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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

11 In re
12 FRUEHAUF TRAILER CORPORATION,
13 et al.,
14 Debtors.

15 DANIEL HARROW, as Successor
16 Trustee of the End of the
17 Road Trust and American
18 Trailer Industries, Inc.,
19 Plaintiff,

20 v.
21 CHRISS STREET,
22 Defendant.

Case No.: 96-1563 through 96-1572
Jointly Administered

Chapter 11

Adv. No.: 08-01865RN

MEMORANDUM OF DECISION AFTER TRIAL

DATE: February 3, 2010
TIME: 9:00 a.m.
PLACE: Courtroom 1645

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INTRODUCTION

25 This adversary proceeding came before this Court pursuant to
26 the Venue Transfer Order signed by Judge Peter J. Walsh of the
27 United States Bankruptcy Court in the District of Delaware and
28 entered on or about October 9, 2008. The Complaint has been amended
twice. The second amended complaint avers virtually the same

1 factual allegations as the first amended complaint with certain
2 refinements. The causes of action have been reduced to the
3 following: six (6) counts of breach of fiduciary duties, one (1)
4 count for breach of liquidating trust agreement, one (1) count for
5 equitable forfeiture of compensation, and one (1) based on fraud.
6 Defendant Chriss Street ("Defendant" or "Street") counterclaimed for
7 indemnification¹.

8 In Courtroom 1645 of the above entitled Court, the Honorable
9 Richard M. Neiter, United States Bankruptcy Judge presiding,
10 conducted a two-day bench trial on February 3 and 4, 2010. Robert
11 T. Kugler, Robert L. DeMay and Jacob B. Sellers appeared on behalf
12 of the Plaintiff Daniel W. Harrow ("Plaintiff" or "Harrow") and
13 Phillip Greer appeared on behalf of the Defendant. No other
14 appearances were made.

15 The Stipulated Facts in the Amended Order Approving Joint
16 Pretrial Conference Statement² ("Amended PTO" or "Stipulated
17 Fact(s)") as supplemented by the Supplemental Amendment to the
18 Pretrial Order Pursuant to the Court's Order ("PTO Supplement"), the
19 164 Stipulated Exhibits for Trial ("Stipulated Exhibit(s)") and
20 impeachment evidence marked as Exhibits 164, 165, 166, 168 and 169
21 ("Impeachment Exhibit(s)") govern the facts of this case. All
22 Stipulated Exhibits and the Impeachment Exhibits were admitted into
23 evidence at trial. The additional evidence consisted of testimonies
24

25 ¹ This issue, however, is limited by the Delaware Bankruptcy
26 Court's decision on summary judgment in the adversary proceeding
27 entitled Street v. End of the Road Trust rendered on or about
September 17, 2008 by Judge Peter Walsh.

28 ² The Amended PTO was entered on January 14, 2010.

1 by the Plaintiff, Tasha Dolan, Abel Wenning, Plaintiff's damages
2 expert, Tammy Lyons, and the Defendant.³ All witnesses were cross-
3 examined.

4 The Court has carefully considered the Stipulated Facts,
5 Plaintiff's pretrial brief, the parties' post-trial briefs, the
6 testimonies and all exhibits admitted into evidence. After trial,
7 the Court took the matter under submission and now renders its
8 Memorandum of Decision containing its findings of fact and
9 conclusions of law as required under Fed. R. Bankr. P. 7052.

10
11 **STATEMENT OF EVIDENTIARY FACTS**

12 This is a case where a fiduciary lost sight of his mandate to
13 liquidate trust assets for the benefit of the trust's beneficiaries
14 by engaging in unsuccessful business ventures, self-dealing, and
15 violations of the liquidating trust agreement. This conduct caused
16 the trust to lose significant sums of money otherwise available for
17 its beneficiaries and to delay their payment through seven (7) years
18 of the trustee's tenure.

19 On October 7, 1996, Fruehauf Trailer Corporation, Maryland
20 Shipbuilding & Drydock Company, F.G.R. Inc., Jacksonville Shipyards,
21 Inc., Fruehauf International Limited, Fruehauf Corporation, The
22 Mercer Co., Deutsche-Fruehauf Holding Corporation, MJ Holdings,
23 Inc., and E.L. Devices, Inc. (collectively, the "Debtors," and on
24 behalf of their respective creditors and interest holders,
25 collectively, the "Trust Beneficiaries"), filed petitions for relief
26 under chapter 11 of the U.S. Bankruptcy Code. (Stipulated Fact ¶

27
28 ³ Defendant withdrew his introduction of the testimony and report of
his damages expert Dennis W. Sinclair on the second day of trial.

1 1.) The Debtors' Amended Joint Plan of Reorganization ("Plan") was
2 confirmed on September 17, 1998 pursuant to an Order and Judgment
3 Confirming the Plan which was later amended by an order entered on
4 October 20, 1998. (Id. ¶ 2.) The Plan contemplated the creation of
5 a Delaware common law liquidating trust to liquidate the Debtors'
6 assets for the benefit of the Trust Beneficiaries. (Id. ¶ 4.) On
7 October 27, 1998, Street and the Debtors entered into a Liquidating
8 Trust Agreement ("Trust Agreement") which created The End of the
9 Road Trust ("Trust"). (Id. ¶ 5.)

10 Trust assets were placed in six special purpose entities: (i)
11 JSI Property Corp.; (ii) Hogan's Creek Realty, Inc.; (iii)
12 Picketsville Realty, Inc.; (iv) Mayport Realty Inc.; (v) JSI
13 Lexington Realty Inc.; and (vi) FrudeMex, Inc. ("FrudeMex").
14 (Stipulated Fact ¶ 10.) FrudeMex was a Delaware corporation formed
15 for the sole purpose of holding the stock of Fruehauf de Mexico,
16 S.A. de C.V. ("FdM"), a Mexican operating company, and the most
17 valuable asset of the Trust. (Id. ¶ 12.) As trustee, Street became
18 the sole director and President of FrudeMex. (Id.) At the time the
19 Trust was created, the Trust had an aggregate value of \$21 million.
20 (Impeachment Exhibit 164.) In addition, the Pension Transfer
21 Corporation (the "PTC") was created and included in the Trust estate
22 to facilitate the ongoing sponsorship and administration of the
23 Fruehauf Trailer Corporation Employees' defined benefit pension plan
24 ("Pension Plan"). (Stipulated Fact ¶ 11.)

