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Supreme Court, New York County, New York.

Mikael SALOVAARA, Plaintiff,

v.

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.

No. 603572/02.

Jan. 4, 2005.

CHARLES EDWARD RAMOS, J.

\*1 Motions bearing sequence numbers 004 through 007 and 009 are hereby consolidated for purposes of disposition.

In motion bearing sequence number 004, Greenwich Street Capital Partners, L.P. (Greenwich) moves, pursuant to CPLR 3212, for summary judgment dismissing the ninth and tenth causes of action of the complaint for failure to state a cause of action, and based upon documentary defenses. In motion bearing sequence number 005, plaintiff moves for summary judgment on his complaint against Greenwich. In motion bearing sequence number 006, defendants Alfred C. Eckert III (Eckert), South Street Corporate Recovery Fund I (International), L.P. (International), and SSP (International) Partners, L.P. (SSPI), collectively referred to herein as the Eckert defendants, move, pursuant to CPLR 3212, for summary judgment dismissing the first through eighth, eleventh and twelfth [FN1] causes of action of the complaint. In motion bearing sequence number 007, plaintiff moves for summary judgment on his complaint against the Eckert defendants. [FN2] In motion bearing sequence number 009, plaintiff moves, pursuant to CPLR 3025(b), for leave to amend his complaint: (1) to add a claim for an accounting (count XII); (2) to bring Count X in the alternative, derivatively, on behalf of SSP Advisors, L.P. (Advisors) and SSP Partners, L.P., (Partners) as well as the previously pled direct claim; and (3) to correct allegations to reflect that Salovaara is withdrawing his claim for indemnification for two of the underlying actions.

FN1. The court notes that the original complaint contains only 11 causes of action, and that the prior motion to amend to add a twelfth cause of action was never granted. Whether a twelfth cause of action should be included is discussed in connection with the motion to amend herein.

FN2. Salovaara is not seeking relief with respect to the second cause of action, which he concedes presents issues of fact regarding defendants' intent to defraud creditors.

#### *Background*

Plaintiff and Eckert worked together at Goldman, Sachs and Company (Goldman) managing private investment funds, specializing in distressed securities funds, which are investment funds that buy the stock or bonds of financially troubled companies, with the expectation that the companies' performance will rebound, and that the securities will then increase in value. [FN3] In 1991, they left Goldman to

go out on their own. They started a new venture, Greycliff Group Inc., a Delaware corporation, which was subsequently reformed as a New Jersey partnership named Greycliff Partners (Greycliff). In 1992, plaintiff and Eckert created a set of three investment funds, South Street Corporate Recovery Fund I, L.P. (Fund I), South Street Leveraged Corporate Recovery Fund, L.P. (Leveraged), and International. These three funds invested primarily in distressed securities. The following year, Salovaara and Eckert created a second set of three funds, South Street Fund B, South Street Corporate Recovery Fund II, L.P. and Greycliff Leveraged Fund 1993, L.P. (all six funds are collectively referred to herein as South Street Funds).

FN3. Distressed securities funds are often referred to as "vulture funds."

Three of the funds had a three tier structure. FN4 Defendant International is a Cayman Islands exempted limited partnership with its principal place of business located in Georgetown, Grand Cayman. SSPI, a limited partnership organized and existing under the laws of the Cayman Islands, was the general partner of International. SSP (International) Inc. (SSPII), a Cayman Islands corporation, owned by Salovaara and Eckert, was the general partner of SSPI. International had a single offshore limited partner, Happy Valley Corp. (HVC), which invested \$4 million in International. FN5

FN4. The other South Street funds are Delaware limited partnerships, with either SSP Advisors, L.P. (Advisors) or SSP Partners L.P. (Partners), serving as managing partners. Advisors and Partners, collectively referred to herein as the SSP Limited Partnerships, are also Delaware limited partnerships, that in turn, both have SSP Inc., a Delaware corporation owned Salovaara and Eckert, as its general partner.

FN5. HVC did not hold an interest in any of the Delaware South Street funds.

\*2 Greycliff was advisor to International. Greycliff managed International, as well as the other funds established by Salovaara and Eckert. Eckert entered into negotiations with Primerica Corp, now Travelers, Inc. (Travelers), to set up a fund operation similar to the arrangement that he had with plaintiff. In 1993, Eckert, without officially severing his relationship to Greycliff or the South Street Funds, joined Greenwich Street Capital Partners, Inc. (GSI), a wholly owned subsidiary of Travelers, and set up funds for GSI. Defendant Greenwich is one of the funds Eckert started for GSI.

Eckert's move to GSI spawned numerous lawsuits instituted by plaintiff in both federal and state courts in New York, New Jersey and Delaware. Plaintiff made three written demands that International provide indemnification to cover his expenses in bringing various lawsuits. Plaintiff alleges that Eckert refused to permit International to provide indemnification. In the interim, International was dissolved as a going concern on December 23, 1998, by vote of the limited partner, which vote also appointed Eckert as liquidating trustee. Eckert paid out distributions of International's funds in 1998, 2000, and 2001 to the limited partner, without requiring an undertaking to repay, as was done with the limited partners of the other South Street Funds.

In this action, plaintiff seeks indemnification from International, based upon the International limited partnership agreement's indemnification provision. Plaintiff initially sought to recover the costs and legal expenses incurred in prosecuting nine lawsuits against Eckert and other parties. FN6 He also sought indemnification from Greenwich, under the Greenwich limited partnership agreement, or contribution from Greenwich, based upon a theory of equitable subrogation.

