

## FTC/Jeepers vs. Zwirn: Opening Statement

This is in main part a breach of contract case. The dollars are large, the circumstances complex, and the parties colorful. But the issue to be decided is vanilla. The contractual language is clear, and the legal principles are solid.

Under the terms of the 2005 Letter Agreement between FTC/Jeepers and the Zwirn Fund, FTC was entitled to withdraw its “Capital Account” on March 31, 2007, so long as it gave notice before December 1, 2006. Notice was given, after a discussion, with both Dan Zwirn and the Fund’s agent Glenn Dubin, to reduce his demand for a total withdrawal of \$133 million to only \$80 million. But the money was never paid. Mr Dubin and Mr Epstein are in lock step with regard the details of these conversations. However Dan Zwirn, the general partner, of the fund had just been notified of gross irregularities in the Fund and an impending SEC investigation. [JE: WHAT DID YOU WANT HERE? THIS MAKES NO SENSE]

The fund never paid the reduced demand, and , the Fund owes FTC a minimum of \$80 million plus prejudgment interest, which is recoverable as a matter of right. There is no dispute that the 2005 Letter Agreement is binding and that it was drafted exclusively by the Fund. The language used is 100% unambiguous. Frankly, this is the sort of issue that would be decided on summary judgment were we in a different forum.

My guess is that the Hearing evidence, however, will not have much to do with this claim. The Fund will attempt to contest, d what exactly happened in November 2006 before FTC made its demand. This is an attempt to turn it into a classic swearing match. But it has no relevance to the \$80 million contract claim. Jeffrey Epstein clearly spoke to Dan Zwirn and Glenn Dubin, only Dan Zwirn disputes this, before making the \$80 million demand and promises were made; however, that in and of itself will not be required to carry the day on at least on FTC's \$80 million breach of contract claim. Indeed, if Dan Zwirn hadn't agreed on November 13, 2006 that FTC had the right to

make a withdrawal, FTC's \$80 million would still be valid. Mr. Zwirn can't change the plain meaning of the language used.

Similarly, questions about Dan Zwirns' credibility and the extent of his disclosures to FTC, are irrelevant to the portion of the \$80 million contract question. As you are aware FTC is not just suing for its \$80 million. WE believe strongly that we are right about the contract—and we believe there really should be little debate here based on the clear language of the 2005 Letter Agreement—the question becomes this: Why did FTC just put in a written request for \$80 million when it had the right to and initially did ask for a total redemption. The answer is that FTC was induced to reduce the demand to \$80 million by the Fund's conduct, or more specifically the conduct of the Fund's agents Messers Zwirn and Dubin. Mr Dubin does not dispute this.

The evidence will show that Jeffrey Epstein clearly wanted to get his money out of the Fund in November 2006. When Mr. Epstein heard about Mr. Gruss's departure, he immediately was suspicious and demanded to withdraw his entire capital account. Mr. Zwirn's reluctance to provide details and insistence on sticking to a prepared

script only fueled Mr. Epstein's suspicions and caused him to reiterate his demand for a complete withdrawal. Keep in mind that Epstein understood his money was locked up. And, according to the terms of the 2005 letter Agreement, he had until December 1, 2006, to give notice to get his money out. So, Epstein thought from the get-go that he had every right to demand all of his money back. It also will be clear that Dan Zwirn didn't want FTC to withdraw for a variety of self-interested reasons. But a compromise was struck between Epstein, Dubin, and Zwirn. Again, Dubin does not dispute this.

As I said, there is a disagreement about what happened with Mr. Dubin and Epstein on one side, and Dan Zwirn on the other. The parties will argue about whether the circumstantial evidence supports their version. Whatever happened three things are crystal clear. First, Mr. Epstein clearly wanted his money back. That's obvious from the written demand itself. Remember this Fund had been reporting strong returns, yet Epstein wanted out on the first sign of trouble.

Second, the \$80 million demand was the product of a conversation where a compromise was reached. The written demand itself begins

with the phrase “as per our conversation.” Moreover, the amount itself is indicative of a compromise number. Why would Epstein just want to demand \$80 million?

Third, it is clear that Mr. Epstein believed the Fund would honor the reduced demand, and had he believed otherwise, he would never have reduced it. How do we know that? It obviously makes sense that if the FTC knew it were going to have a fight with the Fund about its ability to withdraw, it would fight over the \$133 million, not some compromise figure. Doesn't make sense. Moreover, we don't need to speculate what would have happened; we know. In February 2007, when the evidence is crystal clear that Mr. Epstein learned the Fund would not honor the \$80 million. He responded in about three hours with a formal letter demanding all its money.

