UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee

Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To: Parties specified in Local Rule 9013-3

1. Roger J. Wikner ("Wikner") by and through his undersigned counsel, hereby moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 o'clock p .m. on May 5, 2004 before the Honorable Nancy C. Dreher, in Courtroom No. 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55402.

3. Any response to this motion must be filed and delivered not later than April 29, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than April 26, 2004, which is ten days before the time set for hearing (including Saturdays, Sundays and holidays). UNLESS A RESPONSE

OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Federal Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on January 22, 2002. The case is now pending before this Court.

5. This motion arises under Bankruptcy Rule 7056 and Local Rule 9013. This motion is filed under Bankruptcy Rule 9014 and Local Rules 4001-2 and 9013-2 through 9013-4. Wikner requests an Order of this Court granting Defendant Summary Judgment with respect to Counts I through VI of Trustee's Complaint inasmuch as the pleadings, deposition, answers to discovery, taken together with the affidavits, show that there is no genuine issue as to any material fact and that Wikner is entitled to judgment as a matter of law. The bases of Wikner's motion is summarized as follows:

a. With respect to Count I of the Trustee's Complaint, Wikner is entitled to judgment as a matter of law based on the undisputed fact because

   i. Trustee cannot meet his burden of proving that Wikner was an insider, and as a matter of law, Wikner was not an insider; and as a matter of law the alleged preferential transfers were not on account of an antecedent debt;

   ii. Trustee cannot meet his burden of proving that at the time of the transfers, Debtor was insolvent;

b. With respect to Trustee's Count II (11 U.S.C. § 548 Fraudulent Transfer) based on the undisputed facts, Wikner is entitled to judgment as a matter of law inasmuch as:

i. The debtors received reasonably equivalent value on account of the transfer.

ii. Trustee cannot meet his burden of establishing insolvency;

c. With respect to Count III (Uniform Fraudulent Transfer) based on the undisputed facts, Wikner is entitled to judgment as a matter of law inasmuch as:

i. The transfers were not made with actual intent to hinder, delay or defraud creditors;

ii. The transfers were for reasonably equivalent value;

iii. The Debtors were insolvent at the time of the transfers or became insolvent by reason of the transfers; and

iv. The transfers are otherwise barred by the provisions of Chapter 302 Minn. Stat., the Minnesota Business Corporation Act.

d. With respect to Count IV (Breach of Fiduciary Duty) Wikner is entitled to judgment as a matter of law based on the undisputed facts inasmuch as the debtors were not insolvent at the time of the transfers and all of the shareholders of the debtor Miller and Schroeder, Inc. participated in the stock sale and the Trustee has not alleged and has proffered no facts which would support such a claim; and

e. With respect to Counts V and VI of the Complaint, Wikner is entitled to judgment as a matter of law based on the undisputed facts inasmuch as the Trustee has not alleged, and has proffered no facts which would support claims of conversion of unjust enrichment.

This Motion is based upon the Affidavit of Roger J. Wikner, the Affidavit of Larry B. Ricke, the memorandum of law filed herewith, and the depositions of Roger J. Wikner, Brian Leonard and James Dlugosch.

WHEREFORE, Wikner requests that the Court enter an order as follows:

1. Granting Wikner summary judgment on Counts I through VI, and determining that Wikner is entitled to a judgment of dismissal on said Counts I through VI as a matter of law; and

2. For such other and further relief as to the Court seems just and equitable.

Dated: March 19, 2004

LEONARD, STREET AND DEINARD

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UNITED STATES BANKRUPTCY COURT
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In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee,
Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ROGER J. WIKNER'S MOTION FOR SUMMARY JUDGMENT

Defendant Roger J. Wikner ("Wikner"), by and through his undersigned counsel, hereby submits the following memorandum of law in support of his Motion for Summary Judgment. For the reasons set forth herein, the Court should grant Wikner's Motion and find that there are no genuine issues of material fact and that Wikner is entitled, as a matter of law, to a judgment of dismissal with respect to Counts I through VI of the Trustee's Complaint.

STATEMENT OF FACTS

In the summer of 1997, Roger J. Wikner ("Wikner"), James E. Iverson ("Iverson") and Steven Erickson ("Erickson") were the owners of 100% of the common stock of the securities firm Miller & Schroeder, Inc. Wikner had joined Miller & Schroeder shortly after its formation in the early 1970's at an entry level position. By the summer of 1997, Wikner was the owner of 482,812.5 shares of the common stock of Miller & Schroeder, Inc. ("Miller & Schroeder") which represented 49% of the common stock of Miller & Schroeder. An additional 49% was owned by

Iverson and 2% by Erickson. Miller & Schroeder was the parent corporation of Miller & Schroeder Financial, Inc. ("Miller & Schroeder Financial") and various other subsidiaries. Wikner was also the president of Miller & Schroeder, a member of its Board of Directors and was active in the day to day business of the firm as well as its management.

At some point in early 1997, an investment group, headed by James Dlugosch ("Dlugosch") approached Wikner and Iverson about selling their interest in Miller & Schroeder. Dlugosch was a former executive vice president and chief operating officer of Miller & Schroeder Financial. Dlugosch had left Miller & Schroeder in about February of 1997 with the stated intention of acquiring a securities broker-dealer. The investment group, headed up by Dlugosch also included Ken Dawkins, President of C.H. Brown, Paul Tietz, a partner in the law firm of Briggs and Morgan, Dave Malmberg, former President and Chief Executive Officer of National Computer Systems and Chairman of the Board of National City Bank. The investment group headed by Dlugosch formed an entity, MI Acquisition Corporation (MIAC) for the purpose of acquiring all of the outstanding shares of Miller & Schroeder.

Discussions followed between MIAC and Wikner, Iverson and Erickson over a period of several months. Ultimately, these discussions resulted in the execution of a Stock Purchase Agreement dated June 20, 1997 (hereinafter the "Stock Purchase Agreement", a copy of which is attached to the Wikner Affidavit as Exhibit A).

The financial terms of the Stock Purchase Agreement provided that MIAC would acquire 100% of the common stock of Miller & Schroeder for a total purchase price of $15,000,000. Additionally, the Stock Purchase Agreement required that Wikner enter into a Noncompetition Agreement with Miller & Schroeder (the "Noncompetition Agreement", a copy of which is attached to the Wikner Affidavit as Exhibit B). Pursuant to the terms of the Noncompetition

Agreement, Wikner was required to refrain from directly or indirectly competing with the company group (defined as MIAC, its affiliates, successors and assigns); from soliciting the company group's customers; and from soliciting the company group's employees. The term of the Noncompetition Agreement was four years, and in consideration for Wikner's agreement, Wikner was to be paid 48 equal monthly installments, in arrears, of $14,585, which equals $700,080. At the time of the closing of the transaction and the execution of the Noncompetition Agreement, Wikner was very involved in the company's day to day business and the management of the company, generated significant revenues for the company, and had the ability to control a significant amount of the company's business. It was mutually agreed between the MIAC group and Wikner that Wikner would not continue with Miller & Schroeder in any capacity after the stock sale; however, MIAC and Miller & Schroeder clearly did not wish for Wikner to be able to compete with Miller & Schroeder after the transaction.

A closing with respect to the transactions provided for in the Stock Purchase Agreement occurred on July 31, 1997. As reflected in the Stock Purchase Agreement, the total purchase price for 100% of the Miller & Schroeder stock was $15,000,000. Wikner's 49% interest resulted in a gross sales price to him of $7,310,725.55. However, pursuant to the terms of the Stock Purchase Agreement, specifically, Section 5.5, Wikner, Iverson and Erickson were required to pay, at or prior to closing, the "full amount of principal and interest on his outstanding notes and advances owed to the company or any subsidiary." During the course of due diligence over the summer of 1997, a list of amounts required to be repaid by sellers pursuant to Section 5.5 was developed (the amounts required to be repaid shall be sometimes referred to herein as the "Officer Liabilities").

At the closing on July 31, 1997, the parties made and executed a certain Closing Statement Certificate and Receipt (the "Closing Statement", a copy of which is attached to the Wikner Affidavit of Exhibit C). At Section II of the Closing Statement, an accounting is provided for the receipt of, adjustments to, and distribution of Wikner's proceeds.

Section II reflects Wikner's gross closing proceeds in the amount of $7,310,725.55, followed by a number of "adjustments" reflecting either amounts disbursed at closing, or amounts being repaid, either to Miller & Schroeder or Miller & Schroeder Financial. After accounting for such adjustments and disbursements, which total $1,362,736.23, the Closing Statement reflects net closing proceeds to Wikner in the amount of $5,947,989.32.

The Closing Statement goes through a similar calculation for Iverson and Erickson. Attached to the Closing Statement was a set of wire transfer instructions evidencing the wire transfer disbursements made at closing the. (The "Wire Transfer Instructions", Wikner Affidavit, Exhibit D).

The following is a summary of the accounting for the Wikner closing proceeds:

$7,310,725.55	
- 500,000.00	(Mid America Bank wire)
- 66,743.94	(Chase Manhatten Bank wire)
- <u>5,947,989.32</u>	Wire transfer of net proceeds to Roger Wikner
$ 795,992.29	(Balance of proceeds undisbursed representing the amount repaid to Miller & Schroeder and Miller & Schroeder Financial for Officer Liabilities pursuant to Section 5.5 of the Purchase Agreement).

If this same mathematical exercise is performed for Iverson and Erickson, i.e., subtract from gross closing proceeds amounts wire transferred to third parties and the net proceeds wire transferred to the seller, the sum of <u>$2,001,548.08</u> is arrived at, reflecting the total amount deducted from the Sellers' proceeds at closing, in repayment of Officer Liabilities pursuant to Section 5.5 of the Stock Purchase Agreement.

Significantly, pursuant to the Closing Financial Statement prepared pursuant to the terms of the Stock Purchase Agreement (Closing Financial Statement, Wikner Affidavit, Exhibit F) as of July 31, 1997 the Officer Liabilities in the amount of $2,001,548 were satisfied. Wikner's promissory notes (Wikner Affidavit Exhibits E-1, E-2 and E-3) and the Iverson promissory notes were marked satisfied and returned to Wikner and Iverson respectively. Thus, all of the Officer Liabilities owed by Wikner, Iverson and Erickson were paid at closing, and the sellers were provided with a receipt of payment, together with cancelled promissory notes. Simultaneously, the Closing Financial Statements reflect an intercompany liability owed by MI AC to Miller & Schroeder and Miller & Schroeder Financial in the amount of $2,001,548, the exact amount which was withheld from Wikner, Iverson and Erickson to satisfy Officer Liabilities under Section 5.5.