25 Beginning December 31, 1998, FrudeMex underwent several
26 corporate form and name changes until November 8, 1999, when
27 FrudeMex (then, FDM, Inc.) ultimately changed its name to American
28 Trailer Industries, Inc. ("ATII"). (Id. ¶ 13.) During this time,

1 Street was the sole director of ATII from November 19, 1999 through
2 August 1, 2005.

3 Defendant acted as trustee for the Trust from October 27, 1998,
4 to August 1, 2005 when Plaintiff took over as successor trustee.
5 (Id. ¶ 7.) Street's duties, responsibilities, limitations and
6 rights as trustee were as set forth in the Trust Agreement. The
7 Plan provided Street with indemnification for "claims arising out of
8 the good faith performance of duties under the Bankruptcy Code or
9 this Plan." (Stipulated Fact ¶ 9.)

10 **A. Limitations of the Trust**

11 The express purpose of the Trust was set forth in Paragraph 2.3
12 of the Trust Agreement as follows:

13 "This Liquidating Trust is organized for the sole
14 purpose of conserving and liquidating the Trust
15 Estate for the benefit of the Beneficial
16 Interestholders as herein set out, with no
17 objective to engage in the conduct of a trade or
18 business (although companies whose stock is owned
19 by the Liquidating Trust may operate a business).
20 Pursuant to this express purpose, the Trustee is
21 hereby authorized and directed to take all
reasonable and necessary actions to conserve and
protect the Trust Estate and to sell, lease or
otherwise dispose of the Trust Estate, and to
distribute the net proceeds of such disposition .
. . in as prompt, efficient and orderly fashion as
possible"

22 (Stipulated Ex. 15.) Paragraph 5.4.4 further restricted the
23 trustee's powers under the Trust as follows:

24 "[t]he Trustee . . . shall not at any time enter
25 into or engage in any trade or business,
26 including, without limitation, the purchase of
27 any asset or property (other than such assets or
28 property as are necessary to preserve, conserve,
and protect the Trust Estate and to carry out
the purposes of Section Two, Section Seven, and
this Section Five) on behalf of the Trust Estate
or the Beneficial Interest holders."

1 (Id.) (Emphasis added.) There was no implied duty outside of that
2 which was expressly stated in the Trust Agreement. (Id. ¶ 7.2.; see
3 also Stipulated Fact ¶ 8.) Moreover, for certain trust activities
4 such as:

5 (a) borrowing money in excess of \$500,000 or
6 granting liens on any part of the Trust Estate
7 in excess of \$500,000;

8 (b) selling assets of the Trust Estate with a
9 value in excess of \$500,000;

10 (c) modifying the Plan;

11 (d) initiating and prosecuting litigation,
12 including but not limited to claim objections
13 with expected fees and costs in excess of
14 \$250,000;

15 (e) disposing of or settling any claim of
16 litigation with a potential value to the
17 Liquidating Trust in excess of \$500,000; and

18 (f) foregoing or deferring the annual
19 distribution to Class A Beneficial Interest
20 holders,

21 Defendant was required to seek the Trust Advisory Committee's
22 ("TAC") prior approval. (Stipulated Exhibit 15 ¶ 5.4.1.)

23 **B. Violations of the Trust Agreement**

24 Contrary to the express limitations of the Trust, Street caused
25 the Trust to acquire the assets of a bankrupt trailer manufacturer,
26 American Trailer Manufacturing, Inc. ("ATM") through the formation
27 of ATM Acquisition Corp., n/k/a American Trailer, Inc. between
28 October and November 1999. (Stipulated Fact ¶ 30.) While there is
evidence that the TAC granted Street conditional approval to
purchase ATM for an aggregate price of \$1,446,000, the evidence
suggests the same person signed for both TAC members. This cast
doubt on the efficacy of the TAC's approval of the transaction⁴.

⁴ The TAC members at the time the Consent of Trust Advisory Committee was signed were Thomas Kempner of M.H. Davidson & Co. and Kevin Schweitzer of Paloma Partners. The last name of the person who

1 (Stipulated Exhibit 46.) Indeed, the TAC approval provision of the
2 Trust Agreement does not contemplate purchasing assets but is
3 narrowed to selling Trust assets; thus, creating further doubt on
4 the efficacy of the TAC approval Defendant obtained for ATM's
5 purchase. (Stipulated Exhibit 15 ¶ 5.4.1.) Notwithstanding, ATM
6 was ultimately purchased for the sum of \$2,074,000 which exceeded
7 the "authorized" purchase price by \$628,000. (Stipulated Fact ¶
8 33.)

9 ATM never became profitable for the Trust. Testimony revealed
10 ATM was purchased in order for FdM, the Trust's operating company,
11 to have a presence in the United States market by using ATM's
12 trademark. Hence, the two companies engaged in business where ATII
13 would cover ATM's payroll and accounts payable and FdM would sell to
14 and purchase goods from ATM. Neither the TAC nor the Delaware
15 Bankruptcy Court authorized FdM or ATII to engage in such business
16 transactions with ATM. (Stipulated Fact ¶ 44.) ATM eventually
17 dissolved in 2003. (Id. ¶ 40.) There was no evidence that ATM's
18 trademark was sold. This unauthorized business relation resulted in
19 a loss to FdM totaling \$1,112,350.00.