Fourth, and most importantly, Zwirn and Dubin had every incentive in the world to mollify Epstein and give him whatever he wanted, regardless of what Dan Zwirn thought the 2005 Letter Agreement provided. Even without the discovery of financial irregularities, both Zwirn and Dubin understood the importance of

keeping Epstein happy. He was the first investor in the fund and 10% of it. That's why he got a two-year lockup on his entire capital account, including his 2005 investment, when all other 2005 investors were subject to a 3-year lock up. But the discovery of the financial misdeeds by senior officers of the Fund, made it even more crucial to pacify Epstein: the SEC had started an investigation; the scripted explanations that Zwirn gave to employees, investors, creditors and regulators, all included assurances that after disclosures to investors, they all were supportive; and the investors to whom the disclosures were made were urged to keep them confidential because if word got out to the press and the market, there could very well be a run on the bank. And the incentives for GD to make DZ satisfy JE were even greater: in addition to 18 years of personal and family friendship, GD was responsible for each of JE's contributions to the Fund and in the fall of 06, JE had more than \$300m invested with other Dubin-managed entities.

As a result, if Your Honor finds that the Fund's conduct lead FTC to delay making a demand for \$133 million until after the 120-day notice period expired, the Fund cannot stand on the 120-day notice period. We

contend that the Fund’s conduct—or that of its agents—was intentional and designed to avoid a fight with Epstein at a particularly vulnerable moment for the Fund. But we do not have to carry that burden; an estoppel can be found even based on unintentional conduct. Regardless, the Fund must honor the \$133 million demand.

If I may , , I am going to begin by focusing on the contract argument. Our position on the language of the contract is straightforward, and I believe fully explained in our Pre-Hearing Brief.

**DEMO 1** [2005 Letter Agreement]. Under the 2005 Letter Agreement signed on January 11, 2005, FTC was given the right to withdraw its “Capital Account” at the quarter ending “two years after the Company initially purchases this Interest,” which was the January 1, 2005 interest. WITHDRAW ITS CAPITAL ACCOUNT !!

**DEMO 2** [Definition of Capital Account.] The LPA clearly says that there is 1 “Capital Account” per limited partner. “Each Limited Partner” has a capital account.

The Fund acknowledges that Delaware enforces the parole evidence rule. Unless the contract is ambiguous, a court applies the plain meaning of the language. Extrinsic evidence is entirely irrelevant.

The Fund claims that each investment “created a separate ‘Capital Account.’” But this is not supported by the language of the agreement. The language is that there is a Capital Account for “each Limited Partner.” If the Fund’s view were correct, then the definition of “Capital Account” would say, “A ‘Capital Account’ shall be maintained for each investment.” But those aren’t the words used.

The Fund seems to suggest that FTC became a limited partner multiple times, and thus FTC was 5 limited partners. Again, the contract language precludes this dodge. **DEMO 3** [Limited Partner Definition]. The term “Limited Partner is defined as “those persons who have executed this Agreement and whose names and addresses” are set forth on the books and records. There is only one 1 name and address for FTC on the books and records, and thus only 1 FTC as a Limited Partner.

The Fund attempts to create an ambiguity in the Agreement by pointing to the use of the plural “Interests” in the LPA. To begin with, even if the use of the plural “interests” in the LPA were ambiguous, which it is not, this would not create an ambiguity in the relevant contract here: The 2005 Agreement. Regardless, the Fund’s argument is incorrect as a matter of law.

**DEMO 4 [Section 9.1 of First Amended LPA].** The LPA as it existed in January 2005 said that withdrawals “of a Limited Partner’s Capital Account” may be made at the quarter end two years “after the Limited Partner initially purchases Interests.”

**DEMO 5 [Quote from Pg. 29 of Brief].**

The Fund says that the use of the plural “contemplates multiple subscriptions, each of which will trigger its own withdrawal schedule.” That’s the entirety of their argument in a meager attempt to provide a reasonable alternative interpretation of this language. The first part of this sentence is true. The use of the plural “Interest” contemplates multiple investments. Importantly, it contemplates multiple investments by a single—not plural—Limited Partner. The second part of this

argument “each of which will trigger its own withdrawal schedule” is just an assertion; the Fund provides no reasoning for this assertion. By definition, an interpretation unsupported by any reasoning can’t be a reasonable alternative.

But it is worse for the Fund. Their proffered interpretation is unreasonable. To begin with, the thing being withdrawn is not the “Interests” plural but the “Capital Account,” which is singular. Worse for the Fund, the use of the plural “Interests” is the explicit recognition that the singular “Capital Account” can include multiple “Interests.” In other words, instead of helping the Fund’s cause, the use of the plural “Interests” guts their argument.