FN6. The lawsuits are as follows: 1) *Salovaara v. Eckert*, Docket No. MRS-C29-94, Superior Court of New Jersey, Morris County (Salovaara I); 2) *Salovaara v. Eckert*, 94 Civ.3430 (KEW), United States District Court, Southern District New York (New York action); 3) *South Street Corporate Recovery Fund I (International) L.P. v. Milbank, Tweed, Hadley & McCloy*, Index No. 101945/98, Supreme Court of New York, New York County (Milbank Tweed action); 4)

**Unpublished Disposition****(Cite as: 2005 WL 41560 (N.Y.Sup.))**

*Salovaara v. Eckert*, Docket No. MRS-C-126-96, Superior Court of New Jersey, Morris County (Salovaara II); 5) *Salovaara v. Jackson Life Insurance Company*, 97-CV-1422, United States District Court, New Jersey (JNL action); 6) *Salovaara v. Hindes*, 96 Civ. 3203, United States District Court, Southern District New York (Hindes action); 7) *Greycliff v. SSP, Inc.*, Index No. 601366/96, Supreme Court of New York, New York County (Greycliff action); 8) *Salovaara v. Eckert*, MRS-L-539-99, Superior Court of New Jersey (Salovaara III); 9) *Salovaara v. SSP, Inc.*, C.A. No. 18093-NC, Delaware Court of Chancery (Books and Records Action).

*Procedural History*

Previously, the defendants moved, before Justice Ira Gammerman, pursuant to [CPLR 3211\(a\)\(1\) and \(7\)](#), to dismiss the complaint on the grounds that there was a defense to the action based upon documentary evidence and that the complaint failed to state a cause of action. Plaintiff cross-moved for leave to amend the complaint. While these motions were sub judice, Justice Gammerman retired and the matter was transferred to this part. Thereafter, on direction of the court, all the parties moved for summary judgment. Defendants herein seek much the same relief as they requested on the dismissal motions, and plaintiff seeks judgment on his complaint against the Eckert defendants and Greenwich. He also resubmitted a revised motion for leave to amend, which is presently before the court, as motion bearing sequence number 009.

By order dated September 27, 2004, this Court denied the original dismissal motions as moot, in light of the pending applications for summary judgment, and indicated that it would consider the papers filed by all parties on the dismissal motions, when determining the motions for summary judgment. Similarly, the original motion for leave to amend would be considered on the motion bearing sequence number 009.

*The Complaint*

\*3 The original complaint alleges 11 causes of action. Specifically, the first through fifth causes of action are for various claims of fraudulent conveyance, predicated on either New York or New Jersey statutes, and premised upon the Eckert defendants' failure to provide the requested indemnification, while distributing assets, obtained from various lawsuits, to the limited partner of International, and thereby rendering International insolvent and unable to pay indemnification to its creditor, Salovaara. The sixth and seventh causes of action are for breach of contract brought against Eckert, and SSPI and International, respectively, based on the breach of the indemnification provisions of the International partnership agreement. The eighth cause of action is for breach of fiduciary duty against Eckert, both as a manager of the International partnership or as liquidating trustee of International, based upon the same allegedly fraudulent transfers of assets to the limited partner. The ninth and tenth causes of action are against Greenwich and claim indemnification, and/or contribution, as an Affiliate of a Covered Person (Eckert) under the Greenwich limited partnership agreement, or contribution for Greenwich's share of the indemnification paid to Eckert from Advisors or Partners for some of the lawsuits, as equitable subrogation. The eleventh cause of action is for breach of fiduciary duty against Eckert for not seeking indemnification from Greenwich, and thereby increasing the potential liability of the SSP Limited Partnerships, and impacting on plaintiff's interest in these entities.

The proposed amended complaint limits the claim for indemnification to only seven of the actions previously listed. The Hindes action and the Books and Records action are dropped from the request for indemnification. Plaintiff requests leave to add a new cause of action for an accounting. He also seeks to enhance the tenth cause of action by pleading a derivative claim in the alternative to his direct claim. The proposed amendment of the tenth cause of action was not previously requested on the prior motion to amend.

*The Indemnification Claim Against the Eckert Defendants*

Ultimately, both plaintiff and the Eckert defendants agree that the first through fifth causes of action for fraudulent conveyance are premised upon plaintiff's asserted right to indemnification. If the contract actions for indemnification should fail, then plaintiff would not be a creditor of International, with rights under the Debtor Creditor Law (DCL) to support the first through fifth causes of action. This Court, therefore, will first examine the breach of contract claims contained in the sixth and seventh causes of action.

The International limited partnership agreement provides in Section 10.6 for indemnification as follows:

10.6 *Indemnification*. To the fullest extent permitted by law: (a) The Partnership (and any receiver, liquidator, or trustee of, or successor to, the Partnership) shall indemnify and hold harmless the General Partner and each Affiliate, employee and agent of the General Partner from and against any and all liabilities, obligations losses, damages, penalties, actions, judgment, suits, claims, proceedings, costs, expenses, and disbursements of any kind or nature whatsoever (including, without limitation, all costs and expenses of defense, appeal, and settlement of any and all suits, actions and proceedings involving the General Partner or any Affiliate, employee or agent of the General Partner and all costs of investigation in connection therewith) that may be imposed on, incurred by, or asserted against the General Partner or any Affiliate, employee or agent of the General Partner in any way relating to or arising out of, or alleged to relate to or arise out of, any action or inaction on the part of the General Partner or any Affiliate, employee or agent of the General Partner that relates in any way to the Partnership or the business or assets thereof; provided that the indemnification obligations in this Section 10.6(a) shall not apply to the portion any liability, obligation, loss, damage, penalty, cost, expense or disbursement that results from (i) a breach of a duty expressly imposed by Section 10.3 hereof or (ii) any criminal action or proceeding against the General Partner or any Affiliate, employee or agent of the General Partner if such Person knew or had reason to know that such Person's conduct was unlawful.

\*4 The limited partnership agreement defines an "affiliate" as follows: with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person, (ii) any Person owning or controlling 10% or more of the outstanding voting interests of such Person, (iii) any officer, director or general partner of such Person, or (iv) any Person who is an officer, director, general partner, trustee or holder of 10% or more of the voting interests of any Person described in clauses (i) through (iii) of this sentence. Each Principal, the Advisor and each partner of the General Partner is an "Affiliate" of the General Partner.

Salovaara alleges that by virtue of his position as a shareholder and director of International's general partner, he qualifies as an Affiliate, that he has made three separate written demands for indemnification from International regarding the enumerated lawsuits, and that the demands have gone unfulfilled, even though Section 10.6(d) of the limited partnership agreement requires satisfaction of indemnification demands within ten days of written notice.