Effective July 31, 1997, Wikner resigned as a director of Miller & Schroeder and Miller & Schroeder Financial, resigned as an officer of the Debtors, and his employment with the company was terminated effective that date. Wikner was at no time an officer or employee of MIAC, or the Debtors after that date. From and after the date of the closing, the evidence shows that Wikner's only relationship with the company was as a party to the Noncompetition Agreement, which Wikner performed according to its term. Indeed, had Wikner not been constrained by the Noncompetition Agreement, it is likely that he would have obtained employment within the securities industry during the four year term of the Noncompetition Agreement.

The Noncompetition Agreement expired by its terms in June of 2001. The Debtors filed petitions under Chapter 7 of the Bankruptcy Code on January 22, 2002. Notwithstanding the passage of approximately 4-1/2 years from the date of these transactions to the filing of the Debtors' bankruptcy petition, the Trustee has commenced these actions, on various theories seeking to avoid certain alleged transfers as either preferential transfers or fraudulent transfers under the Bankruptcy Code of the provisions of the Minnesota Fraudulent Transfers Act. Specifically, the Trustee appears to claim that the amounts avoidable by the Trustee are those amounts repaid as Officer Liabilities at closing, together with the payments made under the Noncompetition Agreement. Alternatively, the Trustee suggests that the transactions are recoverable by the Trustee on a theory of breach of fiduciary duty, conversion or unjust enrichment. For the reasons set forth herein, Wikner submits that the Trustee's causes of action are completely lacking in factual and legal merit, and that Wikner is entitled to judgment as a matter of law with respect to each of Counts I through VI.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1985). On a motion for summary judgment, the moving party bears the initial burden to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

> " … The plain language of Rule 56(c) mandates the entry of judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." 477 U.S. at 322.

A movant may discharge this burden by merely "showing - that is, pointing out to the district court - that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325.

Once a moving party presents sufficient evidence to entitle it to summary judgment under Rule 56(c), the burden then shifts to the non-moving party to produce evidence that would support a finding in its favor. Anderson, supra, 477 U.S. at 250-52. The non-moving party may not rest merely upon the averments and denials contained in its pleadings, but must instead set forth specific facts that demonstrate a genuine issue for trial. Fed. R. Civ. P. 56(e). Although a court must view the facts of the case in a light most favorable to the non-moving party, unreasonable inferences need not be indulged, and a party opposing summary judgment "must do more than simply show there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986).

The Trustee bears the burden of proof with respect to each and every element with respect to his claim under §§ 547 and 548, the Uniform Fraudulent Transfer Act, and with respect to the Trustee's other counts. To survive Wikner's motion for summary judgment, the burden rests with the Trustee to come forward with specific facts showing that there is a genuine issue for trial in this case. Celotex, 477 U.S. at 323. Because the Trustee has so far not, and cannot now meet this burden, and because as a matter of law Wikner is entitled to judgment on each of the Trustee's counts, the Court should enter summary judgment in favor of Wikner and determine that Wikner is entitled to a judgment of dismissal on each of the counts as a matter of law.

II. WIKNER IS ENTITLED TO SUMMARY JUDGMENT ON COUNT I OF TRUSTEE'S COMPLAINT BECAUSE WIKNER WAS NOT AN INSIDER AND THE TRUSTEE HAS NOT COME FORWARD WITH ANY EVIDENCE OF INSOLVENCY.

A. WIKNER WAS NOT AN INSIDER OF THE DEBTORS BETWEEN JANUARY AND JUNE 2001.

The Trustee seeks under Count I to recover from Wikner certain alleged transfers which the Trustee alleges were made in the one year preceding the Debtors' bankruptcy filing. Specifically, the Trustee seeks to recover, pursuant to Count I, seven payments of $14,585 each which were paid to Wikner pursuant to the terms of his Noncompetition Agreement. The following is a list of those seven payments as taken from Exhibit A attached to the Trustee's Complaint: [1]

Check No.	Check Date	Amount	Account
1002	01/31/01	$14,585.00	Miller & Schroeder, Inc.
1007	02/28/01	$14,585.00	Miller & Schroeder, Inc.
2712	03/29/01	$14,585.00	Miller & Schroeder, Inc.
2764	04/26/01	$14,585.00	Miller & Schroeder, Inc.
2798	05/09/01	$14,585.00	Miller & Schroeder, Inc.
2845	05/31/01	$14,585.00	Miller & Schroeder, Inc.
2896	06/28/01	$14,585.00	Miller & Schroeder, Inc.

It is undisputed that none of the payments alleged by the Trustee to constitute preferential transfers occurred within the 90 days preceding the bankruptcy filing; nor has the Trustee alleged that any payments other than the noncompete payments listed above occurred within the one year period preceding the filing of the Debtors' petitions.

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[1] Notwithstanding that pursuant to discovery requests served by Wikner, Wikner has requested copies of the checks set forth in the Trustee's Exhibit A, the Trustee has not produced copies of such checks or other records evidencing such transfers. For purposes of this Summary Judgment Motion, Wikner assumes that each of the payments was in fact made by the Debtor on the dates set forth on Exhibit A to the Complaint.

11 U.S.C. § 547(b) provides as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made -
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if -
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 547(c) of the Bankruptcy Code sets forth certain statutory defenses of the transferee of an alleged preferential transfer. Section 547(g) provides that the Trustee has the burden of proving the avoidability of a transfer under subsection (b) of § 547; the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the non-avoidability of a transfer under subsection (c) of § 547. <u>Thus, the Trustee has the burden of proving each of the elements of § 547(b)</u>.

11 U.S.C. § 547(f) provides that for purposes of § 547, the Debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition. However, for purposes of an "insider" preference sought to be recovered under § 547(b)(4)(b), there is no presumption of insolvency; accordingly, the Trustee bears the burden of proving that the Debtors were insolvent at the time of an alleged insider preference.

The Trustee alleges, at paragraph 16 of the Complaint, that "defendant was an 'insider' of these debtors as that term is defined in 11 U.S.C. § 101(31)". 11 U.S.C. § 101(31) provides in pertinent part as follows:

'insider' includes ... (B) if the debtor is a corporation - (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor ..."

The undisputed facts in this case show that on July 31, 1997, pursuant to the terms of a Stock Purchase Agreement, Wikner:

- sold 100% of his interest in the Debtors; and
- resigned as an officer and director of the Debtors;
- ceased to be an employee of the Debtors.

Thereafter, Wikner had virtually no contact with the Debtors or its management or employees. His sole relationship with the Debtors was that created by the Noncompetition Agreement; that is, for four years Wikner refrained from competing with the Debtors, from soliciting the Debtors' customers, clients and employees, and from accepting employment with the Debtors' competitors in the securities industry. In exchange for Wikner's noncompetition, he received payments from the Debtors on a monthly basis in the amounts provided for in the agreement. (see Wikner deposition, p. 37; 97. The following is an excerpt of Wikner's testimony at deposition:

"Q. [by Mr. Burton] What were your intentions after this closed, what were you going to do?
A. [Wikner] I didn't know. Again, I didn't plan on it closing. I left the closing and got in my car and drove home and never went back." (Wikner deposition p. 37.)

...

"Q. [by Mr. Burton] Okay. After the stock sale closing, did you have any involvement with Miller & Schroeder, Inc. or M&I Acquisition?
A. No.
Q. I think you stated that after the closing you got in your car and drove away and never came back?
A. That's true.
Q. You never went back at all, huh?
A. (witness nods head). (Wikner deposition p. 97.)

In the deposition of James Dlugosch, who testified that he was the head of the investor group that acquired all of the outstanding shares of Miller & Schroeder from Wikner, and from James Iverson and Steven Erickson, Dlugosch testified as to Wikner's involvement in the company after the sale of the stock as follows:

> "Q. [by Mr. Ricke] Subsequent to the closing of this transaction in, on like July 31, 1997, Mr. Wikner was not an officer, director or shareholder of Miller & Schroeder or any of its subsidiaries, is that correct?
> A. That's correct.
> Q. How much contact did you have with Roger Wikner after the closing?
> A. Virtually none.
> Q. Do you recall if you ever spoke to him after that?
> A. I don't recall.
> Q. Do you know, did Mr. Wikner have any relationship with Miller & Schroeder or its subsidiaries other than the non-compete agreement, other than his relationship pursuant to the non-compete?
> A. Personal or business?
> Q. Business.
> A. No, not directly. He was the principal, or his wife was the principal owner of an aviation charter business that we used from time to time." (Dlugosch deposition p. 28-29.)

Whether one is an "insider" is "determined on a case-by-case basis based on the totality of the circumstances and the creditor's degree of involvement in the debtor's affairs." <u>In re Boston Pub Co. Inc.</u>, 209 B.R. 157 (Bankr. D. Mass. 1997). The persons specified in one of the six subdivisions of § 101(31)(B) of the Bankruptcy Code are sometimes referred to as "statutory" insiders.

> "When in providing that the term insider 'includes' the statutory insiders, Congress made clear that "insider" is not limited to these six categories. Thus the statutory list is not exhaustive, and it is for the courts to define the limits of non-statutory insider status. ... In determining whether a person is a non statutory insider, courts have generally focused on two basic factors: 1) the closeness of the relationship between the debtor and the transferee, and 2) whether the transactions between the transferee and the debtor were conducted at arms length. ... The analysis is a fact intensive one and must be done on a case by case basis."

In re Tarricone Inc., 286 B.R. 256 at 261-262 (Bankr. S.D.N.Y. 2002). See also In re Dygert, 2000 Westlaw 630833 (Bankr. D. Minn. 2000).