20 Contrary to the express limitations of the Trust, Defendant
21 also caused FdM and ATII to engage in unauthorized business dealings
22 with an entity called Dorsey Trailer Corporation ("Dorsey"), a
23 bankrupt trailer manufacturer in Alabama which Street caused the
24

25
26 signed the Consent was unclear from the signed document. However,
27 it was clear that only one person signed the Consent (someone whose
28 name appears to be Michael "Berner") even though it states that one
signature is from Sunrise Partners LLC by Down General Partners
Corp. and the other by Paloma Securities LLC by Paloma Partners
Management Company.

1 Pension Plan to purchase in 2001. (Stipulated Fact ¶¶ 45, 47-49.)
2 Dorsey was not an asset of the Trust. (Id. ¶ 46.) The Pension Plan
3 acquired Dorsey as a vehicle to enhance the sales and purchasing
4 power of ATII as Street was increasing the operations of the Trust's
5 assets rather than liquidating them.

6 Dorsey's acquisition was based, again, on Defendant's desire to
7 establish a business presence in the United States by having a
8 factory and a trademark to use in the United States.⁵ The intent,
9 according to various testimonies, was to create a synergistic
10 relationship between Dorsey and FdM from which Dorsey would
11 eventually emerge a profitable public company with Street as its CEO
12 and a substantial shareholder.

13 Similar to its dealings with ATM, ATII transferred funds to
14 Dorsey to pay for Dorsey's expenses totaling \$913,690.25 as Dorsey
15 had inadequate cash flow to pay for all of its operating costs.
16 (See Stipulated Fact ¶ 56.) Likewise, FdM sold finished goods to
17 Dorsey and purchased materials from Dorsey's suppliers (which FdM
18 paid by transferring funds through Dorsey). The Trust also advanced
19 additional funds to Dorsey totaling \$29,242. (Id. ¶¶ 53-54.) ATII
20 also paid for certain travel expenses totaling \$126,131 which Street
21 and various ATII employees incurred in providing management services
22 to Dorsey. (Stipulated Fact ¶ 59.) Neither the TAC nor the
23 Delaware Bankruptcy Court approved the foregoing transactions.

24 Dorsey never became profitable. In September 2004, Dorsey
25 again filed a chapter 11 petition in Alabama. (Stipulated Fact ¶

26
27 ⁵ Without a license from Wabash National Corporation, FdM was not
28 authorized to conduct business in the United States under the
Fruehauf trademark because of Fruehauf's licensing agreement with
Wabash.

1 50.) FdM filed a claim in Dorsey's bankruptcy case in the sum of
2 \$2,681,363 and ATII filed a claim in the sum of \$500,000. No
3 payments were made on account of these claims. The Trust's total
4 loss, in connection with its business dealing with Dorsey, amounted
5 to \$3,336,736. (Stipulated Fact ¶ 44.)

6 Defendant admitted at trial he was "hands-on" with respect to
7 the major activities of the Trust, the Trust entities, and all of
8 the aforescribed transactions. Street was actively involved in
9 the day to day operations of Dorsey, ATM, ATII and FdM. Tasha
10 Dolan⁶ testified Street approved fund transfers among the different
11 entities and engaged in regular meetings with his management team.

12 This Court finds Defendant's justification for engaging in
13 business with these entities, to create a business presence in the
14 United States for Fruehauf de Mexico, contradictory to the express
15 purpose of the Trust to liquidate Trust assets for its
16 beneficiaries. The length of time Street managed the Trust (7
17 years) and caused these companies to engage in business in the
18 United States is evidence of the Defendant's apparent intent not to
19 liquidate the Trust assets but to create a new trailer conglomerate
20 that conducted business from Mexico to the United States and vice
21 versa. Such vision did not result in profit but rather depleted
22 Trust funds to which Trust Beneficiaries would have been entitled.
23 The Trust did not contemplate such activity; rather, it expressly
24 prohibited it. (See Stipulated Exhibit 15 ¶¶ 2, 3 and 5.4.4.)
25 Defendant could not imply from the Trust's express language that
26 such activities were authorized. (See id. ¶ 7.2.)

27
28 ⁶ Tasha Dolan was the controller of the Trust, the CFO of Dorsey
and eventually its President.

1 This Court rejects Defendant's position that he cannot be held
2 liable for the acquisition of ATM and Dorsey because he did not have
3 the authority or right to approve such transactions. In his
4 testimony, Defendant acknowledged that he recommended to the TAC and
5 the Pension Plan committee the purchase of ATM and Dorsey, which
6 further proved his endorsement of such purchases and his ultimate
7 goal of building the Trust's business rather than liquidating it.
8 Furthermore, even if the acquisitions were approved, nothing in the
9 record of this case suggests that the Trust Agreement or the
10 Bankruptcy Court approved of the multiple transactions among the
11 Trust, FdM, Dorsey and ATM which caused a significant depletion of
12 Trust funds.

13 This Court further finds absurd Defendant's concern regarding
14 losing FdM's Fruehauf license in Mexico as the reason behind his
15 attempts to obtain a brand name in the United States to continue
16 FdM's operations. It is inconceivable that, on the advice of
17 counsel, Street decided not to pay the royalties required to use the
18 Fruehauf name when that was the only way to preserve the trademark
19 in Mexico (an asset of the Trust). Defendant admitted at trial that
20 losing the license would be "catastrophic". Accordingly, stopping
21 payment on the royalties was fundamentally an imprudent decision and
22 not in the best interest of the Trust's beneficiaries. The only
23 plausible explanation for the acquisition of ATM and Dorsey is that
24 Defendant was attempting to create an operating company that would
25 do business in the United States and Mexico that would go public and
26 enable Street to earn substantial sums as its CEO and as a major
27 shareholder. It was not to preserve the Trust assets while pursuing
28 their liquidation. It violated the Trust Agreement.