Second, the notion that the plural “Interests” indicates there would be multiple withdrawal dates is completely undercut by the word “initially.” The language says the withdrawal date runs from the anniversary of the “initial” purchase of the plural Interest. In other words, this language specifies a particular purchase—the initial purchase—that the withdrawal date runs off.

The Fund claims that we are trying to re-write the language to say the withdrawal date runs from when a limited partner “initially purchased its first Interest.” That’s not re-writing anything; it is just another way of saying the same thing as the language used. The phrase “initially purchases Interests” (plural) means the first Interest among a pool of Interests.

There is no way to interpret this language other than as calling for a date upon which you can withdraw a single Capital Account even one containing multiple Interests.

We believe this is the end of analysis. Delaware law takes a strict view towards interpreting contracts. Absent an ambiguity, one cannot look at extrinsic evidence; the words on the page are the beginning and the end of the matter. That’s one of the reasons business routinely select it to govern contracts. Application of this rule in the context of hedge fund investments is particularly important. investors are stuck with the plain meaning of the words, it would be highly unfair to permit the Fund to use evidence outside the documents to change the meaning.

Even if Your Honor wades into the extrinsic evidence, it does not help the Fund. At the outset, since the Fund drafted the documents at issue, Delaware courts will construe the extrinsic evidence against the Fund. So, the Fund has an uphill battle even on the extrinsic evidence front.

The Fund's extrinsic evidence has nothing to do with FTC or any information that would have come to FTC's attention. The Fund focuses exclusively on what management or other third-parties thought, in many instances referencing documents produced after the events at issue. I want to focus on the evidence that sheds light on what FTC should have reasonably believed the contract meant.

While there is no evidence that the parties had any discussions on the specific topic of how multiple investments would be treated for purposes of calculating lock-ups, Your Honor will see that the Fund repeatedly and consistently over the years sent in writing, confirmations that described FTC's sole "Capital Account" as the entire value of all of its Interests. This is critical because the Fund now wants to claim FTC should have understood each investment was in its own Capital Account.

The Fund's Pre-hearing brief anticipates this problem for its argument and claims that FTC had one capital account for tax purposes. Well, it is true that the K-1's provided to FTC over the years for tax purposes showed a single capital account, but that's not the evidence we are relying on. Instead, you will see that whenever we asked a question about the size of our Capital Account (and we asked a lot to the frustration of the Fund), we were always given a single number. There is simply zero evidence that the Fund ever conveyed to us its understanding that FTC in fact had 5 different capital accounts.

The Fund claims that FTC should have known it had 5 separate capital accounts because it filled out 5 separate subscription agreements. The Fund claims that each such subscription constituted an "Initial Capital Contribution" and not an "Additional Capital Contribution." However strikingly, there is nothing in the documents that says this. To the contrary, the LPA defines "Initial Capital Contribution" as "with respect to any Partner, the amount of capital contributed by such Partner in accordance with Section 4.7, 5.1 or 5.2." Section 4.7 is the \$50 put in by the Initial Limited Partner, defined as Dan Zwirn. Section 5.1 is the

contribution by the General Partner. Section 5.2 is the \$2mil minimum initial capital contribution a person must pay upon execution of the LPA. There is no provision in the LPA for multiple Initial Capital Contributions by a limited partner. The Fund's Management t has just decided after-the-fact to characterize these transactions in a self-serving way because they are dead wrong on the contract language itself.

In fact, the act that puts the lie to the Fund's argument is that in late 2006 when FTC assigned its interests to Jeepers, the Fund demanded that Jeepers fill out a new subscription agreement. According to the Fund's Pre-Hearing brief, Jeepers should have been asked to fill out 5 separate subscription agreements since it was allegedly getting 5 separate L/P Interests in 5 separate capital accounts. Of course, that didn't happen; the Fund asked Jeepers to fill out 1 agreement. FOR ITS ONE CAPITAL ACCCOUNT Moreover, the Assignment itself, prepared by the Fund's lawyers, refers to multiple interests but a single capital account.

The Fund also argues that if you accept FTC's interpretation, the 2005 Letter Agreement makes no commercial sense. As of January

2005, the quarter ending on the next two-year anniversary of FTC's initial April 2002 investment would have been June 30, 2006. The 2005 Letter Agreement had the effect of extending FTC's withdrawal date from June 2006 to March 2007. The Fund says FTC would never have agreed to that. Two points in response. First, since FTC was agreeing to add to its position (and receiving an exemption from the three-year, rolling lock-up), it is not illogical at all to assume a new time-period might commence on the date of this unusual transaction. Second, at the time, January 2005, there was zero reason why FTC would have thought the extra 9-months would make any material difference. FTC was being told of significant multi-year positive returns; indeed, FTC was increasing its investment by \$20 million. It's like my law firm, whose lease runs to the end of next year, agreeing now to take more space in our building and signing a new 10-year lease: were we irrational to give up our right to delay a decision for 18-months?

