

# Susman Godfrey [REDACTED].

a registered limited liability partnership  
SUITE 5100  
1000 LOUISIANA STREET  
HOUSTON, TEXAS 77002-5096  
[REDACTED]  
[REDACTED]

Suite 5100  
901 Main Street  
Dallas, Texas 75202-3775  
[REDACTED]

Suite 950  
1901 Avenue of the Stars  
Los Angeles, California 90067-6029  
[REDACTED]

Suite 3800  
1201 Third Avenue  
Seattle, Washington 98101-3000  
[REDACTED]

15th Floor  
560 Lexington Avenue  
New York, New York 10022-6828  
[REDACTED]

Stephen D. Susman  
Direct Dial (713) 653-7801

Direct Dial Fax (713) 654-6686  
E-Mail [REDACTED]

## *VIA EMAIL*

The Honorable Anthony J. Carpinello  
JAMS  
620 Eighth Avenue, 34<sup>th</sup> Floor  
New York, NY 10018

Re: **FORTRESS VERF I LLC and FORTRESS VALUE RECOVERY vs. JEEPERS, INC.**  
JAMS Ref. No.: 1425006537

Dear Judge Carpinello:

Respondents and Counter/Third-Party Claimants Financial Trust Company, Inc. and Jeepers (collectively "FTC") write to raise two issues that have arisen during discovery. The Parties have agreed that Claimant and Counter/Third-Party Respondents ("Zwirn Parties") will respond to this letter by the close of business on June 7, 2011. If Your Honor wants an oral hearing on these issues, the Parties suggest June 13, 2011 to accommodate various scheduling conflicts of counsel. The two issues are as follows:

### **1. Pre-Hearing Testimony from Chris Suan.**

First, FTC requests that Your Honor grant our request to convene a hearing day in June in advance of the Hearing set for July 22-29 in order to hear the testimony of Chris Suan, who was a former partner with Dan Zwirn in the management company and general partner of D.B. Zwirn Special Opportunities Fund, L.P. The parties have discussed this issue with Your Honor previously, but the issue was tabled so that the parties could confer. Unfortunately, we have been unable to agree. The Zwirn Parties insist that any testimony from Mr. Suan be heard at the Hearing itself.

Given that Your Honor is familiar with the issue, FTC will briefly summarize its position. Your Honor previously granted both parties the right to take such pre-hearing testimony of third-

party witnesses (*e.g.*, Mr. Dubin and Mr. Gruss), although the Zwirn Parties and FTC subsequently elected to pass on the opportunity (preferring instead to call these witnesses to the Hearing itself). As a result, neither side is in a position to complain about Your Honor invoking the pre-hearing mechanism.

As Your Honor is aware, FTC made the decision to defer Mr. Gruss's pre-hearing testimony because Mr. Gruss had already given testimony in various other matters which FTC believed would allow it to focus on testimony elicited from Mr. Gruss at the Hearing itself. In contrast, Mr. Suan is a clean slate. FTC is concerned that if his testimony is taken for the first time at the Hearing, it will consume time, which will be tight. Both parties have exchanged long witness lists. Taking Mr. Suan's testimony before the Hearing itself will result in the most efficient use of time during the Hearing week.

## **2. Production of Spreadsheets Without Redaction of Investor Names and in Native Format.**

The Fund has produced a series of Excel spreadsheets in discovery that purport to record the redemption schedules of various investors and calculations of future liquidity, depending on whether the Fund's interpretation of the redemption rights or FTC's interpretation were applied. However, the Fund has produced the documents with all the investor names redacted (other than FTC) and in non-native format. We have asked the Fund to produce the documents without the redactions and in native format. The Fund has agreed to produce some of the spreadsheets in native format but with the redactions. We request that the Fund be order to produce all the documents in native format without redactions.

First, the native format is needed because some of the spreadsheets contain information derived from formulas. In the non-native format, the formulas are hidden. Obviously, one cannot tell what the documents really mean without seeing the hidden formulas, which can be seen easily in the native Excel format. Second, as Your Honor is aware, the key issue in this case is how for purposes of calculating redemption windows to treat multiple investments made by a single investor. The Fund intends to use the above documents to demonstrate that in practice it applied the interpretation that it now advocates. However, one cannot tell from the documents whether that is true without seeing the investor names; otherwise, one cannot tell if a single investor made multiple investments and thus how that investor's investments were treated. The Fund seeks to protect the confidentiality of its investors' names and investment amounts. While that might be an understandable goal, the Parties have agreed to a protective order. Moreover, the Fund (under prior management) produced many similar documents to the Securities and Exchange Commission without redacting any investor names, and a database of that production was given to FTC in this case without any redactions of investor names. As a result, FTC has multiple lists of every investor's name and the amount of their investment. The Fund did not produce the disputed documents to the SEC, and now the Fund is under new management. The Fund's new management says it will not reveal this information without an order from Your Honor.

The Honorable Anthony J. Carpinello  
June 3, 2011  
Page 3

Thank you for considering these matters.

Sincerely,

Stephen D. Susman

cc: William O'Brien  
Allan Arffa  
John S. Siffert