In cases involving non-management creditors, a creditor will be held to an insider standard where it is found that it "dominated and controlled" the debtor. In re KDI Holdings, Inc., 277 B.R. 493 at 511 (S.D.N.Y. 1999). In In re Optical Technologies, Inc., 252 B.R. 531 (M.D.Fla. 2000) affirmed 246 F.3d 1332, the defendants, former officers, directors and sole shareholders of the debtor were subsequently sued for alleged preferential transfers, fraudulent transfers and breach of fiduciary duty. The District Court, in affirming the Bankruptcy Court's grant of summary judgment, held that the former principals of the debtor companies could not be regarded as insiders for preference avoidance purposes where the former principals were not officers or directors of the debtors at the time of the challenged transfers, and were not shown to have retained any continuing control over the debtor's affairs. The court stated:

> "When determining whether control is exerted over a company, the court must focus on whether a defendant had an opportunity to exert more control over the corporate affairs than other creditors are given. ... However, to be determined a person in control, the person must hold the ability to control the company so as to dictate corporate policy and disposition of corporate assets without limits." 252 B.R. 531 at 539.

Based on the facts of this case, it is clear that Wikner could not be considered an insider at any time after July 31, 1997. On that day, Wikner sold all of his interest in the debtors to MI Acquisition Corporation and resigned as an officer and director of the debtor. Wikner was not an employee of the Debtors after July 31, 1997. The undisputed evidence is that Wikner's only relationship with the Debtors from and after July 31, 1997, was as a party to his Noncompetition Agreement. Far from being able to exert control over the Debtors, Wikner could exert no influence or control over the Debtors' actions. Wikner received no financial reporting from the Debtors and indeed, the only evidence is that Wikner did not even communicate with Debtors' new management. Based on these facts, Wikner is entitled to judgment as a matter of law that he was not an insider, and accordingly, Count I of Plaintiff's Complaint must be dismissed.

Notwithstanding that Wikner ceased to be a shareholder, officer and director of the Debtors on July 31, 1997, and the complete absence of evidence of Wikner's ability to exert control of influence over the Debtors subsequent to that date, and despite the passage of nearly four years, it is anticipated that the Trustee will argue that Wikner should be considered an insider for purposes of the noncompete payments received during the one year preceding the filing because, according to the Trustee, these payments were part of a larger single transaction, or were "arranged", while Wikner was an insider. In support of this position, it is anticipated that Trustee will rely on In re EECO, Inc., 138 B.R. 260 (Bankr. C.D.Cal. 1992), and several other similar cases. In EECO, the Chapter 11 debtor filed preference actions against a former officer for certain payments received by that officer during the one year preceding the Chapter 11 filing. The payments which the debtor sought to avoid and recover were payments pursuant to a severance agreement negotiated and executed while the transferee was still an employee and officer. The payments were received subsequent to the defendant's resignation. The transferee in EECO resigned on March 31, 1989, and the debtor sought to recover from him payments made between March 31, 1989, and September 1, 1989, during which period the transferee received compensation from the debtor and use of a company automobile. The court in EECO ruled that the transferee continued to be an insider finding that in the circumstances of that case, "... an insider is no longer an insider when the transfer is no longer a function of or a result of that entities' or person's insider status." 138 B.R. at 265.

Both factually and legally, the Trustee's argument must fail. First, the Noncompetition Agreement was not an agreement negotiated by Wikner with himself and on behalf of himself at a time when he was an insider. The Noncompetition Agreement was a transaction negotiated by MI Acquisition Corp. for its business reasons, not for Wikner's benefit. Wikner ceased to be able to influence or exercise control over the debtors on July 31, 1997. The only control or influence he had over the payment or non-payment of the noncompetition payments was through his performance. Indeed, at his deposition, James Dlugosch testified that had Wikner breached the agreement by competing with Miller & Schroeder, the noncompetition payments would have been discontinued. (Dlugosch dep., p. 33).

The cases cited by the Trustee for the "arranged" theory have been criticized by a number of courts and commentators. The majority of the courts addressing this issue, and the more recent decisions, hold that the proper analysis should be whether the transferee was an insider on the date of the transfer? See for example In re Optical Technologies, Inc., 246 F.3d 1332 (11th Cir. 2001); In re Babcock Dairy Co. of Ohio, Inc., 70 B.R. 657 (Bankr. N.D. Ohio 1986); In re Coors of North Mississippi, Inc., 66 B.R. 845 (Bankr. N.D. Miss. 1986).

In Butler v. David Shaw, Inc., 72 F.3d 437 (4th Cir. 1996) the Circuit Court affirmed the District Court's affirmance of the Bankruptcy Court judgment refusing to expand the definition of insider by adopting the "arranged" theory. The court held that the plain language of the Bankruptcy Code requires an alleged insider transferee to be an insider on the date of the transfer, and where the transferee ceased to be an insider at the time the transfer by check was made, the Trustee could not utilize the expanded insider preference period. The court in Butler cited Barnhill v. Johnson, 503 U.S. 393, 112 S. Ct. 1386 (1992) for the proposition that a transfer by check is a single event occurring at a definite moment in time. The court held,

> ... We reject Butler's approach because it would require us to expand the statutory definition of the term "insider" in a manner that leads to an unduly litigious result. Obviously in many cases it would be difficult, if not impossible, for a court to determine when an insider's influence has ceased to effect the

> actions of the debtor. In light of the Supreme Court's clear preference for bright line rules in this area of the law, we are loath to adopt an interpretation of the Bankruptcy Code that would blur the line established by 11 U.S.C. § 101(2)(A)(31)(E).

72 F. 3d at 442. See also, In re Optical Technologies, Inc., 252 B.R. 531 (M.D. Fla. 2000), affirmed 246 F.3d 1332 (11th Cir. 2001) (former principals of debtor companies could not be regarded as "insiders" for preference avoidance purposes, where former principals were not officers or directors of debtors at time of the challenged transfers, and were not shown to have retained any continuing control over the debtors' affairs.); In re Camp Rockhill, Inc., 12 B.R. 829 (Bankr. E.D. Penn. 1981) (even if creditor was at one time an insider, insider relationship terminated when creditor surrendered his interest back to the debtor, more than one year before the date of the challenged transfer, and Trustee failed to meet burden of establishing burden of insider relationship on the date of the transfer); In re Coors of North Mississippi, 66 B.R. 845 (Bankr. N.D. Miss. 1986).

The "arranged" theory has also been criticized in scholarly journals. In the article Determining Insider Status Under Bankruptcy Code § 547(b)(4)(b): When "I Resign" May Not Be Enough To Terminate Insider Status, 41 UCLA L. Rev. 1541 (1994) the author posited a hypothetical similar to the instant case: a corporate officer terminating employment and arranging a severance agreement. The author asked:

> Would the severance payment still be considered insider transfers if the corporation filed bankruptcy ... five years after the transfer was arranged? ... The arranged theory seems inequitable in such a case where the transfer agreement was arranged so far in advance of the actual transfers. In this instance, it is unlikely that the insider officer used his position of influence to the detriment of the corporation, especially if at the time the transfer was arranged, the corporation was extremely profitable. Nonetheless, this example could be a preferential transfer under the EECO court's finding of a preferential transfer when the nature of a transfer that resulted from an insider's position does not change, even after an insider terminates his employment. By enforcing such a broad application of the arranged theory, nothing would prevent a transfer from becoming a preference even if it was

> arranged by the insider 20 years before the actual transfer. Thus, taking the <u>EECO</u> rationale to its extreme results in tremendous risks and potential inequities to anyone who ever makes a contract or arrangement for future payment with a corporation.

41 UCLA L. Rev. at 1579.

For all of the foregoing reasons, Wikner is entitled to judgment on Count I of Trustee's Complaint because, as a matter of law, Wikner was not an insider at the time of the transfers.

B. <u>TRUSTEE CANNOT MEET HIS BURDEN OF COMING FORWARD WITH EVIDENCE THAT DEBTORS WERE INSOLVENT AT THE TIME OF THE ALLEGED INSIDER PREFERENCES</u>.

As set forth above, the Trustee bears the burden of proof with respect to establishing each of the elements of § 547(b). Because the Trustee is alleging an "insider" preference, the Trustee does not have the benefit of a presumption of insolvency. During the course of discovery in this matter, Wikner requested that the Trustee provide all facts and documents upon which the Trustee bases his claim that the Debtors were insolvent at the time of the alleged insider transfers. In response, the Trustee provided certain documents for inspection and copying. Among the documents provided were the Miller & Schroeder and subsidiaries' consolidated. financial statements and consolidating schedules dated October 31, 2000, and 1999. These statements represent the last audited financial statements of the Debtors. The consolidated balance sheets set forth in those financial statements reflects a shareholder equity of $10,586,601 as of October 31, 2000. In response to discovery requests, the Trustee has produced no other evidence of the Debtors' insolvency or financial condition. Wikner is entitled to judgment as a matter of law based on the Trustee's inability to establish this necessary element of Count I.

III. <u>WIKNER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT II. OF THE TRUSTEE'S COMPLAINT</u>.

A. <u>TRANSFERS MADE IN THE ONE YEAR PRIOR TO THE PETITION DATE ARE NOT AVOIDABLE UNDER 11 U.S.C. § 548</u>.

Count II. of the Trustee's Complaint seeks to recover from Wikner alleged transfers made within the one year period prior to the petition date as fraudulent transfers under § 548 of the Bankruptcy Code. The Debtors filed their petitions on January 22, 2002. The Trustee's Complaint does not allege the existence of any transfers during the one year preceding the bankruptcy petition, other than those set forth on Exhibit A to the Trustee's Complaint. Thus, the transfers which the Trustee seeks to avoid in Count II are the same seven payments which the Trustee seeks to avoid as insider preferences.

Section 548 of the Bankruptcy Code provides in pertinent part as follows:

> The Trustee may avoid any transfer of an interest of the debtor in property … that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily … received less than a reasonably equivalent value in exchange for such transfer or obligation; and … was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; … intended to incur, or believe that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured." 11 U.S.C. § 548(a)(1)(B)(i), (ii)(I), (III).

Thus, the Trustee can only prevail on Count II if, during the one year preceding the petition, Wikner received a transfer which was for less than *reasonably equivalent value* <u>and</u> the Debtors were insolvent on the date of the transfer or were rendered insolvent by the transfer, or intended to incur, or believed that the debtor would incur debts that would be beyond the debtors ability to pay as such debts matured. The Trustee bears the burden of proof with respect to each of the elements of a fraudulent transfer under § 548. Based on the undisputed facts, there are no genuine issues of material fact with respect to Count II, and Wikner is entitled to judgment as a matter of law.[2],

1. Each of the transfers made under the Noncompetition Agreement was supported by reasonably equivalent value.

"Value" means "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2).