In the initial motion to dismiss, the defendants contended that the indemnification provision is limited to defense of lawsuits and not to prosecution of suits, as noted in [Salovaara v. Eckert, 2002 WL 32396171 \(Super Ch NJ\)](#). Plaintiff countered that the same provision has been broadly read to include indemnification of a plaintiff, for actions brought as well as defended. See [State Street Bank and Trust Co. v. Salovaara, 326 F3d 130 \(2d Cir2003\)](#); [Salovaara v. SSP Advisors, L.P., 2003 WL 23190391 \(Del Ch\)](#), [affd 854 A.2d 1159 \(Del 2004\)](#). On the current motions for summary judgment, the Eckert defendants have attempted to finesse this issue. They claim that it is unnecessary to determine this issue, since indemnification for the seven remaining lawsuits is not required, because the underlying actions do not arise out of, or relate to, the partnership or its business, or assets.

As a preliminary matter, the scope of the indemnification provision should be addressed. The prior cited decisions all deal with interpretation of the identical indemnification provision as that contained in the International limited partnership

agreement. However, those cases involve the various South Street Funds or the SSP Delaware limited partnerships. There is some conflict of authority in the prior case law between the New Jersey court and the courts of other jurisdictions that have considered such an indemnification provision, under Delaware law. The weight of authority, including appellate court authority, seems to favor a broad reading of the indemnification language to include indemnification of expenses incurred as a plaintiff. See *State Street Bank and Trust Co. v. Salovaara*, 326 F3d 130, supra; *Salovaara v. SSP Advisors, L.P.*, 2003 WL 23190391 supra. [FN7]

FN7. The Chancery Court premised its decision on statements made by defendant Eckert that contradicted his position that there was a valid issue as to plaintiff indemnification.

Here, we have a Cayman Islands limited partnership agreement governed by Cayman law. Plaintiff has provided an affidavit of Michael Alberga, a distinguished and experienced attorney from the Cayman Islands, who has attested to the fact that Cayman law permits a broad range of indemnification and can include reimbursement of the expenses incurred as a plaintiff. Given the indemnification provision's language that indemnification is "[t]o the fullest extent permitted by law," and the Cayman law presented, this Court finds that the indemnification provision must be read broadly to include actions affirmatively prosecuted by plaintiff as well as those actions defended by Salovaara. This result comports with the broad interpretation found by the appellate courts in the prior cases cited above, and the parties own past practice and conduct of providing plaintiff indemnification in other lawsuits relating to the Delaware entities. [FN8]

FN8. Eckert admits that he was indemnified for his legal expenses as a plaintiff in the first Delaware indemnification action. He also obtained indemnification for prosecuting counterclaims and third party actions in the *Greycliff* and *New York* actions as well as *CC Investors III, L.P. v. Eckert*, Docket No. MRS 310602-02 (Super Ct, Morris County NJ).

\*5 Plaintiff asserts that Eckert had always considered the first set of South Street Funds as one fund, and that Eckert's admissions as to indemnification by Leveraged should be read to encompass International as well. Eckert maintains that this ignores the separate corporate existence of International, with its offshore structure and dependence on Cayman law, rather than the Delaware law employed by the other funds. According to Eckert, while the funds had the same investment advisor Greycliff, and held many of the same securities, decisions regarding the securities in each fund were not uniform or interdependent. This supports the separate existence of the International fund. In addition, Eckert asserts that International's unique structure, under Cayman law, with its single foreign limited partner, precludes treating the funds interchangeably, as suggested by plaintiff.

The parties disagree as to what is meant by the following specific language of the indemnification provision regarding suits that relate to or arise out of any action or inaction on the part of the General Partner or any Affiliate, employee or agent of the General Partner that relates in any way to the Partnership or the business or assets thereof ...

Plaintiff urges a very broad reading that would provide indemnification based upon the underlying action involving the same security as any of the various securities held by International. Defendants urge that there be a more substantial nexus between the underlying litigation and an act or omission of the General Partner, its Affiliates, employees or agents, as well as that the International partnership, or its business, or its assets are directly implicated in the substance of the underlying lawsuit.

Plaintiff's approach appears to be too expansive, based upon the qualifying language of the indemnification provision. The underlying action must arise from or relate to the International partnership, or its business, or its assets. This does not mean that if the underlying lawsuit involves someone else, one of the sister funds' shares of a particular stock, which is also held by International, there is a sufficient nexus to warrant indemnification. The suit should involve International's

actual holdings of the stock, not a third party's.

Plaintiff's proposed amendment to withdraw his claim for indemnification for two of the underlying actions is granted without opposition. Consequently this Court will examine each of the seven remaining underlying litigations to determine whether they involve or relate to the partnership or the business or assets of International.

#### *Salovaara I*

In *Salovaara I*, plaintiff brought suit against Eckert, alleging that his move to GSI constituted a breach of their Greycliff partnership agreement's "best efforts" obligation, as well as a breach of fiduciary duty, fraud and usurpation of a corporate opportunity. Salovaara alleged that, since the complaint in *Salovaara I* involves Eckert's actions vis a vis Greycliff, International's investment manager, the business of International was affected by Eckert's abandonment of Greycliff for GSI, and that his legal expenses incurred in *Salovaara I* should be indemnified. In particular, Salovaara alleged that Eckert was soliciting investors for a competing fund, was not available to manage the South Street Funds, and was no longer actively participating in the funds' day to day management.

\*6 The Eckert defendants contend that International was not impacted by his actions, because International was created as an offshore vehicle for its one limited partner, and was not open to other investors, unlike some of the other South Street Funds, which were still seeking new investors. They point to the damages awarded by the New Jersey court, which were premised on the projected sums, that would have come into SSP Delaware limited partnerships through Fund I and Leveraged, and not International, had Eckert not left Greycliff for a competitor.

The defendants do not address the fact that the case also involved Eckert's lack of participation and management of all of the South Street Funds, including International. To the extent that the claims raised in *Salovaara I* include these allegations, they clearly arise from and relate to, the International partnership, as one of the abandoned funds. *Salovaara I* is a litigation that is subject to indemnification, under the International limited partnership agreement.