1 This Court further rejects Defendant's contention that he
2 undertook the foregoing actions to enhance the value of FdM.
3 Contrary to Plaintiff's testimony that the Trust's assets were
4 valued at \$21 million at the Trust's inception (Impeachment Exhibit
5 164), Defendant later testified that FdM's value, the largest asset
6 of the Trust, was \$250,000 at the Trust's inception. The Court does
7 not find Defendant's testimony credible given that throughout his
8 tenure, (i) FdM was the only company in the Trust with sufficient
9 cash flow to fund its operations in addition to the operations of
10 Dorsey and ATM; (ii) FdM was listed as having a value of \$9.5
11 million in the Trust's financial statements for 1999, 2000 and 2001
12 as prepared by Eisner LLP, the company's auditors during Street's
13 tenure (Impeachment Exhibit 164); and (iii) the Successor Trustee
14 valued FdM at \$8 million at the time it was liquidated.

15 **C. Improper Accounting**

16 Testimony at trial was also telling of the extent of improper
17 accounting and Defendant's failure to keep adequate books and
18 records during his term as trustee. Plaintiff testified when he
19 took over as successor trustee, the Trust's books and records were
20 in disarray and no document-retention policy was in place to ensure
21 good record-keeping. Defendant did not refute Plaintiff's
22 testimony. Instead, he stressed that Ms. Dolan was in-charge of
23 accounting as the Trust's controller. However, while Ms. Dolan was
24 responsible for managing the Trust's books and records, Defendant
25 oversaw all management activities of the Trust including the
26 information placed in the Trust's books. Defendant was provided
27 regularly with financial reports of the Trust having full knowledge
28 of any inadequacies in such statements.

1 Second, Abel Wenning's⁷ testimony revealed Defendant instructed
2 some members of his team that certain transactions were not to be
3 highlighted or disclosed in FdM's regular books and records and its
4 financial statements such as loan agreements and transfer pricing
5 items that violated GAP rules in Mexico. Mr. Wenning maintained a
6 separate set of books for those agreements and transactions and even
7 set up a separate entity with an office address at his residence.
8 Street's preferred means of communication with his management team
9 was oral and not written while only selective items found their way
10 into a company's books. This lack of proper documentation evidenced
11 Street's improper record-keeping as the Trust's fiduciary. The
12 absence of proper books and records also prevented ATII's and FdM
13 accountants from opining on the consolidated financial statements
14 that would have enabled ATII to save over \$1.5 million in taxes.
15 Later, this became a major obstacle to selling FdM.

16 **D. Street's Compensation as Trustee and Self-Dealing**

17 This Court adopts the decision of Judge Peter J. Walsh, as
18 contained in his Memorandum of Decision dated September 17, 2008,
19 which found that the Disclosure Statement, Plan and Trust Agreement
20 were the sole governing documents for Defendant's compensation.
21 (Stipulated Exhibit 44.) In it, Judge Walsh found invalid the
22 provisions of the purported employment agreement with the Trust and
23 the purported employment agreement with FrudeMex to the extent that
24 they contradicted the Trust's express language, which stated:

25 "[t]he Trustee shall not manage, control, use
26 sell, dispose, collect or otherwise deal with
the trust estate or otherwise take any action
hereunder, except as expressly provided herein,

27
28 ⁷ Mr. Wenning was in charge of FdM's operations during most of
Street's tenure.

1 and no implied duties or obligations shall be
2 read into this Agreement in favor of or against
the Trustee. . . " and

3 "[t]he Trustee may not modify the terms of this
4 Liquidating Trust Agreement unless the
5 Liquidating Trustee secures the written approval
of such modification from Class A Beneficial
6 Interestholders holding over 50% of the Class A
Beneficial Interest."

7 (Stipulated Exhibit 15 ¶¶ 7.2 and 5.4.3, respectively; Stipulated
8 Exhibit 44.) Accordingly, the provisions of the Disclosure
9 Statement as amended and dated July 28, 1998, the Plan and Trust
10 Agreement govern the terms of Street's compensation.

11 Street's compensation under the Trust Agreement was to be set
12 by a missing "Exhibit C" to the Trust Agreement. (Stipulated Fact
13 ¶¶ 70-71.) As disclosed in the Disclosure Statement, Street was
14 entitled to receive an annual salary of \$200,000 for serving as
15 trustee and \$50,000 for serving as Chairman and CEO of FdM.
16 (Stipulated Exhibit 14 ¶ IV.L.1 and 2.) He was also entitled to
17 receive "all reasonable out-of-pocket expenses incurred in the
18 performance of his duties." (Id. ¶¶ IV.F.7.b. and IV.L.2.) As the
19 Chairman and CEO of FdM, he was provided with "all fringe benefits
20 and perquisites that [were] provided to senior executives of FdM, .
21 . . all employee benefit plans, programs and arrangements. . . ."
22 (Id. ¶ IV.L.2.) The record does not show any other basis for
23 compensation other than the foregoing.

24 In violation of the terms of his compensation, Defendant paid
25 himself the additional sum of \$242,544 during his term from 1998-
26 2005. (Stipulated Exhibit 115.) The record in this case did not
27 prove his entitlement to any amount exceeding his authorized
28 compensation stated above. This Court finds it unnecessary to

1 distinguish the source of Defendant's compensation. Suffice to say,
2 Defendant was paid in excess of his entitled salary regardless of
3 which Trust entity paid him.

4 Similarly, FdM reimbursed Defendant's personal expenses and
5 charitable contributions in violation of the authorized terms of his
6 compensation. The record demonstrates that Defendant's company
7 credit card was used for both work and personal expenses. Testimony
8 showed FdM paid the entire balance on Defendant's credit card
9 monthly upon his direction (i) with no expense reports submitted
10 despite a company policy to do so and (ii) without distinguishing
11 between personal and work-related expenses. If there was a company
12 policy for expense reimbursements, Defendant seems to have placed
13 himself above such policy.

14 For example, FdM paid on Defendant's behalf significant amounts
15 for travel to South America. No business purpose was shown for such
16 trips. Defendant's position that traveling to South America might
17 have expanded FdM's business was contrary to the purpose of the
18 Trust to liquidate its assets. He was hired to dispose of the
19 business, not grow it with all the attendant risks attributable to
20 an operating business.