The Fund mistakenly points to the 2005 Offering Memorandum a memorandum written months after these event in an attempt to show that FTC should have known each investment was subject to a distinct lock-

up. The 2005 Offering Memorandum contains a paragraph that says each investment will be subject to a three-year lock-up, and that a “separate capital account” will be created for each investment. Again, as we mentioned in our brief, this Offering Memorandum was issued in May 2005— months after all of FTC’s investments were made. The point of updating the Offering Memorandum in May 2005 was, in fact to memorialize a change in the way lock-ups were going to be handled, a change that was clearly not retroactive and certainly didn’t apply to FTC. Frankly, there is no reason why FTC should have paid any attention to this language since it was not contemplating any new investment in the fund.in may of 05.

**DEMO 6 [Sec. 9.1 from 2nd Amended LPA—redline version]**

In fact, let’s look at the amended LPA that was issued in conjunction with the new Offering Memorandum in May 2005. This is a redline version. The new language comes after the “provided however.” Now, this language clearly conveys the notion that each Interest (or investment) has its own lock-up; it specifies a singular date running from the third-anniversary of “the date on which the Interest was purchased.”

Nothing about the date when you “initially purchased Interests.” Moreover, note that it says you can withdraw the “portion” of your capital account attributable to the Interest. Obviously, whoever wrote this understood that a capital account could include numerous Interests even though the Fund now claims that was impossible.

Most importantly, no one went back and changed the language applying to two-year lock-ups to make the withdrawal date run off the purchase of each Interest or to authorize withdrawal of only that portion of a capital account relating to the investment. And, you can't say that was just because no one paid attention to cleaning up the two-year language. You will see that as originally written, the language suggested that the lock-up only rolled to the next two-year anniversary, as opposed to rolling for “each” two-year anniversary. The SRZ lawyers caught this and fixed it.

**DEMO 7 [SRZ Presentation]**. The extrinsic evidence will show that SRZ drafted a many offerings for hedge funds We will show you evidence that SRZ clearly understood that there were at least two

“typical” ways to trigger the running of a lock-up period. This comes directly from the SRZ website:

A **typical** lock-up applies for a specified period beginning on the date of the investor’s admission to the fund **or** the date of each capital contribution made by an investor to the fund.

We will show you examples where SRZ knew exactly how to express the “each capital contribution” or tranche-by-tranche concept in clear language. Had they wanted to they knew how. But they didn’t do it in the Zwirn Fund—at least not until the three-year lock-up was introduced. And, they didn’t go back and change the two-year lock-up rules. There are two only inferences you can make from this: (1) the SRZ lawyers made a drafting error that no one caught ; or (2) the SRZ lawyers knew that under the original lock-up terms, the date began “on the date of the investor’s admission to the fund” and that changing the rules midstream would be unacceptable. I am going to get to the fact that the Fund’s management may have believed in the tranche-by-tranche approach, but this wouldn’t be the first time that lay management preferred their version of some legal right they would

have like to have had but the lawyers knew that's not what the contract said.

The Fund suggests that any sophisticated hedge fund investor should know that lock-ups are always done on a tranche-by-tranche basis. That's clearly false, as the SRZ presentation that I just showed you proves. It is also false based on FTC's actual experience. You will see evidence that FTC invested in a number of hedge funds. Their practices vary . As far as FTC's experience was concerned, there is no concrete boilerplate version of accepted industry practice.

Now, I want to talk some about the Fund's extrinsic evidence. It fits into three categories: (1) evidence that the Fund's management genuinely believed in the tranche-by-tranche approach; (2) evidence that other investors understood that too; and (3) arguments that only a tranche-by-tranche approach makes sense.

The one area where the Fund's extrinsic evidence is clear is that the Fund's management may have believed in this tranche-by-tranche approach. We don't dispute this. but their preferred belief will not carry day. ? FTC, certainly believed , and was given account statements that

on their face confirm the opposite view, . One of basic tenets of contracts is that one party's subjective belief about a contract's meaning can not trump the written word..

In any event, just because the management may prefer to believe in a tranche-by-tranche it is not a reasonable, non self interest based belief based on the contract language. It certainly does not come from the contract language. The Fund will tell you that a tranche-by-tranche approach makes the lock-up stronger. While the Fund wildly exaggerates the impact (more on that later), it is generally true that the tranche-by-tranche locks-up more money longer. It is thus not shocking that management, which earned fees off the capital that is tied up, attempts to , adopt the most self-serving interpretation.