#### *The New York Action*

Salovaara commenced this action against Eckert and various Travelers entities and individuals, claiming that Travelers defendants conspired with Eckert to breach his fiduciary duty under ERISA as to Fund I, and under the common law as to the other South Street Funds, which included International. As with the Eckert defendants' arguments regarding *Salovaara I*, they limit their analysis to the claims that are made under ERISA as to Fund I, and neglect to address the pendant common law claims for breach of fiduciary duty, that would have impacted on International, as well as on Leveraged. This action falls within the parameters for indemnification.

The Eckert defendants urge that indemnification would not be appropriate, because of Salovaara's conduct in bringing a suit that the federal court found to be frivolous. In effect, defendants are challenging the good faith of plaintiff in instituting and continuing the litigation.

Plaintiff argues that the original sanctions were reversed, because defendants did not follow proper procedures, so that they were to blame for the increased costs. Whether there was a lack of good faith on the part of plaintiff, and if so, when it occurred, present issues of fact that preclude summary relief to either party on this claim.

#### *The Milbank Tweed Action*

Plaintiff brought this malpractice action on behalf of International, when Eckert failed to join International in the malpractice action that he brought on behalf of the other funds, stemming from the same facts. The Milbank complaint alleges that the law firm was negligent in representing International's claim in the Gillett

bankruptcy proceedings, which resulted in the loss of its rights under the guaranty of the Fetzner Note. The action was consolidated with the claims of the other South Street Funds, and the amended complaint incorporated many of the added allegations of plaintiff's original complaint.

\*7 Defendants contend that this action does not involve any action or inaction taken by an Affiliate of International. Defendants maintain that plaintiff was not authorized to pursue the matter once International went into liquidation, so that the expenses incurred thereafter should in any event not be subject to indemnification. Defendants also argue that the expenses incurred were disproportional to the recovery obtained, so as to be unwarranted.

The Milbank complaint alleges that SSPI, as managing partner of International, engaged Milbank as counsel to represent International in the Gillett bankruptcy proceedings, and that Milbank failed to respond to discovery demands that resulted in International's claim being dismissed. For these purposes, Milbank was acting as an agent for SSPI, an Affiliate of International, and Milbank's inaction had an impact upon an asset of International, its rights under the Gillett guaranty of the Fetzner Note. Further, Eckert's failure to join International in the action brought on behalf of the other South Street Funds, that were co-holders of the guaranty, was another failure of an Affiliate.

Defendants' argument that the indemnification sought is disproportional to the relief obtained, is not a basis, in and of itself, to deny indemnification. Here, the claim presented in the complaint was for a much larger sum, that would have warranted the institution of legal action. That the claim was ultimately settled for considerably less, does not change the initial right to indemnification and the good faith basis for the request.

The *Milbank Tweed Action* when first commenced was authorized and appropriate. Whether after International went into liquidation, plaintiff should have retained control over the action does not affect the availability of indemnification. Rather, it only goes to the amount. There is liability for indemnification on the *Milbank Tweed Action*. There are conflicting allegations, as to when plaintiff's authority ceased. A factual issue is presented, as to how much of the indemnification claimed by Salovaara is recoverable. This can be addressed at the trial for damages.

#### *Salovaara II*

Plaintiff brought this action to determine whether Eckert was entitled to indemnification from the SSP Delaware limited partnerships for his legal expenses in defending *Salovaara I*.

Since *Salovaara I* involved allegations regarding Eckert's failure to properly manage the funds, including International, the court in *Salovaara II* found that Eckert's right to indemnification was limited, because of his lack of good faith and breach of fiduciary duty to the funds. This action also related to International. Plaintiff would be entitled to indemnification on this claim, however, it appears that Salovaara has received complete indemnification for this litigation from the SSP Delaware limited partnerships, and cannot have duplicate recovery. [\[FN9\]](#)

[FN9.](#) If, in fact, any of this claim remains unindemnified by the SSP Delaware limited partnerships, then plaintiff may restore to this action that portion that is unpaid upon presentation of an affidavit attesting to what has been received and what remains to be paid.

#### *JNL Action*

In this action, Salovaara sued JNL and Lazard Freres Co. LLP (Lazard), both individually and derivatively on behalf of Fund I and Leveraged, and the SSP Delaware limited partnerships. In the lawsuit, Salovaara claimed that JNL committed securities fraud when it engaged in insider trading on its purchase of Bucyrus Erie securities from the funds. This action did not involve International's holdings of

Bucyrus Erie securities, which were sold for a higher figure to a different party.

\*8 Plaintiff alleges that this action is subject to the International indemnification provision, because it involves the same securities that were held by International and so relates to an asset of International. Further, as another basis for indemnification, plaintiff urges that this suit was settled as part of a global settlement that also included JNL's claims against International.

Defendants maintain that the suit only involves assets of Fund I and Leveraged, and that the assets of International, namely its holdings in Bucyrus Erie securities, were not implicated in the lawsuit. Defendants assert that the global settlement, which also resolved some issues between JNL and International being litigated in Wisconsin, does not serve to transform an action into an indemnifiable claim, when the suit did not involve International in the first instance.

Defendants are correct that this action does not relate to the International partnership, its business, or assets. International's Bucyrus Erie securities were not the subject of this JNL litigation and the global settlement does not transform the JNL lawsuit into an action involving International. The settlement agreement resolved entirely separate and independent claims against International pending in Wisconsin. Indemnification from International is not available on this claim. Consequently, the plaintiff's motion for summary judgment as to the JNL action is denied, and the Eckert defendants motion for summary judgment on this claim is granted.

#### *Greycliff Action*

Plaintiff brought this action on behalf of Greycliff against Fund I and Leveraged to recover fees allegedly due Greycliff from these funds. The complaint in *Greycliff* does not allege that any funds were due Greycliff from International. This lawsuit has nothing to do with International's partnership, its business, or assets. Like with the JNL action, plaintiff's motion for summary judgment as to this claim is denied, and the motion of the Eckert defendants is granted.

#### *Salovaara III*

Plaintiff brought this action against the SSP Delaware limited partnerships, claiming that the defendants unnecessarily delayed distributions to him. The complaint in *Salovaara III* does not allege that plaintiff had a dispute with SSPI regarding distributions from International. This matter does not relate to the International partnership, its business, or assets. The plaintiff's motion for summary judgment as to this matter is denied, and the Eckert defendants motion as to this claim is granted.