21 Defendant's reliance on a purported list of 100 or so different
22 fringe benefits he obtained monthly from a local Mexican attorney to
23 justify such personal expenses lacks credibility. First, evidence
24 of such a report and its authenticity was not presented at trial.
25 Second, even if such list of benefits existed, Defendant failed to
26 demonstrate that the personal charges made on his credit card FdM
27 reimbursed fell within those types of fringe benefits purportedly
28 available to a *Director de General* of a company in Mexico. Because

1 of these reimbursements, the Trust lost \$203,754. (Stipulated
2 Exhibits 108 and 109.) It is a further violation of his duty for a
3 fiduciary to permit a large sum of money to be paid to reimburse him
4 for his own personal gain.

5 This Court is not convinced by Defendant's position that so
6 long as nobody objected, his personal expenses were paid properly
7 when he exercised control and decisions over all Trust assets.
8 There is equally no evidence supporting Defendant's position in his
9 post-trial brief that after deducting the offending "Mexican
10 benefits", Street remained underpaid. (Defendant's Post-trial Brief
11 at 14.) No calculation or other reliable evidence leading to this
12 result was produced. Instead, the salary he received alone exceeded
13 the total base compensation to which he was entitled under the
14 Disclosure Statement as discussed above. (See Stipulated Exhibit
15 115.)

16 Likewise, testimony revealed that Defendant permitted his
17 companies, Street Asset Management Co. and Chriss Street and Co., to
18 use Trust assets, such as office space, telephone numbers, e-mails,
19 and personnel, without reimbursing the Trust for their use.
20 Defendant permitted Trust assets to be commingled with his personal
21 assets without any method of separation or allocation. Defendant's
22 testimony failed to prove otherwise.

23 Defendant's initial term as trustee was for three years which
24 was automatically renewable for two one-year periods in the event
25 that the trust estate had not been fully liquidated at the end of
26 first three years. (Stipulated Exhibit 15 ¶ 9.1.) At the end of
27 five years, Defendant could only extend his term further by seeking
28 court-approval within 6 months of the fifth year. Id. Defendant

1 served for seven years from 1998 to 2005. After six years of
2 Street's control without liquidating FdM, Defendant vigorously
3 opposed the beneficiaries, through the reconstituted TAC, efforts to
4 replace him. This created a need for the TAC to seek intervention
5 by the bankruptcy court which resulted in another year of salary and
6 perks for Defendant.

7 **E. Other Acts of Mismanagement**

8 First, Defendant caused the Trust's fiduciary liability and
9 director and officer liability policies to be changed into "runoff"
10 status without justification for the risk which made it difficult
11 for the successor trustee to obtain standard (non-runoff) coverage
12 without paying a substantially higher premium. (Stipulated Exhibits
13 135-137.)

14 Second, certain adversary proceedings pending at the onset of
15 the Trust went stale due to inactivity and lack of prosecution
16 during Defendant's tenure.⁸ Their dormant status made it difficult
17 for the successor trustee to revive and litigate the Trust's
18 remaining claims. In one instance, the defendant had filed for
19 bankruptcy while the adversary proceeding was pending. In another,
20 testimony revealed the Trust had to settle for less money because of
21 witness depreciation. The delay in prosecution impeded meaningful
22 negotiations that may have led to a better return for the Trust.

23 _____
24 ⁸ Upon his appointment, Street inherited the Debtors' preferential
25 transfer actions entitled (1) Fruehauf Trailer Corp. v. Aluminum Co.
26 of Am., Inc., Adv. Pro #98-00497, (2) Fruehauf Trailer Corp. v. Gen.
27 Bearing Corp., Adv. Pro. #98-00485, (3) Fruehauf Trailer Corp. v.
28 Milner-Rigsby Co., Ltd., Adv. Pro. #98-00488, (4) Fruehauf Trailer
Corp. v. ATEC Assocs., Inc., Adv. Pro. #98-00504, and (5) Fruehauf
Trailer Corp. v. Nat'l Union Fire Co., Adv. Pro. #98-00514
(collectively, the "Adversary Proceedings").

1 However, because the loss sustained as a result of Defendant's
2 overlooking such proceedings is speculative--the loss cannot be
3 quantified for purposes of Plaintiff's damages.

4 Third, Defendant also destroyed the Trust's files contained in
5 an Apple computer the Trust owned by reformatting the hard drive
6 causing all information therein to be erased.

7 Lastly, evidence afforded proof Defendant attempted to derail
8 the sale of FdM on two occasions. American Capital Services ("ACS")
9 initially expressed interest in purchasing FdM in 2004. There were
10 contradicting testimonies from Plaintiff and Defendant on the
11 reasons why the sale did not close.⁹ What was undisputed was that
12 ACS encountered difficulty in dealing with Defendant and vice versa.
13 No evidence was presented showing Defendant attempted to fix the
14 stalemate. Additionally, it was undisputed that Defendant
15 unreasonably withheld an essential environmental report. In 2005,
16 ACS renewed its interest in purchasing FdM. However, tax problems
17 emerged that caused the sale to fall apart. Testimony showed that
18 Defendant failed to effectuate the timely filing of consolidated tax
19 returns on behalf of the requisite entities during the early stages
20 of the Trust as advised by Trust counsel Haynes and Boone, LLP.
21 (Stipulated Exhibit 131.) Consequently, at the time of the second
22 sale to ACS, FdM's auditors were unable to prepare and certify the
23 requisite consolidated financial statements. This resulted in
24 significant additional tax liability which caused ACS to lose

25
26 ⁹ Defendant testified the sale did not close because ACS offered a
27 low price for FdM. Plaintiff testified the sale did not close
28 because Defendant ignored due diligence requests, impeded due
diligence efforts and delayed the release of an environmental
report.