Each of the payments made during the one year prior to the filing of the bankruptcy petition were made pursuant to the Noncompetition Agreement entered into between the Debtors and Wikner on July 31, 1997. Pursuant to the terms of the Noncompetition Agreement, Wikner agreed, among other things, for a period of 48 months: not to compete with the Debtors; to refrain from soliciting customers of the Debtors; and to refrain from soliciting employees of the Debtors. In consideration of his agreement, Debtors agreed to pay to Wikner, in 48 installments, in arrears, the sum of $14,585 per month, commencing on August 31, 1997. Pursuant to the Noncompetition Agreement, if Wikner breached the agreement, the Debtors would have no obligation to make the monthly payments.

A review of the pleadings and the results of discovery in this case reveals the following undisputed facts relative to the negotiation and performance of the noncompete agreement:

- As of July 1997, Wikner had been with Miller & Schroeder since the early 1970's, was its President and was a member of the Board of Directors. (Wikner Affidavit ¶ 5-6).
- Although at one point during his employment at Miller & Schroeder, Wikner was subject to an employment agreement which contained a one year noncompete

[2] The Trustee has not alleged that the transfers which are the basis for the claim under Count II were made with actual intent to hinder, delay or defraud under § 548(a)(1)(A).

clause, he does not believe that as of July 1997 he was subject to a noncompete agreement with the Company. (Wikner dep. p. 22-23).

- When Wikner was first approached by the Dlugosch group and asked whether he wished to sell his stock, he was not actively seeking to leave the business or the industry. (Wikner dep. p. 27-28).
- At the time Wikner was approached by the Dlugosch group, he was not looking to sell his shares in the Company; the business was "productive and profitable" and Wikner had substantial income from the Company ("I was making a million dollars a year out of this business." Wikner dep. p. 29.)
- The payments made pursuant to the Noncompete Agreement were not part of a deferred purchase price, but were consideration for the business terms deemed necessary by the Debtors and the acquisition group to prevent Wikner from competing with Miller & Schroeder. Wikner was approached on a number of occasions by parties interested in employing him during the four-year term of the Noncompetition Agreement. He declined all offers of employment. (Wikner depo, p. 50-51, Wikner Affidavit ¶ 16).
- It was important to MIAC, the acquisition group acquiring Wikner's stock, that he not be able to compete or solicit employees of the Company, and a one year noncompete would not have been adequate for the business purposes of the Debtors and MIAC. (Dlugosch dep., p. 28)
- If Wikner had not abided by the terms of the Noncompetition Agreement, payments under the agreement would have terminated (Dlugosch dep. p. 33).

For purposes of determining reasonably equivalent value, it has been held that there need not be mathematical precision or penny-for-penny exchange. In re Dayton Title Agency, Inc., 292 B.R. 857 (Bankr. S.D. Ohio 2003). In the case In re Richards and Conover Steel Co., 267 B.R. 602 (8th Cir. BAP 2001), the 8th Circuit BAP explained in detail the concept of reasonably equivalent value. The Court stated:

> In order for the Trustee to prevail on a claim under 11 U.S.C. § 548(a)(1)(B), he must prove, by a preponderance of the evidence, that the payments to [the transferee] were made not in exchange for reasonably equivalent value. ... (citations omitted). This requires analysis of whether: 1) value was given; 2) it was given in exchange for the transfers; and 3) what was transferred was reasonably equivalent to what was received. ... The record is devoid of any suggestion, and the parties did not contend, that the work done by [the transferee] was not of a value reasonably equivalent to the amount of the fees charged or that the transfer of funds were not in exchange for legal services rendered by [the transferee]. A transfer is in exchange for value if one is the quid pro quo of the other. ... Once it is determined that the debtor received the services of [the transferee] then it is clear they were in exchange for the payment of [the transferee's] fees, directly or indirectly, as the quid pro quo, one for the other. ... The only issue to be resolved is whether [the debtor] received value for the transfers.

267 B.R. at 612.

In analyzing whether the debtor received value, the Court held in Richards and Conover that while the debtor must receive some economic benefit in order for the Court to find reasonably equivalent value, this does not mean that the debtor must receive consideration that replaces the transferred property with something tangible or leviable, which can be used to satisfy creditor claims; rather the Court must examine all aspects of the transaction and measure value of all benefits and burdens to the debtor, direct or indirect.

In In re Metropolitan Steel Fabricators, Inc., 191 B.R. 150 (Bankr. D. Minn. 1996), the Chapter 11 debtor sought to avoid certain payments made to former officers and shareholders of the debtor corporation, including payments made pursuant to noncompete and consulting agreements. In finding that the debtor had failed to meet its burden of proving that it had not received reasonably equivalent value, the court stated:

> Regarding the non-compete and consulting agreements, the plaintiff, in effect, argued that the … actual efforts pursuant to these agreements did not justify the amounts they were paid … [Not] having to compete with its former principals had value, but the plaintiff failed to provide any evidence of that value. Since the burden is on the plaintiff to prove lack of reasonably equivalent value, its claim fails for want of proof.

191 B.R. at 154. See also, In re Northgate Computer Systems, Inc., 240 B.R. 328 (Bankr. D. Minn. 1999).

In the instant case, the evidence of record does not and cannot support a finding that the noncompete payments were not for reasonably equivalent value. The Trustee bears the burden of proof with respect to this issue. Discovery has been concluded. For purposes of this motion, the Trustee, to avoid summary judgment, must produce significant probative and substantial admissible evidence that would support a finding in the Trustee's favor. The only credible evidence reflects that the Noncompetition Agreement was entered into for sound business reasons of the Debtors and MIAC. Wikner was a long-time employee of the Debtors; he was highly compensated based on his ability to generate and control business; the Noncompetition Agreement was entered into in order to preclude Wikner from taking that business which he controlled to a competitor of the Debtors, which in the absence of the Noncompetition Agreement, Wikner had the ability and legal right to do. Based on the foregoing, the Trustee's claim under § 548 fails and Wikner is entitled to judgment on Count II that as a matter of law; the noncompete payments received in the one year preceding the Debtors' filing are not avoidable under 11 U.S.C. § 548.

2. **<u>Trustee can produce no evidence which would support a finding that the Debtors were insolvent on the dates of the transfers, or intended to, or believed that the Debtors would, incur debts beyond the Debtors' ability to pay as such debts mature</u>.**

As set forth above, the Trustee bears the burden of proof with respect to establishing each of the elements of § 548. The Trustee does not have the benefit of a presumption of insolvency. During the course of discovery in this matter, Wikner requested that the Trustee provide all facts and documents upon which the Trustee bases his claim that the Debtors were insolvent at the time of the alleged transfers. In response, the Trustee provided certain documents for inspection and copying. Among the documents provided were the Miller & Schroeder and subsidiaries' consolidated financial statements and consolidating schedules dated October 31, 2000, and 1999. These statements represent the last audited financial statements of the Debtors. The consolidated balance sheets set forth in those financial statements reflects a shareholder equity of $10,586,601 as of October 31, 2000. In response to discovery requests, the Trustee has produced no other evidence of the Debtors' insolvency or financial condition. Wikner is entitled to judgment as a matter of law based on the Trustee's inability to establish this necessary element of Count II.

IV. **<u>THE TRANSFERS ARE NOT AVOIDABLE BY THE TRUSTEE UNDER THE MINNESOTA UNIFORM FRAUDULENT TRANSFERS ACT (UFTA)</u>.**

The Trustee also seeks to avoid and recover under 11 U.S.C. § 544(b) and Minn. Stat. § 513.44 and .45 (UFTA), certain transfers made on and after July 31, 1997, pursuant to the terms of the Stock Purchase Agreement and the Noncompetition Agreement. Although the Complaint is not entirely clear, it appears that these transfers can be categorized into two groups as follows: 1) payments made to Wikner by the Debtors under the Noncompetition Agreement between July 31, 1997, and the date of the Debtors' filing, totaling, at most, $700,080, and 2) the sum of $795,992 which represents the proceeds payable to Wikner by MIAC pursuant to the

Stock Purchase Agreement, but which proceeds were withheld by MIAC at closing in order to satisfy certain obligations due, in turn, from Wikner to the Debtors (the "Officer Liabilities").

A. THERE IS A COMPLETE ABSENCE OF EVIDENCE OF ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS.

Although the Trustee alleges at paragraph 32 of the Complaint that the transfers were made to Wikner in violation of Minn. Stat. § 513.44(a)(1), with actual intent to hinder, delay or defraud creditors, there is no evidence which would support such a finding. At the Trustee's deposition, when asked what evidence the Trustee had to support a finding of actual intent to hinder, delay or defraud creditors, the following exchange occurred: [3]

> Q. (By Mr. Lawver) Now, in paragraph 31, you say that these payments were made or that the transfers were made with the actual intent to hinder, delay or defraud creditors. Do you have any evidence, any facts that you are relying upon to prove intent to defraud?
> A. (By Mr. Leonard) On which transfer are you talking about?
> Q. This is on Count III, the transfers that you are referring to appear to be the noncompete transfers and the transfers for released obligations. Do you have any evidence of intent to defraud?
> A. Well I think the evidence is the Stock Purchase Agreement and the evolution of the purchase price from $15,000,000 down to $12,000,000 so that those promissory notes would not have to be repaid.
> Q. And any person that you would say that you have talked to that would give evidence to that would be Mr. Dlugosch?
> A. Mr. Dlugosch, your client, Mr. Wikner and other parties to the transaction, possibly the lawyers.
> Q. You have had a chance to talk to the lawyers representing MI Acquisition Corporation, correct?
> A. Have we had an opportunity to? Yes. Have we done so is a different question. Is that what you are really asking?
> Q. Have you spoken to them with regards to the transfers?
> A. I believe so, but not in depth and not recently.
> Q. Have they given you any evidence or indication, and I take it this is with MI Acquisitions' counsel, that these transfers were not made?
> A. That the transfers were not made?
> Q. Well that the transfers were made with intent to hinder, delay or defraud?
> A. No.

[3] Although this testimony was elicited by Mr. Lawver in connection with allegations made by the Trustee in the Iverson adversary proceeding, the Complaint against Iverson and Wikner are virtually identical and the testimony is equally telling in this proceeding.

(Leonard Deposition, p. 48-50).