In summary, plaintiff is entitled to indemnification on *Salovaara I* and the *Milbank Tweed Action*. The amount of such indemnification is unclear. First as to *Salovaara I*, the Delaware SSP limited partnerships and Leveraged have been found by the Delaware courts to be required to provide indemnification, and what amounts have already been paid on that judgment is at present unknown to this Court. Second, as to the indemnification for the *Milbank Tweed Action*, there is an issue of fact as to which bills should be covered, as noted above. In addition, there is an issue of fact regarding the good faith of Salovaara in bringing and continuing the *New York* action that precludes summary judgment to either party at this time. The Eckert defendants are entitled to summary judgment dismissing the claims with regard to *Salovaara II*, the *JNL Action*, the *Greycliff Action* and *Salovaara III*.

#### *The Fraudulent Conveyance Claims Against the Eckert Defendants*

\*9 The Eckert defendants' objection to the causes of action for fraudulent conveyance are predicated on the indemnification claims not being viable. They allege that Salovaara was not a creditor of International, as that term is defined in [DCL § 271](#) or [N.J.S.A. § 25:2-21](#), with the right to maintain these claims.



[DCL § 270](#) defines a "creditor" as "a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Similarly, [N.J.S.A. § 25:2-21](#) defines a "creditor" as "a person who has a claim" which is defined as "a right of payment, ... liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

The Eckert defendants' position is without merit, because a claim for indemnification has been sustained on this motion, making plaintiff, in fact, a creditor of International, as that term is defined under both statutory provisions cited above. The basis for dismissal posited by the Eckert defendants fails, and summary judgment to the Eckert defendants on the first through fifth causes of action is denied. A creditor, such as plaintiff, who has a claim for indemnification, may bring an action on his claim, and may also seek to set aside conveyances as fraudulent at the same time. [Kendzia v. Greqian, 222 A.D.2d 1008 \(4th Dept 1995\)](#).

In the first cause of action, plaintiff seeks to set aside certain transfers from International to its limited partner as fraudulent conveyances, pursuant to [DCL § 273](#). Plaintiff alleges that certain transfers were made without fair consideration, and that the result was that International had insufficient funds to meet its obligations to indemnify plaintiff.

[DCL § 273](#) provides:

Every conveyance made and every obligation incurred by a person who is or will be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Plaintiff has established that the distributions by International to its limited partner, of the monies received from the sale of Busse Broadcasting securities and the JNL settlement monies left International with insufficient funds to pay its obligation to Salovaara for indemnification.

Under [DCL § 272](#), "fair consideration" is given for property "when in exchange for such property or obligation as a fair equivalent therefor, and in good faith, property is conveyed or antecedent debt is satisfied." There is no allegation that there was any consideration, let alone fair consideration, for the distributions. Moreover, preferential transfers to investors are per se not made in good faith. [Farm Stores, Inc. v. School Feeding Corp., 102 A.D.2d 249 \(2d Dept 1984\)](#), *affd in part* [64 N.Y.2d 1065 \(1985\)](#); [P.A. Building Co. v. Silverman, 298 A.D.2d 327 \(1st Dept 2002\)](#).

There is a factual issue whether International was insolvent, or was rendered insolvent, as a result of the distributions. Plaintiff appears to have provided evidence that meets the definition of insolvency found in [DCL § 271\(1\)](#), in that the present salable value of International's assets is less than the amount that will be required to pay liability on its existing debts, as they become absolute and matured. This is not the end of the story, because International is a partnership, and, therefore, [DCL § 271\(2\)](#) must also be satisfied. Under [DCL § 271\(2\)](#), further analysis is required, and the fair salable value of the assets of the general partner must be taken into account in determining whether the partnership is insolvent. No proof has been submitted as to the assets, or lack thereof, of the general partner.

\*10 Summary judgment to plaintiff on the first cause of action is precluded by this factual issue. Similarly, the fourth cause of action under [DCL § 277](#) also requires that the debtor be insolvent or rendered insolvent by the transfer. Summary judgment to plaintiff on this cause of action also is denied. Likewise, the New Jersey statute, relied on in the fifth cause of action operates in a similar manner, requiring additional considerations for insolvency of partnerships. See [NJSA 25:2-23\(c\)](#). Consequently, for the reason previously stated, summary judgment to Salovaara on the fifth cause of action will not lie.

With respect to the third cause of action, plaintiff seeks to set aside certain

transfers to the HVA as fraudulent conveyances under [DCL § 275](#). [DCL § 275](#) provides that:

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

A claim under this provision requires not only a conveyance without fair consideration, but also the element of intent or belief that insolvency will result. [Wall Street Assoc. v. Brodsky, 257 A.D.2d 526 \(1st Dept 1999\)](#). Plaintiff has demonstrated that Eckert believed that International was incurring debts beyond its ability to pay as they mature. In August 1998, Eckert wrote to the limited partners of Fund I, Leveraged, and International, and indicated that he was not distributing, at that time, the funds derived from the sale of Busse stock held by all three funds. The reason he gave was the potential outstanding liability in the JNL as, and plaintiff's demands for indemnification, which at that time totaled \$2.1 million. He then made distributions of the proceeds from the Busse sale in November 1998 to the limited partners of all of the funds. However, he demanded, and received from the limited partners of Fund I and Leveraged, an undertaking, in comparable amount to the distributions. No such undertaking was required of International's limited partner, so that, unlike the distributions to the limited partners of Fund I and Leveraged, there was no consideration for the monies paid. This was clearly a preferential transfer, not made in good faith.

Eckert was aware of the growing size of plaintiff's indemnification claims, and acknowledged in the November letter that Salovaara had requested that the Funds establish reserves for the indemnification that he was demanding. Eckert required undertakings from the limited partners of Leveraged and Fund I, but inexplicably did not do so as to International, the smallest, and consequently the most vulnerable of the three funds. It may be inferred that if Eckert believed an undertaking was necessary for the larger funds to insure that the transfers would not be viewed as fraudulent, then he knew it was even more critical for the smaller, less capitalized, International. Plaintiff has made out a claim, under [DCL § 275](#), to void as fraudulent the transfers made to International's limited partner. Plaintiff is entitled to summary judgment on the third cause of action.

