and the Greycliff Leveraged Funds (hereinafter the "new Fund"). Plaintiff's assertion assumes $100--150 million could have been raised with a reasonable degree of certainty and a 25% *per annum* return over a five year term.

The Court has taken into consideration the parties history and past performance, the status of the marketplace, the type of investment vehicle and of course, actual profits raised and profits reasonably lost.

Examining Eckert and Salovaara's history shows that in 1986 at Goldman-Sachs they started a leveraged buy-out fund called Broad Street Fund. The Fund had a goal of $150 million and ultimately raised $250 million, returning approximately 25% to the limited partners.

Later, in 1989 plaintiff Salovaara conceived of a novel investment vehicle whereby investors purchased the debt of financially troubled companies, whose instability was derived primarily from over-leveraged funds. Simply put--a company acquires too much debt but investors believe the company will eventually turn profitable, so the investors purchase the debt. To do so, the investment vehicle is called a distressed security fund or vulture fund. In this case the fund was known as the Water Street Fund. Under the auspices of both Salovaara and Eckert the Fund raised $683 million of which Goldman-Sachs invested $100 million of its own money. Soon, Wall Street firms and investment banks joined the bandwagon and the Water Street Fund was joined by other funds. Ultimately, Eckert and Salovaara joined the bandwagon too, for in November of 1991 they left Goldman-Sachs to form their own partnership and to start their own distressed security funds amongst other business ventures.

The Partnership's funds, cumulatively called SS1, did not reach the anticipated goal of $550 million. Instead the Salovaara and Eckert Partnership ended up raising about $180 million in two closings. Notably, the offering material for these original funds (SS1) contained a written commitment not to close the fund until at least $140 million was raised.

Historically the high point for distressed funds occurred in 1990-1991. By 1992 the market trend leaned away from distressed funds. The trial testimony, and the deposition testimony is replete with options from leading financial advisors describing the considerable downturn in the distressed market arena. Certainly, by 1993, the market for distressed securities was deteriorating. Even the data relied upon by Salovaara's expert, Hamilton, demonstrates a dramatic drop off of distressed security investments (Hamilton referred to *Assets Alternatives, Inc.,* and *Private Equity Analysis*).

The partnership's own offering memoranda for the new Funds listed no minimum amount to be raised. At trial, Salovaara offered nothing that would commonly be a projection of how much would have been raised. Certainly, the market place could not be replicated. After all the nature of this investment vehicle was risky. Salovaara's expert, Williams, was overly optimistic in his damage projections, admittedly having no experience as a Fund raiser.

***22** The partnership raised $33 million dollars for the new Fund by the end of 1993. This amount was raised prior to December 4, 1993 when Eckert announced that Travelers would employ him.

Salovaara and his expert Williams set forth the following damage formula:

> The partnership intended to raise $100--150 million for the new Fund. Investors were told and could expect a 25% rate of return. The Private Placement Memorandum of SS2 forecast a return of 25%. Over a five year period the Fund would have performed as projected and at the end of five years have $259 million under management. With respect to calculations, assuming the fund raised a conservative $110 million, appreciating to $259 million, the net would be $159 million. The profit override would be 20%, totally $31.8 million. Sharing that profit amount, Salovaara and Eckert would each receive $15.9 million.

The Court finds that the partners raised $33 million for the new Fund. That $1 million of the Boone investment was lost but/for Eckert's action (34 million). The Court is mindful that but/for Eckert's action, and particularly his diversion of attention away from the partnership, it is reasonably certain that several million beyond the $34 million explained above, would have been raised. It is also certain that the new Fund was not "closed" as of December 1993 and that had Eckert continued to participate in the partnership, instead of joining Travelers, his reputation and the value of his name would have drew additional investors into the Fund. The Court can not conclude that *all* potential investors were tapped out. It is likely that a total of $50 million could have been raised. Based on Eckert's reputation, the nature and extent of the prospective investors, the existing market condition and the $34 million already brought in. Fund raising would not go on indefinitely and the new Fund would have closed at some point, probably in mid-1994.

Therefore, the basis for the Court's damage award is $50 million, inclusive of the $34 million discussed *infra.* The Court further finds that the rate of return to the partnership would be 15% resulting in a profit to the partnership of $7.5 million, split evenly, Salovaara's damage is $3.75 million.

Additionally, the issue of advisory fees could have resulted in Salovaara receiving 1% of the total capital, $250,000.00 (1% of $50 million equals $500,000 split between the partners).

In sum, the record supports judgment in favor of Salovaara and against Eckert for $4 million, ($3.75 million plus $250,000.00) with interest and costs as taxed.

What Should be Done With Greycliff

Both Eckert and Salovaara agree that Greycliff Partners has outlived its usefulness and should be dissolved. Predictably, they disagree about how it should be done. Eckert suggests simply that any assets in excess of the Partnership's expenses should simply be split 50/50, with that being that. Salovaara, on the other hand, suggests that Greycliff's assets should not be evenly split, but that Eckert is only entitled to profits earned by the partnership before his breach of his responsibilities. Further, Salovaara suggests that because of Eckert's breach of his responsibilities, only he has the right to wind up the Partnership's affairs, and that if he elects to wind up Greycliff's affairs personally, he is entitled to compensation for his efforts.

***23** *N.J.S.A.* 42:1-32(1)(c), (d) provides that:

> The court shall enter judgment of dissolution: On application by or for any partner whenever (c) any partner has been guilty of such conduct as tends to affect prejudicially the carry on of the business; (d) a partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

Either 42:1-32(1)(c) or (d) gives the court the authority to dissolve Greycliff Partners, and it would seem advantageous for this Court to do so.

N.J.S.A. 42:1-38(2)(a)(II) provides that when the dissolution of a partnership is brought on by the wrongful action of a partner, the aggrieved partners are entitled to damages for breach of the agreement. This provides the basis for awarding the damages discussed above.

N.J.S.A. 42:1-37 provides that partners "who have not wrongfully dissolved the partnership" have the right to wind up the partnerships affairs, subject to the right of any partner, upon cause shown, to obtain winding up by the court. As this Court has found Eckert has wrongfully dissolved the partnership, and Eckert has shown no cause why winding up should not be allowed, Salovaara therefore should have the right to wind up the partnership's affairs. Further, according to *Hutchinson v. Onderdonk* 6 *N.J. Eq.* 277 (1847), Salovaara is entitled "to a reasonable compensation for his services."

Finally, *N.J.S.A.* 42:1-43 provides that "[t]he right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners ..." Accordingly, Eckert should be allowed an accounting of his share of Greycliff's assets and profits, and should receive a full distribution of his share of any assets or profits of Greycliff.

Accordingly, this Court orders the dissolution of Greycliff Partners. This Court grants Salovaara both the authority to wind up Greycliff's affairs and reasonable compensation for his services, subject to Eckert's right to an accounting of his interest in Greycliff's assets and profits.

Mr. Buckley will submit a form of judgment under the five-day rule. Counsel will retrieve their exhibits in a timely fashion from these chambers and will maintain such during the time for appeal.

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