

**JAMS ARBITRATION
Reference No. 1425006537**

IN THE MATTER OF

**FORTRESS VRF 1 LLC and FORTRESS
VALUE RECOVERY FUND 1 LLC,
Claimants**

v.

**JEEPERS, INC.,
Respondent**

and

**FINANCIAL TRUST COMPANY, INC. and
JEEPERS, INC.,
Counter-Claimants and Third-Party Claimants**

v.

**D.B. ZWIRN SPECIAL OPPORTUNITIES
FUND, L.P. k/n/a/ FORTRESS VALUE
RECOVERY FUND 1 LLC,
Counter-Respondent**

and

**D.B. ZWIRN PARTNERS, LLC,
D.B. ZWIRN & Co., L.P.,
DBZ GP, LLC,
ZWIRN HOLDINGS, LLC, and
DANIEL ZWIRN,
Third –Party Respondents**

DECISION ON MOTION

Respondent Jeepers, Inc. has applied for permission to take the deposition of Perry Gruss, the former Chief Financial Officer of the D.B. Zwirn Special Opportunities Fund, a hedge fund formerly run by third-party respondent Daniel Zwirn. Respondent alleges that such a deposition is critical to its claim that it was fraudulently induced by Zwirn to reduce its request to withdraw its entire investment from the fund, then worth approximately \$130 million, to a partial withdrawal request of \$80 million. Respondent further alleges that Zwirn had been notified by Gruss of certain financial improprieties prior to its withdrawal request and that Zwirn concealed this information from respondent. This application is opposed by claimants and by the third-party respondents who argue that such a deposition violates JAMS rules and that this Arbitrator has no legal authority to order same.

Fraud in the inducement occurs when one knowingly assents to a transaction, but that assent has been induced by a fraudulent representation (see Whipple v Brown Brothers Co., 225 NY 237 [1919]). A claim of fraudulent inducement requires a knowing misrepresentation of a material fact, intent to deceive another party and to induce that party to act, resulting in injury (see Dalessio v Kressler, 6 AD3d 57, 61 [2nd Dept 2004]). Ultimately, the burden of proof is on the party asserting the fraud (see Boxberger v New York ██████ & Hartford Railroad Co., 237 NY 75, 78 [1923]; see also Foster v Parker, 282 AD 766, 767 [2nd Dept. 1953] ██████, 2 NY2d 848 [1957]). Most

relevant to the instant proceeding, a failure to disclose information when one has an obligation to do so is tantamount to a knowing misrepresentation (see Michigan Nat'l Bank – Oakland v American Centennial Ins. Co., 89 NY2d 94 [1996]; see also Kaufman v Cohen, 307 AD2d 113, 119-120 [1st Dept 2003]). Delaware law is the same (see Stephenson v Capano Development, Inc. 462 A2d 1069, 1074 [Del. Supr. 1983]).

At this juncture it cannot be said that respondent's claim of fraudulent inducement is without merit as a matter of law. If Gruss had communicated the existence of certain financial improprieties to Zwirn prior to Zwirn's communications with respondent which resulted in the reduction of the withdrawal request and Zwirn had a duty to disclose this information to respondent, and such information were material to respondent's decision, then in that event, such information would be relevant to respondent's claim of fraudulent inducement. Therefore it is appropriately discoverable (see Allen v Crowell-Collier Publ. Co., 21 NY2d 403 [1968]).

While it is true that paragraph 15.2 of the fund's partnership agreement provides that "pre-arbitration discovery shall be limited to the greatest extent provided by the rules of JAMS", JAMS Rule 17 (b) makes provision for additional depositions (beyond one) "based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." To third-party respondents' point that a Gruss deposition would become unwieldy because it would implicate the content of a multi-year investigation into Gruss's activities, the only relevant inquiry in such a deposition is what

Gruss told Zwirn about his activities prior to the Zwirn – Jeepers conversation. Such a deposition should be concluded in a day.

As to the issue of whether this Arbitrator has authority to subpoena Mr. Gruss for a pre-hearing deposition, Section 7 of the Federal Arbitration Act provides that an arbitrator “may summon in writing any person to attend . . . as a witness” (9 U.S.C. Section 7). CPLR Section 7505 similarly provides that “[a]n arbitrator . . . has the power to issue subpoenas”. Lastly, JAMS Rule 21 states that “[t]he Arbitrator may issue subpoenas for the attendance of witnesses . . . either prior to or at the Hearing” (emphasis added). In support of their position claimants have relied upon Life Receivables Trust v Syndicate 102 at Lloyd’s of London (549 F.3d 210, 216-17 [2nd Cir. 2008]). While that case does hold that arbitrators cannot compel a non-party to provide pre-hearing document production, this ignores the holding of the same court in Stolt-Nielsen Transp. Group, Inc. v Celanese AG (430 F.3d 567 [2d Cir. 2005]), which noted that Section 7 of the FAA “unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel,” and that “[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing” (“Stolt-Nielsen supra at 578 quoting Odfjell ASA v Celanese AG, 348 F.Supp.2d 283, 287 [SDNY 2004]). The court further noted that “as the District Court correctly observed, Section 7’s reference to hearings “before [the arbitrators] or any of them” suggests that the provision authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel “hears the more central issues.” (Id. quoting Odfjell

supra at 287). State law likewise confirms the authority of an arbitrator to chart the course of arbitral proceedings. “The strong policy of this State requires the courts to enforce arbitration agreements as written, and to leave to the arbitrators the interpretation and application of the procedural rules of the arbitral forum” (CSP Technologies, Inc. v Hekal 57 AD3d 372, 373 [1st Dept. 2008]).

Therefore, even if a non-party cannot be compelled to attend an unsupervised deposition in the context of an arbitration proceeding, such a person can be compelled to attend a preliminary proceeding before the Arbitrator. Accordingly, respondent is authorized to prepare a subpoena for the attendance of Perry Gruss for a one day preliminary hearing at which time Mr. Gruss shall be examined under oath on matters as limited by this decision in the presence of this Arbitrator.

DATED: February 28, 2011

S/ _____
Hon. Anthony J. Carpinello (Ret.)
Arbitrator

Papers Considered on the Motion:

1. Letter dated February 14, 2011 from Susman Godfrey LLP in support of the application.
2. Letter dated February 24, 2011 from Paul, Weiss, Rifkind, Wharton & Garrison LLP in opposition to the application.
3. Letter dated February 24, 2011 from Lankler, Siffert & Wohl LLP in opposition to the application.