In In re Northgate Computer Systems, Inc., *supra*, the Trustee had also brought fraudulent conveyance actions under both § 548 and the Minnesota UFTA. The Court noted that the Minnesota enactment of the Minnesota UFTA contains provisions virtually identical to § 548(a)(1) of the Bankruptcy Code and contemplates the process of inference on the "actual intent" element based on the "existence or nonexistence of the badges of fraud enumerated". 240 B.R. at 366. The Court noted 11 of those badges of fraud applicable under § 548 or the Uniform Fraudulent Transfer Act . 240 B.R. at 361. A review of that list of "badges of fraud" shows a complete absence of any basis for the Trustee's allegations.[4] The Court should find, based on the evidence of record, that Wikner is entitled to judgment as a matter of law with respect to § 513.44(a)(1).

B. THE TRANSFERS ARE NOT AVOIDABLE UNDER MINN. STAT. § 513.44.

Section 544(b) of the Bankruptcy Code provides as follows:

> The Trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under § 502 of this title or that is not allowable only under § 502(e) of this title.

Pursuant to this provision, one of the trustee's "strong arm" powers under § 544(b), the Trustee seeks to avoid certain transfers to Wikner pursuant to the Minnesota UFTA, Minn. Stat. § 513.44(a)(2). This section permits relief upon a showing of constructive fraud in a debtor's transfer of assets without requiring proof of actual intent on the debtors part to harm creditors through a transfer.

Section 513.44(a)(2) of Minnesota Statutes provides in pertinent part as follows:

[4] One of the so called badges listed by the Court is whether the transfer or obligation was to an insider. Although Wikner was an insider prior to the closing on July 31, 1997, this factor standing alone is clearly insufficient to support an allegation of actual intent.

> … A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: … 2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor (i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he or should incur, debts beyond his or her ability to pay as they became due.

Pursuant to Minn. Stat. § 513.45(a), the transfer is constructively fraudulent as to present creditors if made at a time when creditors claims existed, and the transfers were made without reasonably equivalent value, and the debtor was insolvent, or became insolvent as a result of the transfer. Like Minn. Stat. § 513.44(a)(2), a transfer is not fraudulent under this section if supported by reasonably equivalent value.

The Trustee has also alleged that the transfers are avoidable under Minn. Stat. § 513.45(b). Pursuant to § 513.45(b) the transfer is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe the debtor was insolvent.

1) **The transfers are not avoidable under UFTA in that they were made for reasonably equivalent value**.

A common element which the analysis of the Trustee's claims under § 513.44(a)(2) and § 513.45(a) of UFTA shares with the requirements of 11 U.S.C. § 548 is that the Trustee must establish that the Debtors did not receive reasonably equivalent value with respect to the transfers. For the reasons already set forth in section III.A.1. above, Wikner has established that the Debtors did in fact receive reasonably equivalent value for the noncompetition payments. Since the analysis under § 548 is the same as that under § 513.44(a)(2) of UFTA, it is unnecessary to repeat that analysis here.

2). **<u>The satisfaction of the Officer Liabilities did not constitute an avoidable transfer under UFTA because they were supported by reasonably equivalent value</u>.**

Pursuant to § 5.5 of the Stock Purchase Agreement, Wikner was required to "... at or prior to the closing pay the full amount of principal and interest on his outstanding notes and advances owed to the company or any subsidiary." A list of those "notes and advances" (referred to herein as the "Officer Liabilities") was developed during due diligence process. At closing, the parties executed a Closing Statement Certificate and Receipt (Wikner Affidavit, Exhibit C) which reflected a purchase price of $15,000,000 for 100% of the stock of Miller & Schroeder. The Closing Statement reflected that Wikner's 49% share of the total purchase price was $7,310,725.55. From that amount, certain "Adjustments to Closing Proceeds" were made and funds withheld accordingly from the net closing proceeds payable to Wikner. These adjustments represent the amounts which Wikner and MIAC agreed were required to be paid by Wikner under § 5.5 of the Stock Purchase Agreement (the "Officer Liabilities"). The total amount of the Adjustments to Closing Proceeds which were deducted from Wikner's proceeds was $1,362,736.23. The Trustee has now acknowledged that a $500,000 wire transfer to Mid-America Bank and a $66,743.94 wire transfer to Chase Manhattan Bank for the Mercedes Benz payoff are not avoidable and has reduced the Trustee's claims accordingly. The Trustee continues to assert, however, that the remaining adjustments to closing totaling $795,992.29 are avoidable by the Trustee under the UFTA.

The undisputed facts establish that the $795,992.29 which the Trustee seeks to avoid and recover are funds that were withheld by the buyer, MIAC, from Wikner at closing, and that those funds were used to satisfy Wikner's own personal Officer Liabilities to the Debtors (under § 5.5 of the SPA) as of the closing date. The funds which were withheld were used to satisfy the following: three life insurance policies on Wikner's life which Wikner purchased from the Debtor; two promissory notes payable to Miller & Schroeder. and one promissory note payable to Miller & Schroeder Financial, together with interest accrued through the closing date; the purchase of a country club membership by Wikner from Miller & Schroeder Financial; the repayment of bonus advances to Miller & Schroeder Financial; the repayment of expense reimbursements; and the repayment of an aviation charter receivable. (See Closing Statement, Exhibit C to Wikner Affidavit, Section II).

As set forth at § 2.3 of the Stock Purchase Agreement, the purchase price was based on values established by the Debtors January 31, 1997, financial statements, but was subject to a purchase price adjustment based on a Closing Financial Statement which has required to be prepared within 45 business days after the closing date according to generally accepted accounting principles. As set forth on the Closing Financial Statement (Year-to-Date Financial Statement Dated July 31, 1997) [5], the amounts due from officers (Wikner, Iverson and Erickson) were satisfied at closing. (Wikner at Exhibit F, see Tab 1, Consolidated Balance Sheets). On the same date, an intercompany receivable/amount due from MIAC is reflected as having been entered on the statement of financial condition. (Closing Financial Statement, Wikner Exhibit F, see Tab 1, p. 3). Thus, on the consolidated statement of financial condition as of July 31, 1997, an advance to MIAC is reflected from Miller & Schroeder in the amount of $1,231,922, and from Miller & Schroeder Financial in the amount of $769,626, for a total of $2,001,548. These are exactly the amounts withheld by MIAC from the sellers (Wikner, Iverson and Erickson) at closing[6] which is derived by adding the total adjustments to closing proceeds.

[5] The Closing Financial Statement which was prepared by KPMG in accord with § 2.3 of the Stock Purchase Agreement is Exhibit F to the Wikner Affidavit.
[6] This calculation can easily be confirmed as follows: the total seller's adjustments (Wikner, Iverson and Erickson) were as follows: Wikner $1,362,736.23, Iverson $2,221,463.91 and Erickson $14,604.20 for total adjustments of

It is clear that the Debtors received reasonably equivalent value for these transfers. In fact, the Debtors received a dollar-for-dollar payment from Wikner and Iverson at closing. The Debtors' financial statements also reflect that such funds were advanced by Miller & Schroeder and Miller & Schroeder Financial to their new parent, MIAC. The net result of these transactions was that the balance sheet of the Debtors was unaffected; the Officer Liabilities was satisfied per the SPA and contemporaneously, the funds lent to the Debtors' new parent as reflected on the July 31, 1997, Balance Sheet.

The fact that the officer obligations were satisfied as of the closing date, and that such satisfaction constituted reasonably equivalent value is further demonstrated by the following undisputed facts:

1. The existence of cancelled promissory notes dated July 31, 1997 (see Wikner Affidavit, Exhibits E-1, E-2 and E-3);

2. Wikner paid income tax on the gross proceeds received by him pursuant to the Stock Purchase Agreement (Wikner Affidavit, ¶ 14);

3. The workpapers of KPMG relating to preparation of the Closing Financial Statements reflect that the officer liabilities were satisfied, and that Miller & Schroeder and Miller & Schroeder Financial advanced such funds to their parent, MIAC (see Affidavit of Larry B. Ricke, Exhibit J.[7]

$3,598,804.34. Reducing the total adjustments by wire transfers to third party payees ($3,598,804.34 less $530,512.33 wire transferred for American Bank payoff, less $66,743.94 for Mercedes Benz payoff, less $1,000,000 to Mid-America Bank for pay down of loan with respect to the Crossings), leaves net adjustments to sellers of $2,001,548.07. This is the <u>exact</u> dollar amount, rounded to the nearest dollar, of the intercompany receivable from MIAC to Miller & Schroeder and Miller & Schroeder Financial as of July 31, 1997. See Closing Financial Statements, Tab 1, page 3, dated July 31, 1997, reflecting advance to MIAC from Miller & Schroeder of $1,231,922 and from Miller & Schroeder Financial of $769,626 for a total intercompany advance to MIAC of $2,001,548; see also Closing Statement and Certificate and Wire Transfer Instructions, Wikner Affidavit, Exhibit C and D respectively.

[7] Pursuant to the adjustments made under § 2.3 of the Purchase Agreement, the sellers under the Stock Purchase Agreement were required to pay the sum of $1,274,874.10 to MIAC to reflect changes in financial condition from

The Trustee bears the burden of proof with respect to all elements under the statute. The issue of the reasonable equivalence of value is a question of fact. In re Ozark Restaurant Equipment Company, Inc., 850 F. 2d 342 (8th Cir. 1988). The Minnesota enactment of the Uniform Fraudulent Transfer Act contains provisions virtually identical to § 548(a)(2) of the Bankruptcy Code, and cases decided by the Minnesota Bankruptcy Court have held that the analysis under § 548 of the Bankruptcy Code and the Uniform Fraudulent Transfer Act are virtually identical. In re Northgate Computer Systems, Inc., 240 B.R. 328 (Bankr. D. Minn. 1999). The only facts before the Court on this motion clearly demonstrate that the Debtors received reasonably equivalent value for the Officer Liabilities satisfied at closing. Funds to satisfy the Officer Liabilities were withheld by the purchaser, MIAC, the Debtors' new parent corporation at closing. The closing financial statements reflect that the obligations were satisfied, and that the proceeds of the satisfied indebtedness were relent by Miller & Schroeder and Miller & Schroeder Financial to MIAC. The sum of $795,992.29 was withheld from Wikner at closing to satisfy $795,992.29 in obligations to the Debtors. The transfer was not only for reasonably equivalent value; it was a dollar-for-dollar equivalent. Wikner is entitled to judgment as a matter of law determining that the Officer Liabilities satisfied at the closing on July 31, 1997, are not avoidable as fraudulent transfers under the Minnesota Uniform Fraudulent Transfer Act.