#### *Breach of Fiduciary Duty*

\*11 The eighth cause of action is for breach of fiduciary duty on the part of Eckert, as manager of International, and then as its Liquidator, resulting from the fraudulent transfers to its limited partner. In light of the ruling on the third cause of action, plaintiff has established that Eckert had made fraudulent transfers to the limited partner, and that such conduct is a breach of the fiduciary obligations that Eckert owed to International, and to his partner Salovaara. Eckert's motion for summary judgment is denied. Plaintiff's motion for summary judgment is granted as to liability on the eighth cause of action.

#### *Indemnification Claim Against Greenwich*

Plaintiff alleges in the ninth cause of action that he seeks indemnification and/or contribution for his expenses in *Salovaara I*, the *New York Action* and *Salovaara II*, as well as the expenses incurred in seeking indemnification for these three as in *South Street Recovery Fund I L.P. v. Salovaara*, CA No. 16579 Chancery Court Delaware (the Delaware A), and *State Street Bank & Trust Co. v. Salovaara*, 01 Civ 9635 S.D.NY (the State Bank A). Plaintiff asserts that he is an Affiliate of a Covered Person, Eckert, by virtue of their various South Street partnerships, and that his lawsuits all involved claims in connection with Eckert's joining Greenwich and its impact on the existing South Street entities. Salovaara charges that the broad indemnification provision in the Greenwich agreement, applies to as brought by a Covered Person or Affiliate, as well as to as defended.

Greenwich contends that the indemnification claim must fail. Greenwich argues: 1) that plaintiff is not a party to the Greenwich agreement, nor is he a third party beneficiary of said agreement; and 2) that Salovaara is not a Covered Person

contemplated by the Greenwich limited partnership agreement indemnification provision, because he had to have been acting as a Covered Person in connection with the defense of Greenwich, which he was not.

The Greenwich limited partnership was formed in October 1994, and the limited partnership agreement was amended on November 3, 1994. Salovaara is not a party to said agreement, nor is he named in any fashion as a third party beneficiary. The Greenwich limited partnership agreement provides in Section 10 for indemnification as follows:

10.1 *Indemnification of General Partner, etc.* (a) The Partnership shall, to the fullest extent permitted by applicable law, indemnify and hold harmless each Covered Person against all claims, liabilities and expenses of whatever nature ("Claims") relating to activities undertaken in connection with the Partnership, including, but not limited to, amounts paid in satisfaction of judgments, in compromise or as fines and penalties, and counsel fees and expenses (all of such amounts covered by this Section 10.1 and all expenses referred to in Section 10.2 are referred to as "Damages") reasonably incurred in connection with the defense or disposition of any action, suit or other proceeding (a "Proceeding"), whether civil or criminal, before any court or administrative body in which such Covered Person may be or may have been involved as a party or otherwise or with which such Covered Person may be or may have been threatened while acting as such Covered Person except with respect to any matter as to which such Covered Person shall have engaged in Disabling Conduct or shall have committed a material breach of this Agreement. The General Partner, may in its sole discretion, waive any of its rights under this Section 10.

\*12 Section 2.6 defines a "Covered Person" as the "General Partner, the Manager, their respective Affiliates, any of their respective shareholders, controlling Persons, officers, directors, partners, employees, agents or principals" who must act within the scope of their authority and in the best interests of the partnership. An Affiliate, in turn, is defined in Section 14 as "any specified Person, a Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the Person specified."

Reading the definition sections in conjunction with the indemnification provision, it is apparent that plaintiff is not a Covered Person. He has no contractual relationship with Greenwich, and is not operating under any authority granted by Greenwich, or in the best interests of the partnership. Plaintiff's position is entirely adverse to Greenwich. Nor is he an Affiliate of a Covered Person, since an Affiliate, must be one who acts as a Covered Person, and Salovaara, as previously noted, was not qualified to act on Greenwich's behalf. Even though there may have been some common control of their prior joint enterprises by Eckert and Salovaara, these enterprises had nothing to do with the Greenwich partnership, and will not render Salovaara an Affiliate, for purposes of the Greenwich limited partnership agreement indemnification provision.

Moreover, the conduct giving rise to the prior litigations, for which plaintiff seeks indemnification, occurred prior to the existence of the Greenwich limited partnership, and so could not have been undertaken for, or in connection with, an entity that did not yet exist. Consequently, the motion by plaintiff for summary judgment is denied, and Greenwich's motion for summary judgment dismissing the ninth cause of action is granted.

#### *Subrogation and Apportionment*

The tenth cause of action alleges that Greenwich should indemnify and make the SSP Delaware Limited Partnerships whole for all sums paid by those entities to Eckert as indemnification for costs, fees and expenses and any judgment incurred by Eckert in connection with *Salovaara I*, the *New York Action*, and *Salovaara II*, or alternatively, that Greenwich pay its proportionate share of said expenses. Specifically, plaintiff claims that he is a limited partner in the SPP Delaware limited partnerships, that these partnerships have paid indemnification to Eckert, and that indemnification is an obligation that Greenwich is required by its limited partnership agreement to provide to Eckert, so that he, Salovaara, has a right to

subrogation from Greenwich, who should have provided indemnification to Eckert in the first instance.

Greenwich counters that since the limited partnerships, and not Salovaara, paid the indemnification, Salovaara, as a limited partner, cannot bring a derivative claim on their behalf as a direct action. Further, Greenwich maintains that subrogation is available only where one pays the obligation for someone who is responsible for the loss, and in this instance, plaintiff has not alleged in the complaint that Greenwich is responsible for the loss.

\*13 Greenwich is a Delaware limited partnership. [\[FN10\]](#) In order to allege a direct action, plaintiff must plead an injury distinct from the harm to the partnership. [Broome v. ML Media Opportunity Partners L.P., 273 A.D.2d 63 \(1st Dept 2000\)](#). Defendants argue that plaintiff has not alleged an injury to Salovaara that is distinct from the injury to the SSP Delaware limited partnerships.