Moreover, the evidence will show that this management team was careless—indeed reckless—about many many administrative matters. That is what led to the funds demise The mismanagement was certainly not limited to the errors of . Perry Gruss. Dan Zwirn's claimed ignorance of what Mr. Gruss did may have saved Zwirn from being charged by the SEC, but that same what we believe is feigned ignorance

does not alleviate the irresponsibility of Dan Zwirn. Management's opinion that the lock-up was tranche-by-tranche is just an attempt to draw self serving conclusions, by affirmatively misreading the relevant documents.

The Fund attempts to claim that some other investors understood that the lock-up was tranche-by-tranche. Assume that were true, so what? FTC was the only investor with a negotiated side letter that is at issue here. The contract is the 2005 Letter Agreement between FTC and the Fund. The other investors were not parties to that agreement.

In any event, the evidence supporting the Fund's assertion about what other investors understood about their withdrawal rights is weak at best. To begin with, it is important to note that most investors were not subject to the two-year lock-up at issue. The majority of investors elected a one-year liquidity option that permitted withdrawals every December 31, and another big chunk of investors were subject to the three-year lock-up, which as noted above was the only unambiguously tranche-by-tranche. So, the only investors whose understanding matters, here are the two-year investors.

The evidence will be that very few two-year investors ever sought to redeem—certainly not until it was too late. And, even those that sought to redeem, the amounts were relatively small. This issue of whether you can redeem a single investment or the entire capital account only matters if an investor wants to pull out more than the value of a single investment. Before the Fund started to experience its problems, very few (if any) two-year investors who made multiple investments ever asked for an amount of money that equaled the value of even a single of their investments. Obviously, if you didn't want more than a single investment back, you wouldn't care to fight over the tranche-by-tranche vs. single capital account issue; it was not relevant. FTC demand is unique.

The Fund's Pre-Hearing Brief cites one piece of evidence that investors understood the Fund's position that is telling. The Fund cites an internal email where a prospective investor, named EnTrust, asked a woman named, Allison Alamansky, who Fund's Business Development (*i.e.*, dealing with investors), if they invested on Sept 1 and Oct 1 would both investments be subject to the same lock-up. Ms. Alamansky

responded by saying she didn't know the answer and would ask Dan Zwirn, who responds "each piece has its own lock-up. no combo." Of course, this exchange shows that the tranche-by-tranche approach wouldn't be obvious to a reasonable investor. The Fund's own director of business development didn't know the answer to this question. The Fund can't enforce an contract interpretation merely because that's the way Dan Zwirn wanted the contract to read. And, EnTrust did not invest.

The Fund's industry practice evidence is especially weak. To begin with, as we noted in our Pre-Hearing brief notes, industry practice only matters if it is almost universal in practice. No one will testify that the tranche-by-tranche method is universal in practice in the hedge fund industry. You will see examples of hedge fund documents that clearly do not use a tranche-by-tranche method. Many have withdrawal penalties, many have mimum withdrawal amounts, many have a menu of withdrawal choices, even if they have lockups. As noted above, the Fund's own lawyers (SRZ) says that there areat least two methods that are "typical," only one , ONLY one of which is the tranche-by-tranche.

The Fund posits the following hypothetical posed by the FTC interpretation. An investor invests \$10 million on May 1, 2002, and \$30 million a year and a half later. The Fund argues that the manager would not be able to invest the \$30 million because it could be withdrawn in a mere 6 months. Staying in the world of the hypothetical for a second, this problem would only exist during the first lock-up period. Once you got past the 2-year anniversary of the initial investment, everything would be locked-up for two years. But, of course, this is a false hypothetical. The Zwirn Fund had hundreds of investors with one and half billion of invested capital. As noted above, over half these investors had a one-year lock-up. And, it should have had adequate liquidity to meet even fairly substantial redemption demands. There is no reason why Zwirn would be frightened that an investor might want \$30 million back after a mere 6 months, especially an investor who just quadrupled their investment, such that he would have to leave \$30 million in cash for 6-months.— Most funds are careful to have liquidity , for just these types of events.

The Fund argues that it is common for hedge funds to track separate investments to calculate the highwater mark. There is no connection between the highwater mark and redemption rights. In fact, You Honor will see examples of hedge funds that combine investments for redemption purposes but not for purposes of calculating the highwater mark. There is simply no industry standard as they continue to suggest,

The Fund suggests that it tracked investments separately to calculate the highwater mark. To begin with, you will see evidence of the Zwirn Fund tracking a highwater mark based on the gross value of an investor's entire capital account—all investments—not on a tranche-by-tranche basis. Moreover, any highwater mark argument is purely academic for the Zwirn Fund given's the Fund's unusual trajectory. The highwater mark only matters when a fund losses money, and then subsequently makes money. The manager has to recover the past losses before it can earn fees. The Zwirn Fund had many years where it experiences no losses followed by an endless series of losing years. The highwater mark has played no role.