1 interest in pursuing further the purchase of FdM. Eventually, the
2 Successor Trustee decided that FdM could not be sold and he
3 distributed its stock to the beneficiaries who held 80% of the
4 Debtor's bonded indebtedness.¹⁰ This was due to the difficulty in
5 selling FdM caused by the Defendant. At the hearing before Judge
6 Walsh, Defendant even attempted to purchase FdM claiming he had the
7 financing to accomplish the transition but Judge Walsh dismissed the
8 Defendant's offer and approved the disposition of FdM's stock to the
9 beneficiaries holding the largest claims against the Debtors.

10 **F. Indemnification**

11 The Trust Agreement permits indemnification of Defendant unless
12 he engaged in acts of gross negligence or willful misconduct.
13 (Stipulated Exhibit 15.) Defendant failed to introduce any reliable
14 evidence at trial in support of his right to indemnification. This
15 Court finds Defendant's conduct described above falls within the
16 gross negligence and willful misconduct exceptions contained in the
17 indemnification provision.

18 If any of the above findings of fact are subsequently
19 determined to be conclusions of law, they shall be deemed to be so
20 designated.

21
22 **CONCLUSIONS OF LAW**

23 The laws of the State of Delaware and common law on trusts
24 govern the law for the Trust Agreement and the disposition of this
25 proceeding. Under trust law, the burden of persuasion to justify
26 the upholding of a transaction by an interested trustee rests on the

27
28 ¹⁰ Cash was paid to the bondholders who held 20% of the Debtor's
bonds.

1 fiduciary and not the beneficiary. Stegemeier v. Magness, 728 A.2d
2 557, 563 (1999). A trustee must satisfy his burden by a
3 preponderance of the evidence. See e.g., In the Matter of the
4 Estate of Jacob Shulman, 568 N.Y.S.2d 660, 165 A.D.2d 499 (1991).
5 Here, the burden of persuasion rests on Street. He failed to
6 satisfy his burden as discussed below.

7 This Court rejects Defendant's position that the "business
8 judgment rule" applies to a trust. Once a trust relationship is
9 established between a beneficiary and a trustee managing a
10 corporation for a trust, the fiduciary standards of care apply to
11 his conduct regarding the affairs of the corporation. Shulman, 568
12 N.Y.S.2d at 662, 165 A.D.2d at 502. In conducting a review of
13 allegations of self-dealing, the standards of trust law and
14 corporation law are different. Stegemeier, 728 A.2d at 562. Unlike
15 corporate law, self-dealing on the part of a trustee is virtually
16 prohibited under trust law. Id., at 563. The liability of a
17 trustee of a controlling interest in a corporation can arise through
18 imprudent corporate investment policy or a conflict of interest with
19 respect to corporate decisions. 568 N.Y.S.2d at 662 (citations
20 omitted). The principles of trust law impose a higher standard.
21 Stegemeier, 728 A.2d at 564.

22 Accordingly, this Court holds Street to a higher standard of
23 complete loyalty than that imposed on a director or officer of a
24 corporation and rejects the lesser standard of the "business
25 judgment rule". He failed to meet the higher standard when he (i)
26 allowed the depletion of Trust assets by facilitating the
27 transactions among FdM, the Trust, ATII, ATM and Dorsey for which
28 the Trust, ATII and FdM were never reimbursed; (ii) purchased

1 companies with the ultimate intent of creating a public trailer
2 conglomerate for which he could serve as the CEO and a major
3 shareholder; (iii) permitted the payment of his personal expenses
4 without justification; (iv) risked losing the Fruehauf license by
5 not paying royalties; (v) hindered the sale of FdM; (vi) engaged in
6 improper accounting of books and records; and (vii) created
7 obstacles that made it difficult to replace him as trustee in an
8 effort to keep his position.

9 **A. Counts I and II: Defendant breached his duty of loyalty**
10 **and good faith.**

11 Under trust law, self-dealing occurs when the fiduciary has a
12 "personal interest in the subject transaction of such substantial
13 nature that it might have affected his judgment in material
14 connection." Stegemeier, 728 A.2d at 564. A person acting in a
15 fiduciary capacity cannot also act for himself where he has duties
16 to perform for another. Id. Thus, even without a personal stake,
17 the duty of loyalty bars him from acting in the interest of third
18 parties at the expense of the beneficiaries. Wilshire Credit Corp.
19 v. Karlin, 988 F.Supp. 570, 574 n.4 (D. Md. 1997) (citations
20 omitted). A trustee is under a duty to the beneficiary to
21 administer the trust solely in the interest of the beneficiary.
22 Restatement (Second) of Trusts, § 170(1) (1959).

23 Here, Defendant breached his duty of loyalty when he permitted
24 the Pension Plan to acquire Dorsey knowing the Trust would have to
25 provide funds and management to Dorsey as part of a scheme involving
26 the Trust, ATII and FdM to do business with Dorsey so as to
27 establish a new trailer company where he would become the CEO. The
28 transactions among those entities were not a fair equivalent

1 exchange, but instead, caused the Trust to lose money. Dorsey was
2 not an asset of the Trust but was owned by the Pension Plan.
3 Defendant also served as Dorsey's President and CEO during his
4 tenure as trustee. Thus, any benefit to Dorsey inured to him and the
5 Pension Plan's beneficiaries and not to the Trust's beneficiaries.

6 Likewise, the proof of whether the TAC was fully informed and
7 approved of ATM's acquisition or was even legally capable to do so
8 was weak and cannot be relied upon as a basis to absolve Defendant
9 of liability. Indeed, there remains a breach of duty of loyalty
10 when he permitted intercompany transfers between the ATM and FdM,
11 for which no equivalent exchange occurred, causing FdM to lose
12 \$1,112,350.

13 Defendant also breached his duty of loyalty when he allowed
14 Trust assets to be diverted to pay for his personal expenses and to
15 pay his salary in excess of that authorized. The evidence
16 justifying such reimbursements is wanting of proof. This Court
17 finds incredulous Defendant's reliance on a report of benefits
18 produced by a local chamber of commerce attorney in Mexico to
19 support his entitlement to such reimbursements without producing
20 evidence that the TAC or the Bankruptcy Court approved these
21 excessive salaries or reimbursements.