[FN10.](#) The parties agree that the law of Delaware and of New York is essentially the same on the issue of a limited partner's standing to assert claims, so that this Court need not concern itself with choice of law considerations, and can apply the law from both jurisdictions.

Plaintiff contends that he has standing to pursue this claim. He asserts that, in the prior litigations, the SSP Delaware limited partnerships have been found to be mere shells, and that he was a real party in interest, and that as the real party interest, he may maintain this action, citing *Broome*. However, as Greenwich correctly points out, *Broome* does not create a right of suit based on a real party in interest theory. The analysis of the standing issue in *Broome* follows the traditional construction of *direct v. derivative injury*. Here, as in *Broome*, the injury is not distinct from the harm to the partnership, the payment of monies as indemnification to Eckert, for which plaintiff seeks the return of said monies to the partnership, not to Salovaara. Plaintiff's claim is clearly derivative, and does not give rise to a direct cause of action.

Second, plaintiff asserts that the New Jersey appellate courts' affirmance of the trial court decision in *Salovaara I* has already rejected the same standing argument, when it was raised by Eckert on the appeal, and that the same result should follow in this litigation. While the word "standing" is not found in Eckert's appeal papers, he did argue that the damages included sums relating to the SSP partnerships that Salovaara should not been allowed to recoup, as they belonged to the partnership. In essence, this is the same argument presented by Greenwich. When the appellate court affirmed the damages awarded by the trial court, based upon the lower court's reasoning, it implicitly found that Salovaara was entitled to bring the claim. *Salovaara v. Eckert*, A-5283-99TS, Appellate Division, Superior Court New Jersey (January 4, 2002).

Even if this Court were to follow the New Jersey appellate court determination in *Salovaara I*, subrogation would still be unavailable. In subrogation, a party accrues rights as a subrogee when in equity it has been compelled to pay a loss, that ought in fairness to be reimbursed by the party which caused the loss. [Federal Insurance Co. v. Arthur Andersen & Co., 75 N.Y.2d 366 \(1990\)](#). Here, plaintiff has failed to allege in his complaint that Greenwich caused the loss. Plaintiff has merely pled that Greenwich benefitted from the loss, which is not the same as Greenwich being legally responsible for the loss. [Winkelman v. Excelsior Insurance Co., 85 N.Y.2d 577 \(1995\)](#). Furthermore, given that Greenwich was not yet in existence when Eckert engaged in the conduct giving rise to the prior litigations and indemnification, it cannot be said that Greenwich caused the loss. Consequently, the claim for equitable subrogation is not viable.

\*14 As a matter of equity, Salovaara suggests that he, through the SSP limited partnerships, should not have to provide indemnification to Eckert for Eckert's defense of these lawsuits, which were initiated to recover from Eckert for his wrongdoing in abandoning Greycliff and the South Street entities. Greenwich argues that the indemnification that Eckert received from the SSP Limited Partnerships for

these three as resulted, for the most part, from Salovaara's campaign of overkill to make Eckert pay dearly for deserting him and Greycliff. Eckert's indemnification in *Salovaara I* was limited by the New Jersey court in *Salovaara II* to those causes of action that Eckert successfully defended. In short, these were claims that Salovaara lost, and there is no reason why a third party, Greenwich, should have to pay for claims that Salovaara should not have brought in the first instance. In the *New York Action*, the district court found that all of Salovaara's claims were groundless, and would initially have imposed Rule 11 sanctions, based upon Salovaara's frivolous conduct, but for a failure of notice. In the *New York Action*, it was Salovaara's own litigious nature, and his use of a perjured affidavit to perpetuate his claims, that warranted indemnification for Eckert. Under these circumstances, the equities do not stand with Salovaara.

Nor is apportionment between Greenwich and the SSP partnerships appropriate. The Greenwich limited partnership agreement provides in Section 10.2 that Eckert's right to indemnification under the agreement is "cumulative with and in addition to, any and all rights to which such Covered Person may otherwise be entitled by contract \* \* \*." This would require the other benefits to be exhausted before Greenwich's duty to indemnify would be implicated. The SSP Delaware limited partnership agreements do not contain a comparable provision that would cancel out the cumulative language of the Greenwich limited partnership agreement. Consequently, there is no basis upon which to find them jointly responsible for indemnification and require apportionment.

Plaintiff's remedy regarding the indemnification of Eckert lies elsewhere. In *Salovaara II*, the New Jersey court directed that Eckert return monies paid to him, or held for him in escrow, to the SSP Delaware limited partnerships. [Salovaara v. Eckert, 2002 WL 32396171 \(Super.Ct.NJ\)](#). The appropriate course of action would be to seek enforcement of that decision against Eckert, not to bring in a third party, Greenwich, who has no present responsibility in this regard.

The motion by plaintiff for summary judgment on the tenth cause of action is denied. The motion by Greenwich for summary judgment dismissing the tenth cause of action is granted.

Plaintiff seeks leave to amend the complaint to plead the tenth cause of action alternatively, as a derivative claim. Greenwich contends that plaintiff should not be permitted to amend his complaint to plead this claim in the alternative at this late stage. Defendant alleges that it was prejudiced by plaintiff's delay in moving to amend, because it prepared its summary judgment motion based upon the original complaint, and plaintiff only brought the motion to amend after the long briefing schedule was almost completed, even though plaintiff knew for well over a year of the problem with his pleading, and did nothing to correct it. Plaintiff provides no excuse for his delay.

\*15 A motion for leave to amend is addressed to the sound discretion of the court and shall be granted in the absence of prejudice. [Edenwald Contracting Co. Inc. v. City of New York, 60 N.Y.2d 957 \(1983\)](#). This Court, in exercising its discretion, should consider the following factors:

- 1) how long the party seeking leave to amend was aware of the facts upon which the motion was predicated;
- 2) whether a reasonable excuse for the delay was offered;
- and 3) whether prejudice resulted therefrom. [Koeth v. Koeth, 309 A.D.2d 786 \(2d Dept 2003\)](#).