In sum, the contract is not ambiguous. FTC properly exercised its contractual rights in making at least the \$80 million demand. Even in the unlikely event Your Honor concluded the agreement was ambiguous, the relevant extrinsic evidence supports the conclusion that the most reasonable interpretation of the contract is that for two-year investments, the lock-up was keyed off the single capital account even if the investor made multiple investments.

## **Alleged Withdrawal of \$80 Million Request**

The Fund claims that FTC agreed to rescind the \$80 million request in return for the Fund agreeing to an assignment of its interest to Jeepers. This claim is truly made up out of thin air. There is no written evidence that FTC ever struck such a deal. To the contrary, the assignment documents make clear that FTC was not waiving or releasing anything even though the Fund tried to slip that into the documents. In fact, there is a form for a rescission of a demand, that was neither sent or obviously never signed.

Worse, as our Pre-Hearing Brief notes, the Fund had its lawyer SRZ write a letter on March 27, 2007 rejecting both FTC's \$80 million demand and the \$133 million demand. The Fund took a month and a half to prepare this response. Yet, in rejecting the \$80 million demand, SRZ does not make the simple point: You agreed to rescind this.

The Fund's story further makes no sense. The assignment was purely administrative. During 2006, NY State passed a law taxing investment income of foreign entities earned in NY, and the Fund began withholding the NY tax from FTC as it should. Because FTC wants to

maintain its US Virgin Island tax status, Mr. Epstein's tax advisors didn't like the appearance of NY tax records with FTC's name on it. So, the solution was to change the name on the withholding record by assigning the Zwirn interest to Jeepers—an entity wholly owned by FTC. No tax liability was avoided; the Fund kept withholding, just in the name of Jeepers. There is no reason why FTC would have thought Zwirn might refuse this accommodation, which cost the Fund nothing, nor did FTC have much to gain from it. Why would FTC give up \$80 million for that?

### **FTC's \$133 Million Claim**

If your honor finds us right on the contract, the Fund does not only owe FTC the \$80 million that it requested in November 2006. WE maintain that the Fund owes FTC the full \$133 million that FTC requested initially verbally and then in writing in February 2007— While it is true that FTC's written complete withdrawal demand did not meet the 120-day notice requirement, the Fund is estopped from asserting this requirement.

The evidence will be that what directly provoked the February 2007 demand was one thing: Jeffrey Epstein learned on February 14 that the Fund intended to dishonor the reduced 133 million dollar demand ie even the \$80 million demand. His immediate response was to demand the entire balance ie the full \$133 million. Obviously, had JE learned back in November 2006—at anytime prior to December 1, when the 120-notice period expired—that the Fund would not honor his, reduced \$80 million demand, he would have done exactly what he did on February 14: demand in writing the \$133 million

The Fund's response is that we told JE in November that we would not honor the \$80 million and did nothing to make him think otherwise.

This dispute turns on what happened during the first two weeks of November 2006, and in particular on November 13, 2006—the day that culminated with FTC sending in its redemption demand around 6:40PM.

The Parties' Pre-Hearing Briefs lay out each side's respective version of events. But I want to make a few observations. FTC's \$80 million didn't come out-of-the-blue. The text of the memo makes it crystal clear it was the product of some conversation between Mr. Epstein and Dan Zwirn. The demand begins with the words "as per our conversation . . . ." Again Mr Epstein and Mr Dubins recollection, of this conversation are in harmony.

This phrase "as per our conversation . . ." is telling. The Fund claims that FTC recently fabricated the story that there was a conversation between JE, DZ, and GD prior to the \$80 million request. Admittedly, this doesn't say what was discussed, as the Fund notes, but it is pretty powerful contemporaneous evidence that some conversation

occurred and “as per” whatever was discussed, FTC made a written demand for its \$80 million.

According to the Fund, the only discussion had on November 13 was Mr. Zwirn telling Mr. Epstein’s bookkeeper that FTC had no right to withdraw. Assume that’s true, then how can you explain the fact that FTC demanded \$80 million that night? Mr. Epstein was making a futile gesture? It just doesn’t make any sense.

The \$80 million number also doesn’t make any sense. No one is going to say Mr. Epstein , would choose to sit idly by, while his request for his not insubstantial amount of money was going to be ignored. The idea that he reacted to being told he had a right to take out nothing by submitting a request for only part of his investment is totally out-of-character and in contrast to other instances of fund withdrawals when bad information surfaced. [WHAT?] Clearly, this was a compromise figure. Indeed, when he is clearly and unambiguously told on February 14, 2007 that the Fund claimed he had no right to withdraw, he waited only three hours to respond—presumably because he had his lawyers

write a much more formal demand this time—by re-demanding all his money.