B. THE DEBTORS WERE SOLVENT AT THE TIME OF THE JULY 31, 1997 TRANSFERS AND WERE NOT RENDERED INSOLVENT, LEFT WITH UNREASONABLY SMALL REMAINING ASSET.

The best and only evidence of the Debtors' financial condition as of the date of the transaction, July 31, 1997, is the Closing Financial Statement prepared by KPMG (Wikner

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January 31, 1997, through the date of the closing financial statement. These amounts were in fact repaid by the seller and Wikner paid tax in 1997 based on the adjusted proceeds received by him. See Settlement Agreement Exhibit G to Wikner Affidavit.

Affidavit Exhibit F) and the October 31, 1997, audited financial statement prepared only three months later (Ricke Affidavit, Exhibit D). Based on the July 31, 1997, financial statement, Miller & Schroeder and its subsidiaries, had a consolidated shareholder equity of $10,552,344. Looked at separately, Miller & Schroeder had total shareholder equity on July 31, 1997, of $6,843,694, and Miller & Schroeder Financial had total shareholder equity of $12,016,193. According to the Consolidating Balance Sheet dated October 31, 1997 (See Ricke Affidavit, Exhibit D), as of that date, Miller & Schroeder's shareholder equity was $6,252,553 and Miller & Schroeder Financial had total shareholder equity of $12,067,949. The Debtors' October 31, 1998, balance sheet reflects shareholder equity of $ 9,387,101. See Ricke Affidavit, Exhibit D).

The Debtors' audited financial statements as of October 31, 2000, which are the last audited financial statements available, reflect total shareholder equity as of October 31, 2000, of $10,586,601 (Ricke Affidavit, Exhibit E). Note 7 to the October 31, 2000, consolidated financial statements reflects that Miller & Schroeder Financial, which was required to meet the minimum net capital requirements of the Securities and Exchange Commission Uniform Net Capital Rule (Rule 15c3-1) had a net capital, as defined, of $3,330,522, which was $3,080,522 in excess of the minimum net capital required by the SEC.

Notwithstanding Wikner's discovery request to the Trustee that the Trustee provide Wikner with all of the facts on which the Trustee relied on his allegations of insolvency, the Trustee has produced no evidence whatsoever of the Debtors' alleged insolvency, other than the Audited Financial Statements which clearly show the Debtors were, in fact *solvent*. Nor has the Trustee produced any evidence to controvert the veracity of the Debtors' Audited Financial Statements. Even if the evidence did not clearly establish that the transfers were supported by reasonably equivalent consideration, which the evidence does in fact establish, the Trustee's claims must fail inasmuch as the Trustee cannot meet his burden of establishing that the Debtors were insolvent or were "… engaged in or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or intended to incur, or believe to reasonably should have believed that the debtor would incur debts beyond their ability to pay as they became due."

The Trustee also asserts a claim under Minn. Stat. § 513.45(a) (Transfers fraudulent as to present creditors). For purposes of § 513.45(a), the Trustee cannot establish that the Debtors were insolvent at the time of the transfers or became insolvent as a result of the transfers. For purposes of § 514.45(b), the Trustee cannot establish that the Debtors were insolvent at the time of the noncompete transfer, or had reasonable cause to believe that the Debtors were insolvent. Moreover, for the reasons set forth in section II.A. above, the Trustee allegations with respect to § 514.45(b) (insider fraudulent transfer) must necessarily fail for the additional reason that at the time each and every one of the noncompete payments was received, Wikner was not an insider. The Trustee bears the burden of all elements under the UFTA. Even if the Trustee's claims did not fail by virtue of the fact that Wikner gave reasonably equivalent value on account of the satisfaction of the officer liabilities, the Trustee's claim must fail because at the time of the transactions, the Debtors were solvent, were not rendered insolvent, and clearly had adequate capital for their continuing business operations.

C. THE TRUSTEE'S CLAIMS UNDER THE UFTA MUST FAIL BECAUSE THEY ARE PRECLUDED BY THE MINNESOTA BUSINESS CORPORATION ACT.

The Trustee's claim under the UFTA necessarily fail because satisfaction of the Officer Liability was for reasonably equivalent value, and made at a time when the Debtors were clearly solvent. However, even if Wikner were not entitled to Summary Judgment for those reasons, the

Trustee's claim must necessarily fail, because the Trustee's claim is barred by the provisions of the Minnesota Business Corporation Act governing corporate distributions.

Minn. Stat. § 302A.011(10) provides as follows:

> "Distribution" means a direct or indirect transfer of money or other property, other than its own shares, with or without consideration, or an incurrence or issuance of indebtedness, by a corporation to any of its shareholders in respect of its shares. A distribution may be in the form of a dividend or a distribution in liquidation, or as consideration for the purchase, redemption, or other acquisition of its shares, or otherwise.

To the extent the satisfaction of the Officer Liabilities was not a transfer for reasonable equivalent value, i.e. repayment of debt, then it would constitute a distribution to Wikner pursuant to the provisions of Minn. Stat. §§ 302A.551 to 302A.559.

Minn. Stat. § 302A.551 provides that the board may authorize and cause the corporation to make a distribution if the board determines that the corporation will be able to pay its debts in the ordinary course of business after making the distribution. Section 302A.559 provides for liability on the part of a director who fails to vote against or who consents in writing to a distribution made in violation of § 302A.551, and also provides for contribution from the shareholder. Minn. Stat. § 302A.551(d) also provides as follows: "Sections 302A.551 to 302A.559 supercede all other statutes of this state with respect to distributions, and the provisions of §§ 513.41 to 513.51 do not apply to distributions made by a corporation governed by this chapter." In In re Metropolitan Steel Fabricators, Inc., 191 B.R. 150 (Bankr. Minn. 1996), the court noted that summary judgment dismissing fraudulent transfer claims asserted by a debtor was appropriate where those claims constituted distributions under the Minnesota Business Corporation Act based on the language of § 302A.551(d). 191 B.R. at 152-153.

D. TRUSTEE MUST DEMONSTRATE THE EXISTENCE OF A CREDITOR HOLDING ALLOWED CLAIM ON JULY 31, 1997, FOR PURPOSES OF HIS CLAI UNDER 513.45 OF MINNESOTA STATUTES.

To the extent that the Trustee relies on § 513.45 of Minnesota Statutes for his claim, the Trustee is required to prove the existence, as of the date of the challenged transfer on July 31, 1997, of at least one creditor with a claim against the Debtors that existed as of the date of the transfer. See In re Jollys, Inc., 188 B.R. 832 (Bankr. D. Minn. 1995). As set forth in the affidavit of Larry Ricke, upon review of the Claims Registers in this case, Wikner denies the existence of such a creditor. The burden is therefore on the Trustee to come forward with some evidence of the existence of such a creditor as of July 31, 1997.

E. THE EFFECT OF THE SETTLEMENT AGREEMENT.

As set forth above, pursuant to § 2.3 of the Stock Purchase Agreement, the parties were required to make a purchase price adjustment based on the Closing Financial Statement to be prepared pursuant to that section. The Closing Financial Statement was prepared by KPMG, and ultimately resulted in the Sellers (Wikner, Iverson and Erickson) paying to MIAC and Miller & Schroeder a total purchase price adjustment of $1,242,971.10. Thus, the stock purchase price was reduced by this amount. To evidence this, the parties entered into a Settlement Agreement, dated December 11, 1997 (Wikner Affidavit, Exhibit G. The parties to the Settlement Agreement were Wikner, Iverson and Erickson as sellers, as well as MIAC and Miller & Schroeder. Paragraph 5 of that agreement provides in part as follows:

> The parties hereto agree to the mutual release and discharge of any and all claims, demands, obligations, actions, causes of action, damages, costs, debts, liabilities, or expenses arising under or related to Section 2.3 of the Stock Purchase Agreement. The release contained herein shall not apply to and shall not effect the parties' rights to enforce (i) the remaining terms of the Stock Purchase Agreement, (ii) any ancillary agreement to the Stock Purchase Agreement, including, but not limited to, any employment agreement or noncompetition agreement, or (iii) the terms of this Agreement.

To the extent the Trustee's claims are that the Officer Liabilities were not repaid to the company, such claims were clearly released by the terms of the mutual release. If on the date of the Settlement Agreement, the Officer Liabilities had not been repaid, such claims would have certainly been a part of the purchase price adjustment process. In fact, as evidenced by the Closing Financial Statement, the Officer Liabilities were paid. Not only were such claims paid, they were released pursuant to the terms of this Settlement Agreement.

IV. BREACH OF FIDUCIARY DUTY.

Count IV. of the Trustee's Complaint purports to state a claim against Wikner for breach of fiduciary duty. The Trustee alleges, in summary fashion, that:

- Defendant had a duty of loyalty to the Debtors pursuant to Minnesota common law and Minn. Stat. § 302A.251 and .255;
- in causing the Debtors to make the transfers, defendant breached his duty of loyalty to the Debtors and their creditors; and
- the alleged breach of duty of loyalty caused the Debtors harm in the amount of the transfers.

Interrogatory No. 21 propounded by Wikner to the Trustee asks for the following information:

> "Discuss in detail the factual and legal basis for the allegation in Count IV of the Complaint that Defendant had a duty of loyalty to the Debtors, and identify all documents which evidence the factual and legal basis asserted in your answer to this interrogatory."

Plaintiff answered as follows:

> "Plaintiff objects to this interrogatory as calling for legal conclusions. Notwithstanding said objection, Defendant breached his duty of loyalty by having the Corporation, of which he was a shareholder, officer and director, by being paid a portion of his stock price by way of forgiveness of debt owed to Miller &

> Schroeder, Inc. Plaintiff also believes that the non-compete agreement was a violation of that duty. Relevant documents include the corporate records."

The Trustee seems to suggest, although fails to specify any facts to support his theory, that Wikner, in entering into the Stock Purchase Agreement and the Noncompetition Agreement and by satisfying the Officer Liabilities at closing, violated some fiduciary duty of loyalty to the corporation, its shareholders and/or its creditors.