22 Issue preclusion or collateral estoppel bars the relitigation
23 of an identical issue between the same parties or party in privity
24 that has been adjudicated previously by a competent court and has
25 reached finality in the first proceeding. See Taylor v. Sturgell,
26 553 U.S. 880, 128 S. Ct. 2161 (2008). As such, the decision of
27 Judge Walsh with respect to the limitations on the terms of
28 Defendant's employment and compensation has now become final as no

1 appeal was taken of his decision. Based on the principles of
2 collateral estoppel, this Court adopts his opinion and will not
3 infer employment terms that are beyond what was set forth in the
4 Disclosure Statement, Plan and Trust Agreement.

5 The overwhelming evidence at trial showed that the Defendant
6 willfully engaged in self-dealing to advance his personal interest
7 ahead of that of the Trust's beneficiaries. The Trust was not meant
8 to continue conducting business; it was meant to liquidate with
9 proceeds going to the beneficiaries. The acts presented at trial
10 were all directed toward one goal--that of establishing a presence
11 and conducting a business in the United States contrary to the
12 Trust's express purpose. Throughout this process of creating an
13 international company, Defendant enriched himself by allowing Trust
14 assets to be used for his excessive salaries and his personal
15 expenses.

16 **B. Count III: Defendant breached the Trust Agreement.**

17 The trustee can exercise only his powers as

- 18 (a) are conferred upon him in specific words by the terms of
the trust or
19 (b) are necessary or appropriate to carry out the purpose of
the trust and are not forbidden by the terms of the trust.
20

21 Restatement (Second) of Trusts § 186 (1959). The language of the
22 trust instrument will be "given their ordinary meaning and the court
23 will not consider extrinsic evidence to vary or contract express
24 provision of a trust instrument that are clear, unambiguous and
25 susceptible of only one interpretation." Wilmington Trust Co. v.
26 Annan, 531 A.2d 1209, 1211 (Del. 1987).

27 The Trust Agreement expressly prohibited the Trust from
28 conducting any trade other than the preexisting business of the

1 Trust. (Stipulated Exhibit 15 ¶5.4.4.) It also prohibited
2 purchasing assets or property other than that necessary to preserve,
3 conserve, and protect trust assets in carrying out the Trust's
4 purpose to liquidate. (Id.) The main purpose of the Trust was to
5 "conserve[e] and liquidat[e] the Trust Estate for the benefit of the
6 Beneficial Interest holders. . . with no objective to engage in the
7 conduct of a trade or business (although companies whose stock is
8 owned by the Liquidating Trust may operate a business)." (Id.
9 ¶2.3.) The Trust also precluded any investment other than interest-
10 bearing deposits or certificates of deposit, among others. (Id.
11 ¶5.4.5.)

12 Defendant breached the Trust Agreement when he affirmatively
13 recommended to the TAC ATM's acquisition, procured its approval, and
14 ultimately purchased ATM with Trust assets. Under Delaware law, "an
15 interested transaction is not void but is voidable, and a court will
16 uphold such a transaction against a beneficiary challenge only if
17 the trustee can show that the transaction was fair and that the
18 beneficiaries consented to the transaction after receiving full
19 disclosure of its terms." Stegemeier, 728 A.2d at 563 (citations
20 omitted). Defendant did not disclose the ATM acquisition to the
21 beneficiaries nor did the beneficiaries approve of it.

22 Even under a more relaxed rule, the court will carefully
23 scrutinize all the attendant circumstances before it can find that
24 the sale is not detrimental to the trust. Id., 728 A.2d at 563.
25 The purchase of ATM proved to be detrimental and unfair to the
26 Trust. In addition to the sums exceeding the purported TAC-
27 authorized purchase price (which this Court already found suspect),
28 conducting business with ATM proved to be unprofitable for FdM.

1 Because ATM had inadequate cash flow, FdM paid all of its expenses
2 without reimbursement. ATM eventually dissolved resulting in FdM
3 losing \$1,112,350.

4 Defendant also breached the fundamental purpose of the Trust
5 when he permitted FdM to conduct business through Dorsey creating a
6 loss to the Trust in the sum of \$3,336,736. Street failed to
7 satisfy his burden of demonstrating that terms of the Trust allowed
8 the transfers made to Dorsey.

9 As further evidence of breaching the main thrust of the Trust,
10 Defendant's actions derailed the sale of FdM. As discussed above,
11 Defendant breached the Trust Agreement when he failed to salvage the
12 souring deal with ACS, failed to file consolidated tax returns for
13 the Trust entities, failed to maintain adequate books and records
14 from which consolidated financial statements could be prepared and
15 certified, unreasonably withheld the requisite environmental report
16 and attempted for one last time to stop the liquidation of the
17 company before Judge Walsh. The foregoing facts present conclusive
18 evidence of Defendant's blatant breach of the Trust Agreement.

19 **C. Count V: Defendant breached his duty to keep and render**
20 **accounts.**

21 A trustee owes a duty to keep and render clear and accurate
22 accounts in administering trust assets. Restatement (Second) of
23 Trust, § 172 (1959). Testimony at trial not only showed the lack of
24 proper accounting with respect to the transactions among FdM,
25 Dorsey, ATM, ATII and the Trust but the intent to keep certain
26 information off of the Trust's books and records. Most telling was
27 Abel Wenning's testimony that Defendant instructed various members
28 of his team that certain transactions should not be disclosed in

1 FdM's regularly maintained books and records or its financial
2 statements. Defendant controlled, had a full grasp of the Trust's
3 financial information, and caused FdM to maintain a second set of
4 books under the name of a fictional entity. His preference not to
5 convey information in writing, which his staff knew, contributed to
6 the lack of proper documentation and improper record-keeping.

7 **D. Counts VI and VII: Defendant breached his duty to preserve**
8 **Trust assets and pursue claims of the Trust.**

9 A trustee owes a duty to preserve trust property and to use due
10 care to pursue claims of the trust. Restatement (Second) of Trust,
11 §§ 176 and 177 (1959).

