

INSERT A (“Trade Usage”):

The Fund has submitted the expert report of a lawyer who has drafted hedge fund documents before and opines that he commonly sees funds employ a tranche-by-tranche approach. Conspicuously, the Fund’s expert does not opine that this is a uniform practice. Such a claim would be entirely false, as evidenced by the expert report submitted by FTC. Presumably, the Fund intends to claim that its expert’s understanding constitutes a custom and usage in the trade. The Fund, however, cannot satisfy the exacting standard required to establish a trade usage.

Delaware courts have stated that the common law of custom and usage is codified in Delaware’s enactment of the UCC,¹ which states: “A ‘usage of trade’ is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” 6 Del. C. § 1-303(c). Trade usage can be established in two ways: (1) by evidence that the other party actually knows of the alleged usage, or (2) by evidence that the alleged usage is “so general and notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it.” 12 Richard Lord, *Williston on Contracts* § 34:15 (4th ed. 1999). There is no evidence FTC knew of an alleged “tranche-by-tranche” usage, and the Fund cannot establish that the “tranche-by-tranche” approach is “so general, notorious, and universal and well established” that knowledge can be presumed. *See id.* (“[O]ne who seeks either to define language or to attach a term to a contract by means of usage must demonstrate that the usage was actually known by the party to

¹ *See Freudenberg Spunweb Co. v. Fibervisions* [REDACTED], No. 04C-03-073-FSS, 2006 WL 1064173, at *18 (Del. Super. Ct. Mar. 27, 2006) (“The Delaware Uniform Commercial Code codifies the common law doctrine of ‘custom and usage in the trade’”)

be affected by it, or that it is so general, notorious, universal and well established that knowledge of it will be presumed.”).

There is zero evidence FTC knew of some industry practice to calculate redemption periods based on a tranche-by-tranche basis. To the contrary, FTC has provided the governing documents for its various hedge fund investments. The picture that emerges is mixed: Some clearly employ a “tranche-by-tranche” approach advocated by the Fund; others clearly use a “single capital account” approach; and some employ both. Worse, when the other hedge funds FTC invested in seek to employ a “tranche-by-tranche” approach, their documents say so expressly.² Obviously, if there were some accepted custom to use a “tranche-by-tranche,” this specific language would be unnecessary.

There is no evidence that the tranche-by-tranche approach is “general, notorious, and universal and well established.” As noted by a continuing legal education paper that two of the firm’s partners authored and posted on its website, SRZ (the author of the Fund’s documents) has opined that the “single capital account” and “tranche-by-tranche” approaches are both “typical”:

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.

Managing Liquidity, Stephanie R. Breslow & Kelli L Moll (January 18 2007) (emphasis added).

There simply is no uniform practice. The proffered testimony of the Fund’s expert witness, Henry Bregstein, is that in “my experience,” funds “routinely” use a tranche-by-tranche

² For example, the Prentice Capital Limited Partnership Agreement expressly states that each investment is put in its own “Capital Account”: “A capital account (the ‘Capital Account’) shall be established on the books of the Partnership for each Capital Contribution made by each Partner.” As a result, the Offering Memorandum explains: “Each capital contribution of a Limited Partner will be credited to a separate capital account (each, as ‘Capital Account’). Each capital contribution by a Limited Partner (and any appreciation or depreciation thereof) will be subject to a new Lock-Up Period (as defined below) and to the application of other provisions relating to withdrawals.” Similarly, the Bear Stearns Asset Backed Fund’s Limited Partnership Agreement states: “For purposes of this Sec. 4.02, each additional contribution by a Limited Partner made pursuant to Sec. 3.02(b) shall be placed in a separate Capital Account for purposes of determining the applicable Lock-up Period.” Schulte Roth and Zabel, the same firm that drafted the Zwirn documents, drafted both sets of these documents.

approach. Bregstein Report, at 6. That opinion does not establish that the practice is so “general, notorious, and universal” that any reasonable hedge fund investor should be aware of the practice.