There is NO mystery to what happened on November 13. Here's what the evidence will show. Mr. Epstein was clearly agitated, he wanted to get his money out. Mr. Beller is instructed to make a written demand on the Fund. Dan Zwirn claims that in response, he talked to Beller and explained to him that FTC had no right to withdrawal. Mr. Beller says it didn't happen. This conversation never occurred. Mr. Beller the accountant, would have gone straight to Mr. Epstein, had there been such a conversation. Moreover—it doesn't really matter.

Mr. Zwirn always tasked Mr. Dubin as the sole person to talk to Mr. Epstein. The Fund is right that Mr. Dubin and Mr. Epstein have a close relationship; it is a relationship based on a long standing professional record and solid footing. Their relationship is a handshake is my word type of relationship. The other side will make much of the fact that Mr. Dubin agreed to pay Mr. Epstein \$20 million as a finder's fee even though there was no contractual obligation in writing. But that just proves out point. It is extraordinarily unlikely that Mr. Dubin got

on the phone and told Mr. Epstein that he had no legal right to withdrawal and walked him through some rolling redemption schedule for each investment. Instead, Mr. Dubin affirms in writing that he attempted to strike a business compromise between Mr. Epstein and the Fund. Then, Dubin, Zwirn, and Epstein got on the phone to confirm the agreement that Epstein would withdraw the \$80 million. And per both Epstein and the Funds own agent Dubin, - Zwirn agreed..

The Fund asks why on earth would Zwirn agree to this, especially after having taken the position that Epstein had no right to withdraw? The fund had determined that serious wrongdoing had occurred. An SEC investigation had started. In every conversation he had with employees, creditors and investors, Zwirn needed to be scripted to say that he had talked to all the investors and that they were supportive; he was scripted to ask the his disclosures be kept confidential. Zwirn was 37-years old at the time and in the midst of a credibility crisis, where his business was about to be under investigation by the SEC. He was on the phone with two folks who had made his business possible. Mr. Dubin put him into business and was his partner; Mr. Epstein was the initial,

big investor who backed him at the start. Dan Zwirn was to get prepared for his investigation of wrongdoing.. He needed peace and the last thing he wanted was his largest investor running loudly for the door.

The day after Mr. Epstein sends in the demand, Mr. Zwirn attempts to set up a meeting to make Epstein comfortable that his remaining 53 million in the fund is safe and suggests a presentation about the NAV of the Fund. It would be the first substantive meeting they've ever had. Obviously, Mr. Zwirn hopes to rehabilitate his credibility with Mr. Epstein. But Epstein cancels the meeting; he believed that a proper NAV would not be determined for months and Glenn Dubin promised to bird-dog the issue for Mr. Epstein.

During December, the lawyers work out the transfer from FTC to Jeppers. As I mentioned earlier, this was purely an administrative matter, nothing substantive. However, when the Fund attempts to insert, a general release language, for all its potential past wrongdoing into the documents, FTC immediately objects, and the offending language is quickly removed.

It is not until February 14, 2007, that Mr. Epstein clearly learns of the Fund's contrary position. He asks Mr. Beller to follow-up on the \$80 million. Mr. Beller is told that the Fund is not going to honor it, and is sent a schedule that shows the Fund's position. Mr. Dubin and Mr. Beller both forward the schedule to Mr. Epstein, who now sees in clear writing the Fund's position. He immediately responds by again demanding all his money.

One thing is clear from this story: Had Mr. Zwirn or Mr. Dubin told Jeffrey Epstein that he wasn't even getting \$80 million back in November 2006, Mr. Epstein would have continued with his demand for all his money then, and we would only be fighting over a written \$133 million that met the 120-day notice requirement. Thus, the Fund only has a notice defense because either Mr. Zwirn or Mr. Dubin—both of whom are agents of the Fund—misled Mr. Epstein into believing that his reduced demand would be met.

In addition to not being straight with Mr. Epstein about his withdrawal rights, the Fund—and Mr. Zwirn—was not straight with Mr. Epstein about the nature and grand scope of the myriad of problems that

surrounded Perry Gruss's firing. The evidence will be that Zwirn downplayed his own knowledge of the acts, the knowledge of other members of management, and even the true nature of the problems. Had the Fund and Zwirn been honest with Epstein, FTC would have never have reduced his demand.

**Even if the Fund Is Right**

Even in the unlikely event that Your Honor concludes the Fund is right about the tranche-by-tranche interpretation, FTC has a valid claim. It now seems obvious that the Fund owed FTC \$45 million. Money that should have been paid back in 2007. The failure to pay this money is inexcusable. If there were a case where prejudgment interest was warranted, the claim for \$45 million is it. Since I have mentioned interest, let me note that the Fund's Brief is highly misleading when it says that an award of prejudgment interest on a contract claim is discretionary under Delaware law. The law is crystal clear that it is a matter of right. The \$45 million plus prejudgment interest comes to about \$60 million.

Another feature of this claim is that the Zwirn entity that served as the Fund's GP is clearly liable for this claim. It is black-letter law that a General Partner is liable for the Fund's liabilities, including contract liabilities. The GP can't hide behind the exculpation because the failure to honor the contract was clearly in bad faith, as even the Fund does not

seriously dispute the liability. Now, Mr. Siffert says that entity has no money. We will deal with collecting later.

But even if the Fund is right on the contract, FTC has a claim for more than \$45 million. The evidence will show that the Fund knew about the problems with Gruss much earlier in 2006. Had the Fund merely disclosed the problems earlier in 2006, then FTC could and would have withdrawn most if not all of its money. In fact, if the Fund had merely disclosed before September 1, FTC could have withdrawn an additional \$53 million.

**Discretion Not to Pay**

The Fund's repeatedly notes that the GP has the discretion not to pay redemption requests. Under Section 9.7 of the LPA, the GP has the right to suspend all withdrawal payments. This is called putting up the gates. But under the terms of Section 9.7, the GP has to put up the gates as to all investors and has to provide written notice to all partners of his decision. This is the nuclear option. Putting up the gates spells the end for a Fund. Dan Zwirn did put up the gates but only in February 2008 after well more than half of investors asked for their money back at year end. While FTC's demand for \$80 million or even \$133 million would have been a significant payment, it would have been manageable for a Fund with almost a billion and half billion in invested capital. There is no reason to believe Dan Zwirn would have destroyed his baby to prevent paying FTC.

Section 9.6 says that if the Fund receives withdrawal requests exceeding 10% of the Fund's NAV, the GP can reduce requests "pro rata" among investors so that only 10% of the Fund's NAV will come out. And, the GP must pay the balance in priority to all subsequent

requests. At the time, FTC's investment was just at 10%, so this limitation would not apply.

Section 9.8 says that 90% of the withdrawal request will be paid within 45-days with a 10% hold-back until the annual audit is complete. Section 9.8 says that the GP may delay payment longer "in order to effectuate an orderly withdrawal from any investment." In other words, the GP cannot punish one particular investor because he doesn't like him or disagrees with the investor's view of his contract rights. There will be no evidence that Zwirn could have justified a refusal to pay FTC by invoking Section 9.8—at least not without grossly breaching his fiduciary duties. Obviously, you cannot defeat a contract claim by arguing I would have tortiously refused to pay you anyway, so you have no damages.

### **Order of Priority**

Assuming Your Honor finds in favor of FTC, the Fund claims that Your Honor should determine what priority FTC's claim should get among the Fund's other creditors. This issue is obviously inappropriate for this arbitration. To begin with, the issue of where FTC's claim fits in the order of priority is a dispute among the Fund's creditors. None of whom other than FTC are present. Second, the statute that the Fund is citing, Section 18-804(a) of the Delaware LLC Act governs the priority of distribution for a limited liability company that has been dissolved and is in the subsequent process of winding down. Fortress says that it is winding up the Fund, and in the vernacular, maybe that's true. But Section 18-801(a) of the LLC Act provides very technical definition of what events trigger a "dissolution and winding up" under Delaware law. These events include things like the sole Managing Member stopped being the sole Managing Member; the Managing Member elected to dissolve the Company; a vote of 2/3 of the members; a situation where suddenly there are no members; or a judicial dissolution. None of those

events have occurred. So, what priority FTC's claim would get under 18-804 is entirely premature.

Nevertheless, the Fund repeatedly echoes the them that any money awarded FTC will reduce the money that other investors recover. That may be true, but it is totally irrelevant. The Fund says that it would be unfair for FTC to get its money out when other investors are going to taking a big bath. FTC is only in this position because of the Fund's failure to honor its contract back in 2007. Had the Fund honored the contract, FTC would be in the same position as many investors who got money out during 2007. Including Highbridge managed acct. No one is saying that they must give the money back or there was anything unfair about it. They exercised their rights and made a smart decision.

Unlike the overwhelming majority of investors who are stuck in the Fund still, FTC was smart enough to try to get out of the Fund in late 2006. The other investors were enamored of the Fund's returns and wanted to keep their chips on the table. When you gamble, of course, you can lose. FTC made—what turns out to have been the right choice

in hindsight—to get out. There is nothing unfair about FTC obtaining the benefit of its wise decision.

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