12 Defendant failed to preserve trust assets when he permitted the
13 Trust's fiduciary liability and director and officer liability
14 policies to go into "runoff" status causing difficulty for the
15 successor trustee to obtain standard coverage at a higher premium.
16 (Stipulated Exhibits 135-137.) Street willfully breached his duty
17 to preserve trust assets when he destroyed the Trust's files
18 contained in the Apple computer which the Trust owned.

19 Defendant also breached his duty to pursue Trust claims when he
20 permitted certain adversary proceedings to become dormant making
21 them more difficult to prosecute and settle. The delay certainly
22 cost the Trust lost opportunity and money albeit difficult to
23 quantify.

24 **E. Count VIII: Defendant breached his duty to keep trust**
25 **assets separate.**

26 A trustee owes a duty to keep trust property separate from his
27 individual property and ensure proper designation to the trust.
28 Restatement (Second) of Trust, § 179 (1959). In this case,

1 Defendant breached this duty by permitting his companies, Chriss
2 Street and Co. and Street Asset Management Co., to use the same
3 facilities, personnel, and personal properties as the Trust's.
4 Street failed to present evidence of any contractual agreement or
5 allocations between his companies and the Trust that would establish
6 compensation to the Trust for his companies' use of its office
7 space, personnel and properties. Because of this commingling of
8 assets, Defendant was enriched by having his companies not be
9 responsible for their own expenses that were provided by using Trust
10 assets.

11 The totality of the circumstances in this case and the
12 overwhelming evidence lead this Court to conclude that Defendant
13 breached the Trust Agreement and several of his duties to the Trust.

14 **F. Damages**

15 Under Delaware Code § 3581, a trustee's violation of a duty
16 owed to a beneficiary is a breach of trust. Once established, a
17 court may order any equitable remedy including:

- 18 ". . .
19 (3) compelling the trustee to redress a breach of trust by
20 paying money, restoring property, or other means;
21 (4) ordering a trustee to account;
22 ". . .
23 (7) reducing or denying compensation to the trustee;
24 ". . .
25 (9) granting any other appropriate relief."

26 Del. Code Ann. tit. 12 § 3581(b) (2010).

27 It is within the Court's discretion whether a trustee, found in
28 breach of trust, shall receive full compensation, reduced
compensation or deny him all compensation. Restatement (Second) of
Trust § 243 (1959). Similarly, if a breach of trust occurs, the
court may impose a surcharge for losses to the trust due to the

1 trustee's faulty management. 568 N.Y.S.2d at 662. A beneficiary
2 may charge a trustee . . . the amount required to restore the value
3 of the trust property and trust distribution to what they would have
4 been had the breach not occurred." Del. Code. Ann. tit. 12 §
5 3582(1).

6 Pursuant to Delaware Code § 3581, the Court finds that
7 Plaintiff, as the Successor Trustee under Trust Agreement, is
8 entitled to judgment against Street in the form of (i) money damages
9 arising from the Defendant's breach of duty and breach of Trust
10 Agreement, and (ii) reduction in compensation of the Defendant in
11 excess of his authorized compensation including reimbursement for
12 his personal expenses.

13 **G. Indemnification**

14 Delaware law prohibits exculpation or indemnification of a
15 fiduciary for his willful misconduct. Del. Code Ann. tit. 12 §
16 3303(a). Defendant failed to prove at trial and in his Post-trial
17 Brief his entitlement to indemnification in this case. In addition,
18 Defendant failed to show evidence of the amount of reasonable
19 attorney's fees might be entitled to be indemnified.

20 To the extent that he claims entitlement to indemnification
21 because he exercised good business judgment, Defendant is subject to
22 the fiduciary standards of loyalty and the business judgment rule
23 does not apply. Moreover, the defense that he did everything based
24 on advice of counsel cannot stand against the weight of evidence
25 showing he willfully engaged in various acts of self-dealing and
26 breach of duty which are an exception to the indemnification
27 provision of the Trust Agreement. This Court, therefore, finds that
28 the conduct described above amounts to gross negligence and willful

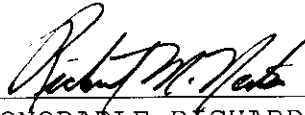
1 misconduct in violation of the Trust's limited authority granted to
2 Street.

3 If any of the above conclusions of law are subsequently
4 determined to be findings of fact, they shall be so designated.

5
6 **CONCLUSION**

7 For the reasons stated herein, the Court finds in favor of the
8 Plaintiff on Counts I-III, V-VIII that Defendant breached his
9 fiduciary duties to the Trust and violated the Trust Agreement.
10 Judgment will be entered against the Defendant in the amount stated
11 therein consistent with this Memorandum of Decision.

12
13
14
15 DATED: March 5, 2010



HONORABLE RICHARD M. NEITER
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

1
2 Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM OF DECISION AFTER**
3 **TRIAL** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be
4 served in the manner indicated below:

5 **I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling
6 General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s)
7 by the court via NEF and hyperlink to the judgment or order. As of **March 5, 2010**, the following person(s) are
8 currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF
9 transmission at the email address(es) indicated below.

10 US Trustee's Office (Los Angeles): ustpregion16.la.ecf@usdoj.gov
11 Plaintiff's Counsel (Scott Blakeley): SEB@BandBlaw.com; (Bradley Blakeley): bblakeley@BandBlaw.com

12 Service information continued on attached page

13 **II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order
14 was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the
15 address(es) indicated below:

16 **Defendant's Counsel:**
17 Phillip B Greer
18 1280 Bison Suite B9 531
19 Newport Beach, CA 92660

20 **Plaintiff's Counsel:**
21 Robert Kugler and Robert DeMay
22 Leonard, Street and Deinard
23 150 South Fifth Street
24 Suite 2300
25 Minneapolis, MN 55402

26 Service information continued on attached page

27 **III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or
28 order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy
bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of
service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile
transmission number(s), and/or email address(es) indicated below:

Service information continued on attached page