Plaintiff has been aware of the underlying facts of this cause of action since the inception of this litigation, some two years ago. He became aware of the flaw in his complaint on the prior motion to dismiss, well over a year ago. Nonetheless, the prior motion to amend did not contain this proposed revision to the tenth cause of action. Plaintiff waited until the motions for summary judgment were briefed before deciding to assert an alternative derivative claim. He has not offered any excuse for his dilatory conduct, let alone a reasonable excuse for his failure to seek such amendment earlier. Defendant would be prejudiced by the need to rebrief the issues on this particular cause of action. A review of the relevant factors militates against granting this amendment.

Furthermore, the proposed amendment will solve only plaintiff's direct vs derivative problem, but would not address the other deficiencies in plaintiff's claim enumerated above. Thus the proposed amended cause of action remains palpably without merit. Leave to amend the tenth cause of action is denied.

*Breach of Fiduciary Duty Against Eckert*

Plaintiff alleges that Eckert breached his fiduciary duty to Salovaara, as a partner of the SSP Delaware limited partnerships, when he failed to first request indemnification from Greenwich for the costs of *Salovaara I*. Plaintiff alleges that the failure to obtain indemnification in whole, or in part, from Greenwich, before approaching the SSP Delaware limited partnerships constituted self-dealing.

Eckert argues that there was no contractual requirement that he pursue indemnification from Greenwich first, before requesting it from the other entities, since the SSP Delaware limited partnership agreements do not require exhaustion of other indemnity sources, like the Greenwich limited partnership agreement does. To support this position he points to the employment agreement with GSI, that bars indemnification for these claims.

Plaintiff counters that he is not alleging a breach of fiduciary duty premised upon the GSI agreement, but rather based upon the indemnification provision of the Greenwich limited partnership agreement. While the distinction that plaintiff draws is valid, it is immaterial to the result. As previously noted, the indemnification provision of the Greenwich agreement is cumulative of other indemnification, so that Eckert would have no right to indemnification from Greenwich until other sources of indemnification had been exhausted. Since Eckert's indemnification from Greenwich was contingent upon exhaustion of other indemnification, there would be no point in requiring him to seek unavailable indemnification from Greenwich, before requesting it from the SSP Delaware limited partnerships, which he must pursue first. Under these circumstances, there was no breach of fiduciary duty, there being no indemnification presently available to Eckert from Greenwich. Plaintiff's motion for summary judgment on this cause of action is denied. Eckert is entitled to summary judgment dismissing the eleventh cause of action.

\*16 The proposed twelfth cause of action is for an accounting of International's books and records, under Section 12 of the Exempted Limited Partnership Laws of the Cayman Islands, and Section 7.1 of the limited partnership agreement. On a motion to amend, this Court must examine the underlying merits of the proposed amended pleading to determine if the pleading fails to state a cause of action or is palpably insufficient as a matter of law. [\*Davis & Davis P.C. v. Morson\*, 286 A.D.2d 584 \(1st Dept 2001\)](#). Defendants argue that both the Cayman Islands statute and the limited partnership agreement provide limited partners of International with the right to inspect books and records, and that plaintiff is not a limited partner of International, and so he has no standing to seek this relief.

A reading of the Cayman Islands statute and the limited partnership agreement confirms that the right to inspect books and records, that is not to say a formal accounting, is provided to limited partners only. The complaint makes clear that plaintiff is not a limited partner of International, nor is he a limited partner of SSPI. The plaintiff's basis for this action is not supported by the documents he cites. The amendment fails to state a claim for an accounting, and leave to amend to include such action is denied.

Plaintiff's conclusory allegations that discovery of the books and records has been inadequate and that the accounting is necessary to complete the process does not present an alternative basis for a formal accounting. If discovery is inadequate, which has not been demonstrated on this motion, then upon a proper factual showing of the insufficiency, further discovery can be ordered.

Accordingly, it is

**Unpublished Disposition****(Cite as: 2005 WL 41560 (N.Y.Sup.))**

ORDERED that motion bearing sequence number 009 for leave to amend the complaint is granted, only to the extent of permitting plaintiff to withdraw the Hides and Books and Records as from consideration on the contract claims, and is otherwise denied; and it is further

ORDERED that motion bearing sequence number 005 by plaintiff for summary judgment against Greenwich is in all respects denied; and it is further

ORDERED that motion bearing sequence number 004 by defendant Greenwich for summary judgment dismissing the complaint as to Greenwich is granted, and the ninth and tenth causes of action are severed and dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion bearing sequence number 006 by the Eckert defendants for summary judgment is granted in part and denied in part as follows:

1. As to the first through fifth and eighth causes of action, the motion is denied.
2. As to the eleventh cause of action, the motion is granted and this cause of action is severed and dismissed.
3. As to the seventh and eighth causes of action, the motion is denied with respect to the following underlying as: a) *Salovaara I*, b) the *New York Action*, and c) *Milbank Tweed Action*.

\*17 4. As to the seventh and eighth causes of action, the motion is granted with respect to the following underlying as: a) *Greycliff Action*, b) *JNL Action*, c) *Salovaara II* and d) *Salovaara III*, and the indemnification claims for these as are severed and dismissed; and it is further

ORDERED that the motion bearing sequence number 007 by plaintiff against the Eckert defendants is granted in part and denied in part as follows:

1. As to the first, fourth, fifth, and eleventh causes of action, the motion is denied.
2. As to the third and eighth causes of action, the motion is granted as to liability.
3. As to the sixth and seventh causes of action, the motion is denied with respect to the following underlying as: a) *New York Action*, b) *Greycliff Action*, c) *JNL Action*, d) *Salovaara II*, and e) *Salovaara III*.
4. As to the sixth and seventh causes of action, the motion is granted as to liability on the following underlying as: a) *Salovaara I*, and b) *Milbank Action*.
5. The matter of damages on the claims for which summary judgment on liability has been granted shall be heard with the trial on the remaining first, second, fourth and fifth causes of action and the *New York Action* claim of the sixth and seventh causes of action; and it is further

ORDERED that the Clerk of the court enter judgment for Greenwich against plaintiff accordingly.

2005 WL 41560 (N.Y.Sup.), 2005 N.Y. Slip Op. 50010(U), Unpublished Disposition

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