First, with respect to any duty of loyalty to the corporation's creditors, it is absolutely clear that on July 31, 1997, the Debtors were solvent and not in any way approaching the "zone of insolvency". It is also clear that under general principles of corporate law, that absent special circumstances such as insolvency, directors do not owe creditors any special duty beyond the terms of their contracts. See for example, Geyer v. Ingersoll Publications Co., 621 A.2d 784 (Del. Ch., 1992). However:

> "When a corporation is insolvent, or on the verge of insolvency, its directors and officers become fiduciaries of the corporate assets for the benefit of creditors. ... As fiduciaries, they cannot by reason of their special position treat themselves to a preference over other creditors."

Snyder Electric Co. v. Fleming, 305 N.W.2d 863, 869 (Minn. 1981). Even this fiduciary duty, however, does not amount to a requirement that directors and officers of an insolvent corporation hold the assets of corporation in trust for the benefit of creditors. Rather, the duty owed is limited to avoidance of self-dealing to the detriment of the corporation's other creditors. St. James Capitol v. Pallet Recycling, 589 N.W.2d 511 (Minn. App. 1999). It has been held that under Minnesota law, the fiduciary duty of an insolvent corporation's director and officers does not extend beyond the prohibition against self dealing or preferential treatment. Travis v. Curron Shares of America, Inc., 272 F.Supp.2d 816 (D. Minn. 2003); Helm Fin Corp. v. MNVA RR, Inc., 212 F.3d 1076 (8th Cir. 2000).

On July 31, 1997, the Debtors were neither insolvent or operating within the zone of insolvency. No duty of loyalty was owed by Wikner to the creditors on this date; nor could Wikner owe a duty to the Debtors' creditors at any time after that date inasmuch as at no time after July 31, 1997, was Wikner an officer, director, shareholder, agent or employee of the Debtors.

Second, with respect to the fiduciary duties owed by Wikner to the Debtor corporations/shareholders, the Trustee's claims must fail. As set forth above, the evidence shows that the transfers were in fact supported by reasonably equivalent consideration. There is no evidence that Wikner engaged in self-dealing at the expense of its shareholders or the corporation. The payments under the Noncompetition Agreement were supported by reasonably equivalent value. The satisfaction of the Officer Liabilities was in consideration of dollar-for-dollar payment. There is simply no evidence of a breach of duty of loyalty or any other duty. Indeed, under these circumstances, where 100% of the shareholders of the Debtors were party to the Stock Purchase Agreement and participated in the sale, to whom could Wikner owe this duty? Even if the facts and circumstances of this case warranted a conclusion that the transfers complained of by the Trustee constituted a misappropriation of corporate assets, as a general rule, where 100% of the shareholders consent to such use, the directors or officers have not violated a duty to the corporation. See Fletcher, Cyclopedia of Corporations, § 1103-1104. See also Anderson v. Benson, 394 N.W.2d 171 (Minn. App. 1986).

Moreover, Minn. Stat. 302A.255 sub. 1 provides in pertinent part as follows:

> "A contract or other transaction between a corporation and one or more of its directors … is not void or voidable because the director or directors or other organizations are parties or because the director or directors are present at the meeting of the shareholders or board or committee at which the contract or transaction is authorized, approved, or ratified, if: a) the contract or transaction was, and the person asserting the validity of the contract or transaction sustains

> the burden of establishing that the contract or transaction was, fair and reasonable as to the corporation at the time it was authorized, approved or ratified; b) the material facts as to the contract or transaction and as to the directors or directors' interest are fully disclosed or known to the holders of all outstanding shares, whether or not entitled to vote, and the contract or transaction is approved in good faith by (1) the holders of two-thirds of the voting power of the shares entitled to vote which are owned by persons other than the interested director or directors, or (2) the unanimous affirmative vote of the holders of all outstanding shares, whether or not entitled to vote ..." 302A.255 sub.1.

In the instant case, it is clear that the transaction giving rise to the transfers were approved by 100% of the shareholders of the corporation.

Finally, it is clear that Court IV of the Trustee's Complaint must fail because it is barred by the applicable statute of limitation. Section 302A.559 provides in pertinent part as follows:

> "Sub. 1. Liability. In addition to any other liabilities, a director who is present at a meeting and fails to vote against, or who consents in writing to, a distribution made in violation of § 302A.551 sub. 1, paragraph (a), or 4, or a restriction contained in the articles or by-laws or an agreement, and who fails to comply with the standard of conduct provided in § 302A.251 is liable to the corporation ..."
>
> Subd. 4 Statute of Limitations. "Any actions shall not be commenced under this section more than two years from the date of distribution."

Any claim that Wikner violated a duty to the corporation by authorizing this transaction amounts to a claim that he authorized an illegal distribution. Even if that claim had merit, which it does not, such claim would be time barred. For all of the foregoing reasons, Wikner is entitled to summary judgment on Count IV of the Trustee's Complaint in that there are no genuine issues of material fact, and he is entitled to judgment as a matter of law.

V. WIKNER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT THE ACTIONS COMPLAINED OF BY THE TRUSTEE DID NOT CONSTITUTE A CONVERSION UNDER STATE LAW.

The Trustee alleges in conclusory fashion in Count V that Wikner's "misappropriation of the Debtors' funds via the transfers was a willful interference with the Debtors' property that was without justification and was inconsistent with the Debtors' right to use, possess and own their property." Complaint, paragraph 43. <u>Dunnell Minnesota Digest (5th Edition)</u> defines conversion as: "an act of willful interference with chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession." <u>Dunnell</u>, Conversion, § 1. While the Trustee has correctly stated the definition of conversion under Minnesota state law, the Complaint completely fails to set forth facts which would state a cause of action for conversion under such law. Moreover, assuming the property which the Debtors were allegedly deprived of are the Officer Liabilities (which were paid dollar-for-dollar) and the noncompete payments (which as set forth above, were for reasonably equivalent value, pursuant to a valid and binding contract with the Debtors, which contract had been approved by the corporation with the knowledge and consent of all of its shareholders), Plaintiff has totally failed to explain to this Court how this could constitute an act of conversion.

Moreover, both the satisfaction of the Officer Liabilities and the noncompete payment were made with full knowledge and consent of the Debtors.

"If the conversion was with the knowledge and consent of the owner, the owner cannot recover. A disposition of property pursuant to an agreement with the owner cannot be a conversion." <u>Dunnel Minn. Digest 5th Edition</u>, Conversion § 1.06a. There are no factors upon which the Court could base a claim of conversion. Wikner is entitled to judgment as a matter of law on Count V.

VI. <u>WIKNER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON COUNT VI., UNJUST ENRICHMENT.</u>

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." <u>Restatement of Law,</u> Restitution, § 1. The Comments to § 1, <u>Restatement</u> provide that a person is enriched if he has received a benefit, and a person is unjustly enriched if the retention of the benefit would be unjust. For all of the reasons previously stated, it is clear that the Trustee cannot prevail on the claim set forth in Count VI. The "transfers" were supported by reasonably equivalent value; they were made pursuant to contractual obligations of the debtors. There is no evidence which would support a finding of unjust enrichment and Wikner is therefore entitled to judgment as a matter of law with respect to the Trustee's Count VI.

CONCLUSION

For all of the reasons set forth herein, Wikner is entitled to the entry of summary judgment on Counts I-VI of the Trustee's Complaint.

Dated: March 19, 2004

LEONARD, STREET AND DEINARD

/e/ Larry B. Ricke
Allen I. Saeks(#95072)
Larry B. Ricke (#121800)
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402
Telephone: 612-335-1500

ATTORNEYS FOR ROGER J. WIKNER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee

Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

AFFIDAVIT OF ROGER J. WIKNER

Roger J. Wikner, being first duly sworn and upon oath states and deposes as follows:

1. My name is Roger J. Wikner and I am the Defendant in this adversary proceeding.

2. I began working at Miller & Schroeder, Inc. ("Miller & Schroeder") in approximately January, 1967 as an office worker, shortly after Miller & Schroeder was formed. Thereafter, I completed training and licensure to become a broker in mid 1968. At some time in 1969 or 1970, I became a minority shareholder of Miller & Schroeder and at the same time I became a member of the Board of Directors and a Vice President.

3. Sometime in the mid 1970s I acquired additional shares of Miller & Schroeder and increased my ownership interest to approximately 25%. At that time, 25% of the stock of Miller & Schroeder was owned by each of James Iverson ("Iverson"), Joseph Miller ("Miller"), Dennis Schroeder ("Schroeder") and myself. In approximately 1975 or 1976, Miller sold his

interest to the other shareholders. I cannot recall the exact percentages of ownership held by myself, Iverson and Schroeder subsequent to that time.

4. At or about this same time, Steven Erickson acquired a 2% interest in the stock of Miller & Schroeder.

5. In approximately 1986, I became the President of Miller & Schroeder and with the passage of time I became more involved in underwriting and firm management. In 1995 or 1996, Schroeder sold his shares in the company. After that time, Iverson and I each owned approximately 49% of the company, and Erickson owned 2%, representing 100% of the stock ownership of Miller & Schroeder.

6. Sometime in early 1997, I was approached by James Dlugosch ("Dlugosch"), who inquired whether I would be interested in selling to him my interest in Miller & Schroeder. Dlugosch had been an employee of Miller & Schroeder for several years, but left Miller & Schroeder in early 1997. At the time he left the firm, Dlugosch had indicated that he was interested in acquiring a brokerage firm. Subsequently, Dlugosch approached Iverson and me and asked whether we would be interested in selling our interest in Miller & Schroeder. My recollection is that Dlugosch first contacted Iverson, and that after Iverson had preliminarily indicated that he was interested in pursuing discussions with Dlugosch to sell his stock interest in Miller & Schroeder, Dlugosch then contacted me.

7. Over a period of several months Dlugosch made various proposals to me, Iverson and Erickson. Ultimately, these proposals resulted in the execution of a Stock Purchase Agreement dated June 20, 1997. A copy of the Stock Purchase Agreement, without the voluminous schedules to the agreement, is attached to this Affidavit as Exhibit A.

8. As a part of the transaction contemplated by the Stock Purchase Agreement, I was required to and did in fact enter into a Noncompetition Agreement with Miller & Schroeder. A copy of this Noncompetition Agreement dated July 31, 1997, is attached hereto as Exhibit B. At the time of this transaction, I was very involved in the company's underwriting business as well as the management of the firm. As such, I had many contacts with the firm clients particularly in the mortgage-banking and Indian gaming sectors and had the ability to control a significant amount of the firm's business. At this time, my income at Miller & Schroeder was approximately $1,000,000 per year, a significant part of which was performance based. Additionally, at this time, I was the President of Miller & Schroeder, and also had the longest tenure of any Miller & Schroeder employee. As such, and as the head of the Minneapolis office, the employees of Miller & Schroeder looked to me as the person in authority in the Minneapolis office. Based primarily on these factors, and not necessarily a great desire on my part to leave the business, it was decided that I would not remain with Miller & Schroeder subsequent to the sale of the control of Miller & Schroeder to MI Acquisition Corporation pursuant to the terms of the Stock Purchase Agreement.

9. During the summer of 1997, due diligence with respect to the sale went on for a significant period of time and I personally had doubts as to whether the sale would close. However, on July 31, 1997, the transaction contemplated under the Stock Purchase Agreement was in fact closed. As a part of the sale, I resigned immediately as an officer and director of Miller & Schroeder, and subsequent to the sale, I owned no stock in Miller & Schroeder or its subsidiary, and was not an employee. My sole relationship subsequent to July 31, 1997, was pursuant to the terms of the Noncompetition Agreement.

10. At the closing, the parties prepared and signed a Closing Statement Certificate and Receipt, a copy of which is attached hereto as Exhibit C. Page 1 of the Closing Statement Certificate and Receipt indicates that in exchange for my 49% interest in Miller & Schroeder, I was to receive closing proceeds of $7,310,725.55. Pursuant to the terms of the Purchase Agreement, certain notes, advances and other liabilities owed by me to either Miller & Schroeder or Miller & Schroeder Financial, Inc. ("Miller & Schroeder Financial") were required to be paid as a part of the closing. As set forth in the closing statement, these amounts were withheld by MI Acquisition Corporation at closing, resulting in total withholding/adjustments at closing of $1,362,736.23. The net closing proceeds paid to me were $5,947,989.32. Of the amounts withheld at closing, $500,000 was wire transferred on my behalf to Mid-America Bank for an obligation relating to the Crossings. It is my understanding that the Trustee is not seeking to recover this amount from me in this adversary proceeding. Additionally, $66,743.94 was wire transferred to Chase Manhatten Bank for a Mercedes Benz automobile which I was purchasing from the company. It is also my understanding that the Trustee is not seeking to recover this amount. A copy of the wire transfer instructions is attached to this Affidavit as Exhibit D. The balance of the amounts withheld at closing were used to satisfy the remaining liability. As set forth on the closing statement, a portion of the funds were used to purchase three life insurance policies which the company held on my life. The amount paid was the cash surrender value of those policies. A portion was used to satisfy two notes payable to Miller & Schroeder together with accrued interest, and one note payable to Miller & Schroeder Financial. $81,000 was used to purchase from Miller & Schroeder Financial a country club membership which had been in the company's name. $175,000 was repaid for bonus advances. $45,007.62 was repaid in expense reimbursements. Finally, $13,792.01 was paid for an item referred to an aviation charter

receivable. I do not recall specifically what this item relates to, but believe it related to a receivable which was apparently due to Miller & Schroeder Financial from my wife's aviation charter company.

11. In consideration of the adjustments to closing, I received a transfer of the insurance policy, a satisfaction of the notes, the country club membership and the obligations were satisfied on the books and records of the companies. A copy of the satisfied promissory notes are attached hereto as Exhibit E-1, E-2 and E-3.

12. After the closing, I never returned to my office at Miller & Schroeder. My personal belongings were packed up by my former secretary and were shipped to me.

13. Pursuant to the provisions of the Stock Purchase Agreement, a closing financial statement was prepared by KPMG and a purchase price adjustment was made reflecting the difference in the book value of the company from the January 31, 1997, book value to the closing financial statement prepared as of July 31, 1997. The Closing Financial Statement dated July 31, 1997 is attached hereto as Exhibit F. The post-closing financial statements resulted in a purchase price adjustment of $1,274,874.10, of which I was required to and did pay 49%. The parties entered into a Settlement Agreement reflecting such purchase price adjustment dated December 11, 1997. A copy of that Agreement is attached hereto as Exhibit G.

14. In connection with the filing of my 1997 taxes, I paid tax on the entire amount of the sales proceeds received by me; that is, the gross sales proceeds reflected on the closing statement as adjusted by the post-closing sales adjustment in an amount totaling $6,704,931.

15. At no time subsequent to the sale, or as a part of the negotiation of the adjusted sales price or execution of the Settlement Agreement did MI Acquisition Corporation, Miller &

Schroeder or Miller & Schroeder Financial indicate that the officer liabilities had not been satisfied from the funds withheld from me at closing.

16. My sole contact with the company after the closing of the sale of my stock was to receive checks from the company for the payments due under the Noncompetition Agreement. During the term of the Noncompetition Agreement, I was approached on a number of occasions by contacts in the securities industry and asked whether I was interested in working for them or consulting with them. Because of my obligations under the Noncompetition Agreement, I declined to discuss such opportunities. On several occasions during the term of the Noncompetition Agreement, I was approached by former client and business contacts relative to business opportunities. On each occasion, I directed those parties to Miller & Schroeder. After the term of the Noncompetition Agreement had expired, I was again approached by Eldon Miller of Miller Johnson Steichen and Kinnard and had discussions relative to possible employment with that firm. For reasons unrelated to the Noncompetition Agreement, those discussions did not result in my employment with that firm. Had it not been for the sale of my interest in Miller & Schroeder and my having entered into the Noncompetition Agreement I believe it is likely that I would have sought, and would have obtained employment with another firm in the securities industry in the Twin Cities.

FURTHER AFFIANT SAITH NOT.

Roger J. Wikner

Subscribed and sworn to before me
this 17th day of March, 2004.

Notary Public

LARRY B. RICKE
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2005

2458785v2

WIKNER EXHIBITS A – G ARE BEING FILED

SEPARATELY ON CD.ROM

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee

Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

AFFIDAVIT OF LARRY B. RICKE

Larry B. Ricke, being first duly sworn and upon oath states and deposes as follows:

1. I am one of the attorneys representing Roger J. Wikner in connection with the above captioned adversary proceeding.

2. Attached hereto and made part of this Affidavit are Roger J. Wikner's First Set of Interrogatories and Request for Production of Documents to Plaintiff and First Set of Request for Admission. Attached hereto as Exhibit A are Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents and attached as Exhibit B are Plaintiff's Responses to Request for Admissions.

3. Attached hereto as Exhibit C is Wikner's Request for Production of Documents (Second Set) and Plaintiffs Answers to Defendant's Request for Production of Documents.

4. In connection with Responding to the attached Request for Production of Documents, Plaintiff produced for inspection and copying a number of documents, including the following:

a. MI Acquisition Corporation and subsidiaries Consolidated Financial Statements and Consolidating Schedules October 31, 1998 and 1997 (attached as Exhibit D);

b. Miller & Schroeder, Inc. and subsidiaries Consolidated Financial Statements and Consolidating Schedules October 31, 2000 and 1999 (attached as Exhibit E);

c. October 31, 1997 audited Financial Statement of MI Acquisition Corporation and subsidiaries (attached as Exhibit F).

5. Attached hereto as Exhibit G to this affidavit are excerpts from the deposition of Roger Wikner.

6. Attached hereto as Exhibit H to this affidavit are excerpts from the deposition of James Dlugosch.

7. Attached hereto as Exhibit I are excerpts from the deposition of Brian Leonard.

8. In connection with conducting discovery in this adversary proceeding, I caused to be served on KPMG, the former accountants for the Debtor, a Request for Production of Documents and subpoena duces tecum. In response to the Request for Production of Documents and subpoena, certain financial statements and work papers were produced by KPMG. Attached hereto as Exhibit J are excerpts from those work papers, bates stamps number 0077. Also attached is a copy of a Memorandum produced by KPMG in response to the subpoena, bates numbers 0591 through 0595.

9. In connection with this case, I have reviewed the claims register and proofs of claim filed in the SRC Holding Corporation and Securities Resolution Corporation bankruptcies.

Based on that review, it does not appear that any of the claims which have been filed in these cases represent creditors who had existing claims against Miller & Schroeder or Miller & Schroeder Financial as of July 31, 1997. The vast majority of the claims appear to have been filed by parties asserting security claims substantially after July 31, 1997.

FURTHER AFFIANT SAITH NOT.

Larry B. Ricke

Subscribed and sworn to before me
this 18 day of March, 2004.

Jill M. Lillis

Notary Public

JILL M. LILLIS
Notary Public
Minnesota
My Commission Expires Jan 31, 2005

RICKE EXHIBITS A – J ARE BEING FILED

SEPARATELY ON CD.ROM

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee

Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

ORDER

This matter having come before the Court upon the Motion of Roger J. Wikner for Summary Judgment against the Plaintiff, Brian F. Leonard, Trustee (Plaintiff), Allen I. Saeks and Larry B. Ricke appeared on behalf of the movant, Defendant Roger J. Wikner. Other appearances were as noted on the record. Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant's Motion is hereby granted.

2. Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure, it appearing that there are no genuine issues of material fact, and that Defendant is entitled to judgment as a matter of law, Defendant Roger J. Wikner is hereby entitled to judgment in his favor of each of Counts I through VI of Plaintiff's Complaint, land Counts I through VI are hereby dismissed, on their merits, with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:___________, 2004

By the Court:

____

Nancy C. Dreher
U.S. Bankruptcy Judge

CERTIFICATE OF SERVICE

In Re:

SRC Holding Corporation, Bky No. 02-40284

Debtor,

Brian F. Leonard Trustee

Plaintiff, Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

I, Jill M. Lillis, declare under penalty of perjury that on the 19th day of March, 2004, I served Notice of Motion, Motion, Memorandum, supporting Affidavits and Proposed Order for Summary Judgment by hand delivery as follows:

Matthew R. Burton, Esq.
Leonard, O'Brien, Wilford, Spencer & Gale, Ltd.
100 South Fifth Street, Suite 1200
Minneapolis, MN 55402

Joseph W. Lawver
Messerli & Kramer
1800 Fifth Street tower
150 South Fifth Street
Minneapolis, MN 55402

Dated: March 19, 2004

/e/ Jill M. Lillis
Jill M. Lillis