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BY EMAIL

Hon. Anthony J. Carpinello (Ret.)
Arbitrator, JAMS
620 Eighth Avenue, 34th Floor
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VRF I LLC v. Jeepers, Inc., JAMS Ref. No. 1425006537

Dear Judge Carpinello:

On behalf of Claimants VRF I LLC and Fortress Value Recovery Fund I LLC (together, "Claimants"), we write to object to the request of Financial Trust Company, Inc. and Jeepers, Inc. (together, "FTC") for permission to take the deposition of third-party witness Perry Gruss. As discussed further below, Claimants do not believe that the facts support, or the law authorizes, the issuance of a subpoena for Mr. Gruss's pre-hearing deposition.

Background

As Your Honor is aware, Claimants are involved in this matter as the inheritors of a dispute that began before Claimant Fortress VRF I LLC became the Managing Member of Fortress Value Recovery Fund I LLC (formerly known as D.B. Zwirn Special Opportunities Fund, L.P. prior to its conversion from a Delaware Limited Partnership to a Delaware LLC on June 1, 2009) (the "Fund"). Claimants' sole interest in this dispute is to resolve the matter of whatever obligations are owed to FTC under the Fund's relevant documents, and to do so in a way that does not unfairly prejudice the interests of the Fund's other investors who are entitled to share in the limited proceeds available from the Fund's liquidation.

The central issue in this case is whether FTC was entitled to redeem its investments in the Fund at an earlier date, and, if so, by what amount. Claimants believe, based upon their review of the relevant withdrawal notices, the governing Fund documents, as well as the Fund's policies and practices concerning investors' withdrawal and redemption rights, that FTC's notices for withdrawal were invalid on their face. FTC alleges, however, that an oral conversation may have occurred prior to Claimants' involvement that FTC believes affects the validity of those notices. Claimants view discovery in this case as an opportunity to learn about that alleged conversation (and potentially other relevant information).

FTC's "Fraud" Theory

The only possible relevance of Mr. Gruss's testimony would be to explore a "fraud" theory that bears no relevance to the central issue in this case as described above. Respondents do not allege that Mr. Gruss knows anything about FTC's notices for withdrawal, investors' withdrawal and redemption rights generally, or any conversation that may or may not have taken place between the parties regarding, or to alter, those rights.

Respondents thus appear to seek Mr. Gruss's testimony solely in order to determine what Daniel Zwirn knew about certain financial improprieties impacting the Fund and when he knew about them. These issues do not bear on Mr. Epstein's (or FTC's) withdrawal rights. To the contrary, they raise issues that would affect all investors equally and thus ultimately have no effect on the relative amounts due from the Fund to each investor through the Fund's liquidation. FTC's claim seeks to shift a greater relative portion of the limited liquidation proceeds available from the other investors to Mr. Epstein.

As a result, from the Fund's point of view, Mr. Gruss's testimony about his experiences as the former Chief Financial Officer of the Fund amount to nothing more than a sideshow that threatens to derail and distract the parties from the real issues at hand. The threat that Mr. Gruss's testimony may well create a sideshow is evidenced by Respondents' own letter, in which Respondents acknowledge that one of their purposes for seeking to depose Mr. Gruss is to "point FTC to the critical issues" in the more than 15 million pages of documents produced by Zwirn to the SEC. This will no doubt require the Zwirn parties to respond in kind, either in discovery or at trial, in defense of Mr. Zwirn's behavior.

The Fund thus believes that, for the purpose of resolving any claims against the Fund, the "fraud" issue is a potentially burdensome and dilatory sideshow.

The Parties' Agreement Limits Depositions

In addition, allowing the deposition of Mr. Gruss is contrary to the partnership agreement and the JAMS Rules governing the parties to this proceeding, which are both designed to ensure a speedy and efficient dispute resolution process.

In the partnership agreement, the parties specifically agreed that "prearbitration discovery shall be limited to the greatest extent provided by the rules of JAMS." *See* Section 15.2 of the Highbridge/Zwirn Special Opportunities Fund, L.P. Limited Partnership

Agreement dated May 1, 2003. Rule 17(b) of JAMS Comprehensive Arbitration Rules & Procedures provides that the parties are limited to one deposition of an opposing party. Thus, FTC's request for the deposition of Mr. Gruss far exceeds that limitation, particularly given the already now agreed-upon depositions of Jeffrey Epstein, Daniel Zwirn, Glenn Dubin, Harry Beller, and David Lee.

The Arbitrator's Authority to Compel Mr. Gruss's Deposition

Putting aside the issue of the relevance of Mr. Gruss's testimony and the propriety of taking his deposition under the governing contract, we believe that Respondents are not entitled, either under Federal or New York law, to depose Mr. Gruss because Your Honor lacks the authority to compel the deposition testimony of a witness who is not (unlike the witnesses listed above) either a representative of, or under the control of, one of the parties.

Both Federal and New York law are quite clear on this point. Under the Federal Arbitration Act (the "FAA"), because individuals "who are not parties to the arbitration[] never bargained for or voluntarily agreed to participate in an arbitration[.]. . . an arbitrator does not have the authority to compel nonparty witnesses to appear for pre-arbitration depositions." *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 70 (S.D.N.Y. 1995). The Second Circuit expanded the holding of *Integrity* in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008), in which the Court held that arbitrators cannot compel pre-hearing discovery of any kind from third-parties, whether in the form of depositions or document production.

As the *Integrity* Court noted, while the arbitrator's authority over the parties to the arbitration stems from both the arbitration agreement and the FAA, because "parties to a contract cannot bind nonparties . . . an arbitrator's power *over nonparties* derives solely from the FAA," which the Court found provided no authority for pre-hearing depositions of third parties. *Integrity*, 885 F. Supp. at 71. Additionally, the Court pointed to the burdens that would be imposed on the non-party by allowing such a deposition. The Court pointed out that "the nonparty may be required to appear twice—once for deposition and again at the hearing. That a nonparty might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it." *Id.* at 73. Moreover, the Court reasoned "as the deposition is not held before the arbitrator, there is nothing to protect the non-party from harassing or abusive discovery." *Id.*

New York law is to the same effect. "[A]rbitrators d[o] not have the authority to order discovery." *Berg v. Berg*, 873 N.Y.S.2d 231, 2008 WL 4155652, at *9 (Sup. Ct. Kings Co. 2008); *see also DaSapio v. Kolmeyer*, 35 N.Y.2d 402, 406 (1974) ("Under the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings."); *Goldsborough v. New York State Dept. of Corr. Servs.*, 628 N.Y.S.2d 813, 814 (2d Dep't 1995) (same). While CPLR § 7505 does confer upon the arbitrator the power to issue subpoenas, "[t]he subpoena power conferred by CPLR 7505 is limited to the procuring of evidence *for the hearing or trial* of the dispute. Depositions or other forms of pretrial discovery are not ordinarily contemplated in arbitration proceedings." Vincent C. Alexander, Practice Commentaries, CPLR 7505 McKinney's (1998) (emphasis added). As a

third party not under the control of any party in this case, Mr. Gruss cannot be compelled to testify at a pre-hearing deposition.

For the foregoing reasons, Claimants respectfully request that Your Honor deny Respondents' request for the deposition of Mr. Gruss.

Respectfully submitted,



Allan J. Arffa

cc: Harry P. Susman (counsel for Financial Trust Company, Inc. and Jeepers, Inc.)
John Siffert (counsel for Daniel B. Zwirn),
William O'Brien (counsel for D.B. Zwirn Partners, LLC; D.B. Zwirn & Co., L.P.;
DBZ GP, LLC; and Zwirn Holdings, LLC)