JUDICIAL ARBITRATION AND MEDIATION SERVICE
NEW YORK, NEW YORK

IN THE MATTER OF

FORTRESS VRF I LLC and FORTRESS VALUE RECOVERY FUND I LLC,
Claimants

v.

JEEPERS, INC.,
Respondent

and

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

v.

FORTRESS VALUE RECOVERY FUND I LLC,
Counter-Respondent

and

D.B. ZWIRN PARTNERS, LLC,
D.B. ZWIRN & CO., LP,
DBZ GP, LLC,
ZWIRN HOLDINGS, LLC, and
DANIEL ZWIRN,
Third-Party Respondents

JAMS Reference No. 1425006537

Arbitrator: Hon. Anthony J. Carpinello (Ret.)

CLAIMANTS' PRE-HEARING BRIEF

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Claimants Fortress VRF I LLC and Fortress Value Recovery Fund I LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

Table of Authorities

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES

OTHER AUTHORITIES

Claimants Fortress VRF I LLC ("VRF I LLC") and Fortress Value Recovery Fund I LLC (f/k/a the D.B. Zwirn Special Opportunities Fund L.P.) (the "Fund") (and together with VRF I LLC, "Claimants") respectfully submit this pre-hearing memorandum in support of their claims in this matter and in opposition to the purported counterclaims of Respondent Jeepers, Inc. and Counter-Claimant Financial Trust Company, Inc. ("FTC") (together, "Jeepers").

Preliminary Statement

Claimants initiated this arbitration to resolve a dispute inherited when, in June 2009, VRF I LLC became the managing member of the Fund. The dispute centers on whether or not Jeepers, an investment vehicle controlled by Jeffrey Epstein, complied with the rules of the Fund when it attempted to withdraw money from the Fund.

Claimants have no direct financial interest in this dispute, as it ultimately affects only the allocation of the Fund's assets as among its investors. Claimants, however, wish to protect the interests of *all* of the Fund's investors. In particular, Claimants are here to ensure that no investor is given special treatment. Yet, that appears to be what Mr. Epstein is seeking here.

While Claimants were not involved in any aspect of the original dispute, they know the rules. They understand the history of the Fund, have reviewed the evidence amassed in this case, and have many years of experience in the hedge fund industry. Based on this knowledge and experience, Claimants believe that Jeepers simply did not comply with the rules and never made a valid request to withdraw its investments from the Fund.

Specifically, Jeepers made a demand in November 2006 for the "immediate" withdrawal of $80 million and another demand in February 2007 for the withdrawal of all of its investments in the Fund. Yet, Jeepers never had any right to

"immediate" withdrawal of any funds, and each of its investments was subject to a two-year rolling "lock-up" that limited withdrawal rights as to each investment. Subject to the rules of the Fund, at the time of Jeepers's $80 million withdrawal demand, Jeepers was only entitled—had it delivered a proper withdrawal notice—to withdraw approximately $45 million, and an even lesser amount at the time of its subsequent request for all of its funds. Thus, the withdrawal requests Jeepers submitted were clearly defective.

To avoid this problem, Jeepers has alleged an "oral agreement" providing for a "waiver" of the applicable terms of the Fund's operative documents that was purportedly reached between Mr. Epstein and Daniel Zwirn, an executive at the Fund's former manager, who was, according to Jeepers, in desperate fear of a "run on the bank." The documentary evidence does not support that assertion, nor does it make any sense. There was no "run on the bank" at the time, and Mr. Zwirn would have had no reason for allowing Jeepers to make an "immediate" withdrawal of $80 million when Jeepers had no right to do so. (Indeed, if Mr. Zwirn had been afraid of a "run on the bank," why would he agree to allow Mr. Epstein to withdraw any more money than was absolutely required?)

The current status of the Fund is also highly relevant here. Since early 2008, all withdrawals from the Fund have been suspended and will remain so. The Fund's portfolio of assets is frozen and now being liquidated through a dissolution and winding down process that will ultimately distribute net proceeds from that process to the Fund's investors. The result is that any award to Jeepers here will come from assets otherwise available to pay other investors.

The Fund currently has two categories of remaining investors: (1) investors who, after making valid withdrawal requests, withdrew from the Fund prior to the

suspension of withdrawals in February 2008 but still have not been paid in full ("Redeemers")[1] and (2) investors who did not validly withdraw from the Fund before February 2008 ("Non-Redeemers"). Because they validly withdrew from the Fund prior to the suspension of withdrawals, Redeemers became "creditors" of the Fund for fixed withdrawal amounts ("priority claims"), which do not earn interest, and are entitled to receive distributions in the Fund's winding up in advance of distributions to Non-Redeemers. Non-Redeemers are entitled to a pro-rata share of the Fund's remaining net asset value, which has declined significantly since 2008, after the Fund pays or makes reasonable provision for the Fund's creditors, including satisfaction of the priority claims of Redeemers.

As discussed further below, Claimants submit that, pursuant to Delaware law, if any award is made to Jeepers, it should take the form of granting Jeepers a "priority claim" (in the same category as the Fund's Redeemers, and, like Redeemers' claims, without interest) on the Fund's assets as they become available for distribution to Redeemers. Providing Jeepers with anything more than such a priority claim (*e.g.*, a cash award subject to immediate execution) would likely result in a premature "fire sale" of the Fund's assets, thereby further harming other investors.

---

[1] As explained further below, there is a distinction between the date of withdrawal and the date of actual payment of withdrawn amounts. The manager of the Fund has discretion as to when to pay withdrawn investments. As a result, there are a number of investors (the Redeemers) who validly withdrew from the Fund prior to February 2008, but who have still not been paid.

Statement of Facts

The Parties

Claimants are related entities. Claimant VRF I LLC, the current managing member of the Fund, is an affiliate of Fortress Investment Group LLC ("Fortress"), a leading global alternative asset manager that raises, invests and manages private equity funds, credit funds, hedge funds and traditional asset management portfolios. Claimant Fund was initially known as the Highbridge/Zwirn Special Opportunities Fund L.P., and subsequently known as the D.B. Zwirn Special Opportunities Fund L.P.; it was initially formed as a Delaware limited partnership. As of June 1, 2009, the Fund converted to a Delaware LLC, and, in connection with the conversion, D.B. Zwirn Partners LLC (the "Zwirn Fund GP") withdrew as General Partner of the Fund, and VRF I LLC became the Fund's managing member. D.B. Zwirn Special Opportunities Fund L.P. was then renamed the "Fortress Value Recovery Fund I LLC," the other Claimant here.

Respondent Jeepers, Inc. is a U.S. Virgin Islands corporation that is owned and controlled by Jeffrey Epstein, an experienced and sophisticated investor. Jeepers, Inc. is a member of the Fund, having received an assignment of limited partnership interests in the Fund in 2006 from FTC, Jeepers's parent entity, which is another investment vehicle that Mr. Epstein controls. (For ease of reference, Jeepers, Inc. and FTC are both referred to here as "Jeepers.")

Third-Party Respondent Zwirn Fund GP was the General Partner of the Fund. Third-Party Respondent D.B. