

**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.

**MEMORANDUM IN OPPOSITION TO TRUSTEE'S
MOTION FOR SUMMARY JUDGMENT**

The facts upon which Defendant Roger J. Wikner (“Wikner”) bases his opposition to the Trustee’s Motion for Summary Judgment are set forth in detail in Wikner’s Motion for Summary Judgment, accompanying Memorandum of Law, and Affidavit of Roger J. Wikner and Affidavit of Larry B. Ricke. For the reasons set forth therein, and as set forth below, the Trustee’s Motion should be denied and the Court should grant Wikner’s Motion for Summary Judgment.

A. The Officer Liabilities were Paid by Wikner at Closing.

Wikner was party to a Stock Purchase Agreement among Wikner, James Iverson (“Iverson”) and Steven Erickson (“Erickson”), and MI Acquisition Corporation (“MIAC”), dated June 20, 1997, and effective as of June 1, 1997. (Stock Purchase Agreement; Exhibit A to Wikner Affidavit). MIAC was buying 100% of the stock of Miller & Schroeder, Inc. (“M&S”) from Wikner, Iverson, and Erickson. Miller & Schroeder Financial (“MSF”) was a subsidiary of

M&S. The transaction was structured in the normal fashion for such acquisitions, i.e. an acquisition company is formed to buy the target stock and subsequently the acquisition corporation and target are merged to allow the acquisition debt to be financed by the target income. The closing occurred on July 31, 1997. Pursuant to the provisions of the Stock Purchase Agreement, Wikner was to receive \$7,310,725.55 for his 49% interest in M&S. Pursuant to § 5.5 of the Stock Purchase Agreement, Wikner was required to repay at closing to M&S and MSF amounts owed by him to the companies (the “Officer Liabilities”).

For purposes of this motion, it is important that the court understand that SRC Holding Corporation, the Debtors, MIAC and M&S are all one legal entity. M&S was acquired by MIAC and as typical later merged into MIAC. MIAC was the surviving entity, and changed its name to Miller & Schroeder Inc., which thereafter changed its name to SRC Holding Corporation. Legally they are one and the same entity and have been for years.

The common element, if such exists, which runs through the Trustee’s claims is the alleged non-payment of the Officer Liabilities by Wikner. According to the Trustee, Wikner received a fraudulent transfer because the satisfaction of the Officer Liabilities at closing was not supported by adequate consideration – it was “debt forgiveness”.¹ The Trustee alleges that the satisfaction of the Officer Liabilities was “waste”, again on the theory that the debt was not paid or, alternatively that the debt was forgiven. The Trustee also alternatively argues, based on the same facts, that such conduct constituted conversion or gives rise to the equitable remedy of unjust enrichment. The Trustee’s theories demonstrate an apparent attempt to make a relatively common merger-acquisition transaction complex while at the same time avoiding a simple fact

¹ Throughout the Trustee’s Memorandum of Law, the Trustee interchangeably refers to “debt forgiveness” and “nonpayment of debt”.

which cannot be disputed – the Officer Liabilities were in fact paid at closing by offset to the purchase price granted to the Debtor, now SRC Holdings, by Wikner.

At the closing of the stock sale, as reflected by the Closing Statement (Wikner Affidavit, Exhibit C) the proceeds of \$7,310,725.55, which Wikner received at the closing, were handled as follows:

- a. \$566,743.94 paid by wire transfer to Mid-America Bank and Chase Manhattan Bank for corporate obligations owed by Wikner;
- b. \$795,992.29 credit to MIAC in satisfaction of the Officer Liabilities owed to the wholly owned subsidiary; and
- c. \$5,947,989.32, as the net proceeds, after the above payment, paid to him by wire transfer.

Did Wikner actually write a check to M&S and MSF to satisfy the Officer Liabilities? No; instead the parties “netted” the various amounts owing to one another and accounted for the sums by way of bookkeeping entries. Far from being either mystical or nefarious, such accounting treatments occur thousands of times every day in business and personal transactions. For example, in a typical residential real estate transaction, parties do not write checks or pass cash back and forth over the table to satisfy each of the buyer’s and seller’s obligations. Rather, the parties arrive at a “net” number due from the buyer to the seller and account for debits and credits on a closing statement. That is exactly what happened here.

The Trustee argues that despite the “netting” MIAC never actually paid the \$795,992.29 over to M&S. Instead, the Trustee argues, this sum was merely carried on the books of M&S as an inter-company debt due to M&S from MIAC. Indeed, as reflected in the books and records of both MIAC and M&S, the parties did treat the \$795,992.29 as a loan from M&S to MIAC, its

new parent corporation. MIAC assumed the liability and M&S discharged Wikner. The assumption was full consideration for the discharge of the liabilities, no different than if cash had passed.

Suppose, instead, that MIAC had paid the purchase price to Wikner by way of three cashier's checks: one for \$566,743.94; one for \$795,992.29; and one for the net amount payable to Wikner of \$5,947,989.32. Suppose further that Wikner then endorsed the \$795,992.29 check to M&S in satisfaction of the Officer Liabilities. Certainly, the Trustee could not claim this to be less than full payment in satisfaction of Wikner's Officer Liabilities. Now, suppose further that M&S then endorsed the \$795,992.29 cashier's check over to MIAC as a loan due from MIAC. Would this action render the Officer Liabilities paid by Wikner any less satisfied?

From a legal, accounting, and common sense point of view, this is precisely what occurred. Moreover, at the end of the day (July 31, 1997) the balance sheets of the Debtors were unchanged, except that a receivable due from officers was replaced by a receivable due from the parent, a perfectly solvent corporation. The Trustee's purported claims seek to elevate form over substance. When the simple facts are laid out, there can be no dispute – the Officer Liabilities were actually paid, not forgiven. The transaction was normal in all respects. (See Affidavit of Morris M. Sherman). Thereafter MIAC merged with M&S and the intercompany debt was eliminated as a matter of law. There is no debt here either from Wikner or M&S upon which to sue.

Every party to the transaction recognized that the Officer Liabilities were satisfied. Indeed, everyone but the Trustee recognizes that fact. After the closing, the parties entered into a Settlement Agreement dated December 11, 1997 by and among Wikner, Iverson, Erickson, MIAC and M&S, and exchanged mutual releases. (The Settlement Agreement is Exhibit G to

the Wikner Affidavit). The Trustee's claims beg the question – if the Officer Liabilities were not paid at closing, why has the Trustee not sued on the debt? Why assert claims of fraudulent transfer and waste and conversion? Why not sue on the debt? The answer, of course, is that he could not sue on the debt because it was in fact paid. The Trustee apparently recognizes some weakness in his theory, but states that the payment of the liabilities was by way of “mere accounting entry”. Accounting entries however are universally used as evidence of the validity of debts and liability in our economic system. These “mere accounting entries” were subjected to the scrutiny of a certified audit by M&S’ auditors. The payment and satisfaction of the Officer Liabilities as reflected in the books and records of the Debtors was real.

B. Effect of Merger.

It is undisputed that on or about May 8, 2000, MIAC and M&S merged. A copy of the Certificate of Merger and the Articles of Merger are attached to the Trustee’s Motion as Exhibit F. Pursuant to the Articles of Merger, M&S was merged into MIAC. The common stock of M&S was cancelled. MIAC emerged as the surviving corporation.² MIAC then changed its name to “Miller & Schroeder, Inc.” Pursuant to Article V of the Articles of Merger, and Minnesota statutes, all of the assets and liabilities of M&S survived and became the assets and liabilities of the surviving entity, MIAC, then to be known as Miller & Schroeder, Inc.

Assuming for the sake of argument that the officer liabilities had not been paid, but in fact, still existed as of the date of the merger, the obligation owed by Wikner would have become an asset of the new Miller and Schroeder, Inc., formerly MIAC. Had MIAC sought to collect this “debt” from Wikner, Wikner would have been and still is entitled to assert a right of set-off since he had credited MIAC with the liabilities at closing.

² The Trustee at § 21, page 5 of his Memorandum states that M&S was the surviving entity – that is incorrect.

The Trustee's argument that creditors of M&S were somehow deprived of assets through the stock purchase transaction becomes even more illusory when the merger is taken into account. Whether the merger occurred on July 31, 1997, or May 8, 2000, following the merger, MIAC and M&S became one entity. If there were an amount due M&S from Wikner, then it is equally true that there was a corresponding amount due Wikner from the merged entity, equal and offsetting. MIAC and M&S are the same corporation.

C. M&S Was Not In the "Zone" or "Vicinity" of Insolvency on July 31, 1997.

The Trustee, obviously searching for a "victim" of the stock purchase transaction – a transaction in which 100% of the shareholders of Miller & Schroeder participated, and at a time when the certified and audited books and records of the company reflected a shareholder equity in excess of \$10,000,000 – now suggests for the first time in his Motion for Summary Judgment that a fiduciary duty was owed to creditors of M&S by Wikner in July of 1997 because, according to the Trustee, M&S was in the "zone" or "vicinity of insolvency".³

1. The certified financial statements of the Debtors show they were neither insolvent nor in the vicinity of insolvency.

As set forth above, pursuant to the provisions of the stock purchase agreement, a post-closing financial statement as of July 31, 1997, was prepared. That financial statement reflected total shareholder equity as of July 31, 1997, of \$10,552,344.⁴ On October 31, 1997, according to the certified audit conducted by KPMG Peat Marwick, LLP, the Debtors' consolidated balance sheet reflected total shareholder equity of \$8,159,751. On October 31, 1998, again, based on

³ The compact Oxford English Dictionary defines "vicinity" as: "The state, character, or quality of being near in space: propinquity, proximity. Nearness in degree or quality; close relationship or connection, resemblance, likeness." If M&S on July 31, 1997, nearly five years prior to its bankruptcy and with a balance sheet reflecting in excess of \$10 million in shareholder's equity was in the "vicinity" of insolvency, then that phrase is meaningless in defining a term that can be useful in analysis.

⁴ The purchase price set forth in the Stock Purchase Agreement was \$15 million. However, as noted above, the Settlement Agreement gave rise to a downward principal adjustment to the purchase price of \$1,242,971.10 reflecting an adjusted purchase price of \$13,757,028.90.

KPMG's certified audit, the Debtors' consolidated balance sheet reflected a total shareholder equity of \$9,387,101 and net income for the period of \$1,096,350. The Debtors' audited financial statements for periods ending October 31, 1999, and 2000 reflected shareholder equity of \$11,034,090 and \$10,586,601 respectively for those periods.

The Trustee suggests that the Debtors were insolvent based on the Heritage Bond offering which were underwritten by M&S. The Trustee's argument fails for the following reasons:

(a) Even if M&S was the underwriter for the Heritage Bond offerings, it was not the obligor on the bonds. The sale of the bonds did not give rise to a debt owed by M&S.

(b) Even based on a reading of the Trustee evidence in the light most favorable to the Trustee, the Trustee's suggestions that the Heritage Bond offering constituted an obligation of the Debtors on July 31, 1997, is without merit. Even the hearsay testimony of David Rhinehart, quoted by the Trustee at pages 6 and 7 of his memorandum, states that the defaults relating to the Heritage Bond offerings did not occur until approximately June, 2000, three years after the Stock Purchase Agreement. This time line is consistent with the testimony of James Dlugosch. At Dlugosch's February 10, 2004, deposition, he testified that: the Heritage Bonds were not in default until 2000 or 2001; that the risk of default and potential claims against M&S was a "potential" liability; and that litigation relating to the bonds did not arise until "late 2000" (Dlugosch deposition pgs. 37-40).

SFAS No. 5 governs the GAAP accounting for contingencies. Such practices identify different probabilities for the occurrence of loss contingencies. The probabilities range from "probable" to "reasonably possible" to "remote". See 2004 U.S. Master GAAP Guide, Jarnagen,

CCH, § 718, page 471. According to GAAP a loss contingency should be charged to income only if two conditions are met:

- (1) On the balance sheet date, it is probable, from information available before the release of the financial reports, that an entity has incurred a liability or that an asset of the enterprise has been impaired and;
- (2) The entity can reasonably estimate the amount of the loss.

Id at 471. Moreover, companies are not permitted to disclose loss contingencies relating to “general or unspecified business risks.” *Id* at 473.

The solvency or insolvency of the Debtors is not to be determined with the benefit of hindsight. The fact that disgruntled holders of the Heritage Bond subsequently filed claims against M&S does not render such claims anything other than what they were in July of 1997 – a remote loss contingency, arising from a general business risk. In July 1997, M&S was neither “insolvent” nor in the “vicinity of insolvency”, and the Heritage Bonds are completely irrelevant.

2. The McDavitt Affidavit does not support the Trustee’s claims.

The Trustee attaches an affidavit of J. Patrick McDavitt (“McDavitt”), an attorney with the law firm of Briggs and Morgan, which acted as counsel to MIAC in connection with the transaction. Far from supporting the Trustee’s assertion that the company was on the verge of insolvency, the affidavit in fact states that, as counsel for MIAC, McDavitt and Briggs and Morgan reviewed threatened and existing litigation and contingency matters and estimated the anticipated legal fees and estimated loss from such contingencies as a total of only \$300,000 as of July 31, 1997. When put in the context of MIAC being clearly motivated to *maximize* the amount of loss contingencies for purposes of adjusting the purchase price downward, the \$300,000 was obviously a generous number ... not a conservative one.

3. **The Kleinberger Affidavit is self-serving, of no probative value, and should be disregarded.**

On or about October 23, 2003, Plaintiff served answers to Defendant Wikner's Interrogatories and Request for Production of Documents. In response to Interrogatory No. 13, Plaintiff was asked to identify each person expected to be called as an expert witness at trial, Plaintiff answered as follows: "Plaintiff expects to call Professor Daniel Kleinberger of the William Mitchell College of Law to testify about the stock sale and the issues of fiduciary duties. The bases for his opinion will be the records related to the stock purchase that is the subject of this suit." Request for Production of Documents No. 3 requested that Plaintiff provide the following: "All reports, summaries, or other documents prepared, reviewed, relied upon or which may be reviewed or relied upon, by any expert whom you expect to call to testify in this adversary proceeding." Plaintiff's response was "none at this time". As set forth in Supplemental Affidavit of Larry B. Ricke, on several occasions thereafter, Ricke inquired of Burton as to the existence of an expert's report or opinion and was told that none existed. On January 20, 2004, Ricke wrote to Mr. Burton. A copy of the letter is attached to the Supplemental Affidavit of Larry B. Ricke. The letter stated in part as follows:

"You continue to refer to opinions which have been or expect to be rendered by your expert in the case. We have requested, and as of the date of this writing, you have not produced any expert reports. To the extent such reports are in your possession, I remind you of your obligation to produce the same."

Subsequent to that letter, and prior to the discovery cut-off, Ricke again had a conversation with Burton in which Ricke asked yet once again about the substance of any opinion to be rendered by an expert on behalf of Plaintiff. In response, Mr. Burton indicated that Mr. Kleinberger was not so much an expert as he was a party with whom Trustee's counsel was consulting in connection with the Trustee's legal theory. In reliance on this conversation with the Trustee's

counsel, counsel for Wikner determined not to depose Mr. Kleinberger prior to the discovery cut-off.

The Trustee now submits, in support of his motion, an Affidavit of Daniel S. Kleinberger, in which Kleinberger opines that in July of 1997, “MSI was in the vicinity of insolvency”, and that “Wikner and Iverson each violated their fiduciary duties to MSI and its creditors”.

Although this Court’s scheduling orders provided that unless the parties agreed otherwise by written stipulation, FRCP Rule 26(a)(2) does not apply, Wikner through interrogatories and requests for production of documents did in fact request “all reports, summaries, or other documents prepared, reviewed, relied upon or which may be reviewed or relied upon” by any expert to be retained by the Trustee. Thus, Wikner sought to obtain the same information which would have been required by FRCP Rule 26(a)(2). Rule 26(a)(2) requires the disclosure of the identity of the witness as well as “a complete statement of all opinions to be expressed and the bases and the reasons therefore; the data or other information considered by the witness in forming the opinion; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness ...”. Trustee’s response was “none at this time”, and at no time has the Trustee supplemented such response. Based upon the Trustee’s failure to disclose the facts, exhibits and documents upon which the expert purports to base his opinion, and further based on Trustee’s counsel’s representation that Kleinberger was a “consulting” expert and not a “testifying” expert, the Kleinberger affidavit should be stricken and disregarded by the Court.

Moreover, the Kleinberger affidavit is self serving and of no probative value. In essence, the Kleinberger opinion is little more than a statement that he has read the Trustee’s moving papers, and based upon his review of the moving papers and based upon what the Trustee has

represented to him, he agrees with the Trustee's conclusions. Finally, Kleinberger is clearly not qualified to render an opinion as to the financial condition of the Debtors in 1997.

D. Wikner Was Not Subject to An Employment Agreement on July 31, 1997.

Trustee alleges that the Noncompetition Agreement entered into between M&S and Wikner on July 31, 1997, was not supported by consideration because, the Trustee asserts, Wikner was already subject to an employment agreement with a one-year non-compete. Wikner has already set forth in great detail the consideration which supported the noncompetition agreement (see Wikner Memorandum in Support of Motion, pp. 18-21). However, the Trustee's argument that the noncompetition agreement was not supported by consideration because Wikner was already subject to an employment agreement is incorrect and has no basis in fact. The sole evidence in the record relating to the November 1, 1985, employment contract is Wikner's deposition testimony to the effect that that agreement was terminated some time during years 1991 through 1993. (Wikner deposition, p. 22-23).

CONCLUSION

For the reasons set forth herein, and in Wikner's Cross-Motion for Summary Judgment and accompanying Memorandum of Law which are incorporated herein by reference in response to the Trustee's Motion, Trustee's Motion for Summary Judgment should be denied. With respect to the Trustee's preference claims, which have not here been addressed, Wikner incorporates by reference those arguments made in the Wikner Motion for Summary Judgment, and specifically, that Wikner is entitled to judgment as a matter of law on the preference claims that in 2001, nearly four years after the stock sale, Wikner was not an insider as a matter of law. The fraudulent transfer counts have been adequately addressed in Wikner's Motion and accompanying Memorandum of Law. Finally, the Trustee purported conversion and unjust

enrichment claims necessarily fail for the reasons discussed in this memorandum – the Officer Liabilities were in fact paid. Accordingly, Wikner requests that this Court enter its judgment denying the Trustee’s Motion for Summary Judgment in its entirety and determining that Wikner is entitled to judgment as a matter of law on each of the Trustee’s Counts I through VI.

Dated: April 28, 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

Facsimile: 612-335-1657

Attorneys for Defendant 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 LARRY B. RICKE

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

1. I am an attorney with the law firm of Leonard, Street and Deinard and am one of the attorneys representing Roger J. Wikner in connection with the above-captioned adversary proceeding.

2. In connection with the adversary proceeding, I caused to be served upon Trustee Interrogatories and Requests for Production of Documents. Copies of the Interrogatories and the Request for Production of Documents are attached to the Affidavit of Larry B. Ricke accompanying Wikner's Motion for Summary Judgment as Exhibit A.

3. Interrogatory No. 13 asks Plaintiff to identify each person expected to be called as an expert witness at trial. Plaintiff's Answer to Interrogatory 13 identified Daniel Kleinberger as a potential expert and stated that the subject would be "the stock sale and the issues of fiduciary

duties” and that the basis for his opinion “will be the records related to the stock purchase that is the subject of this suit.”

4. Request for Production of Documents No. 3 served with the Interrogatories requested that Plaintiff provide “all reports, summaries, or other documents prepared, reviewed, relied upon or which may be reviewed or relied upon, by any expert whom you expect to call to testify in this adversary proceeding.”

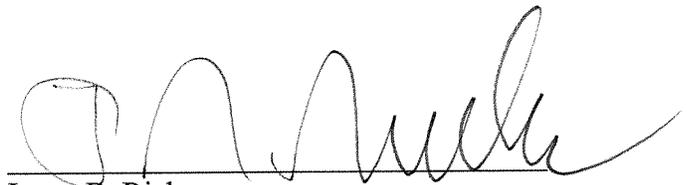
5. The response to Request for Production of Documents No. 3 was “None at this time.” At no time has Plaintiff supplemented the discovery responses.

6. Thereafter, on several occasions, I inquired of Trustee’s counsel as to the existence of an expert’s report and was told that none existed. On January 20, 2004, I wrote to Matthew Burton. A copy of the letter is attached hereto as Exhibit A. The letter stated in part as follows: “You continue to refer to opinions which have been or expect to be rendered by your expert in the case. We have requested, and as of the date of this writing, you have not produced any expert reports. To the extent such reports are in your possession, I remind you of your obligation to produce the same.”

7. Subsequent to the January 20, 2004, letter required to the discovery cut-off, I had a conversation with Mr. Burton in which I again asked whether the Plaintiff had obtained an expert’s opinion. In response, Mr. Burton indicated that Mr. Kleinberger was not as much an expert as he was a party with whom Trustee’s counsel was consulting in connection with the Trustee’s legal theories.

8. Based on this conversation and the fact that the Trustee had not supplemented discovery responses to provide either a report or any materials or exhibits on which an expert would be basing his opinion, the decision was made not to depose Mr. Kleinberger.

FURTHER AFFIANT SAITH NOT.


Larry B. Ricke

Subscribed and sworn to before me
this 28th day of April, 2004.

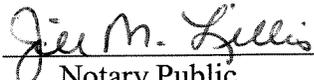

Notary Public



EXHIBIT A

LEONARD, STREET AND DEINARD

PROFESSIONAL ASSOCIATION

January 20, 2004

Larry B. Ricke
612-335-7080
larry.ricke@leonard.com

Matthew R. Burton
Leonard, OBrien, Spencer, Gale & Sayre
100 South Fifth Street, Suite 1200
Minneapolis, MN 55401

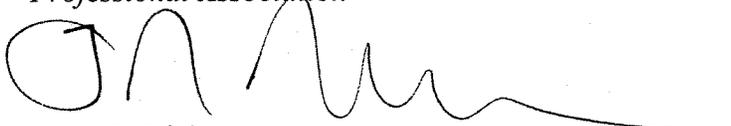
RE: Leoanrd v. Wikner

Dear Mr. Burton:

Enclosed within and served upon you please find Defendant Roger Wikner's Second Request for Production of Documents in the above matter. You continue to refer to opinions which have been or expect to be rendered by your expert in the case. We have requested, and as of the date of this writing, you have not produced any expert reports. To the extent such reports are in your possession, I remind you of your obligation to produce the same.

Very truly yours,

LEONARD, STREET and DEINARD
Professional Association



Larry B. Ricke

LBR/jl
Enclosure

150 SOUTH FIFTH STREET SUITE 2300 MINNEAPOLIS, MINNESOTA 55402 TEL 612-335-1500 FAX 612-335-1657

LAW OFFICES IN MINNEAPOLIS, SAINT PAUL, MANKATO, SAINT CLOUD AND WASHINGTON, D.C.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

SRC Holding Corporation,

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Debtor,

Brian F. Leonard Trustee,

Plaintiff,

Adv. Pro. No. 03-4153

vs.

Roger J. Wikner,

Defendant.

AFFIDAVIT OF MORRIS M. SHERMAN

Morris M. Sherman, being first duly sworn and upon oath states and deposes as follows:

1. I am a senior shareholder in the law firm of Leonard, Street and Deinard and represented Roger J. Wikner and the other selling shareholders in connection with the sale of Miller & Schroeder, Inc. to MIAC.

2. I have been engaged in the practice of corporate law with particular emphasis on mergers and acquisitions for the past 25 years.

3. The structure of the transaction by which MIAC acquired Miller & Schroeder and its subsidiaries was regular in all respects. By that I mean, it was the customary structure for such stock purchase transactions. Normally an acquisition corporation is formed to buy the stock of the target, in this case Miller & Schroeder, Inc., and thereafter the target is merged with the acquisition corporation thus allowing the acquisition corporation and the target to offset interest on the acquisition debt with income from the target business. It could also be handled by leaving

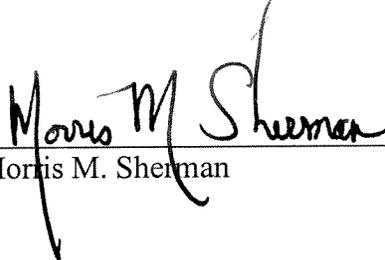
the two in place and filing consolidated returns. The merger is simpler. In this particular instance, a merger was contemplated and occurred. When that merger occurs, as a matter of law, all intercompany debt is eliminated. A corporation cannot owe itself money.

4. The closing of this transaction was typical. It has been at least two decades in my experience since people came to the closing table at a significant merger or acquisition with checks. All funds are normally transferred by wire and all amounts due from the seller to the buyer are normally netted. It is, in effect, no different than a simple house closing except that the bankers or the lawyers are the closing agent. In this case, the selling officers of the corporation, including Roger Wikner, had received certain advances and bought certain assets from the target Miller & Schroeder, Inc.. The transaction was based upon the net book value of the company which therefore required that the advances and other obligations be paid or netted out. The obligations were paid by offset at the closing. It is typical that the offset be granted to the acquisition corporation since the target is generally not a party to the transaction itself and neither receives or pays any money. The thought that one would have written a check to the target which in turn would have advanced the check to the acquisition company which in turn would have given the check to the selling shareholders is wholly inconsistent with modern commercial transactions. It is a suggestion evidencing a lack of understanding of the normal way in which these transactions are closed, i.e., sums are netted, funds are wired.

5. With respect to the solvency of the two companies in question, MIAC and Miller & Schroeder, Inc., there was extensive due diligence performed by the buyer and by the seller and, in each case, both the certified financial statements of the parties and the due diligence clearly indicated both parties were solvent. MIAC had the funds to pay at closing and Miller & Schroeder itself was sold based upon a certified book value in excess of \$12 million.

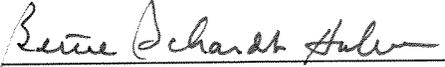
6. All parties involved in this transaction deemed the officers' liabilities paid in full at the closing by way of credit. Subsequently, at the final true up of the net worth of the company which, pursuant to the underlying Purchase Agreement, occurred in December of 1997, the parties extended to one another full and final mutual releases supported by the consideration recited therein. Everyone involved in the transaction viewed the officer liabilities as paid. All parties were represented by experienced lawyers, accountants, and advisors. No one suggested that the transaction be handled as the Trustee now claims it should have been handled.

FURTHER AFFIANT SAITH NOT.

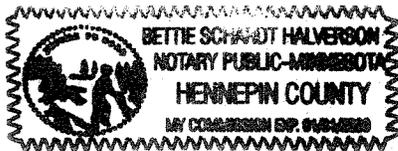


Morris M. Sherman

Subscribed and sworn to before me
this 28th day of April, 2004.



Notary Public



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 28th day of April, 2004, I personally served Memorandum in Opposition to Trustee's Motion for Summary Judgment on the following:

Matthew R. Burton
Leonard, O'Brien, Spencer, Gale & Sayre, Ltd.
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402

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

Dated: April 28, 2004

/e/ Jill M. Lillis

Jill M. Lillis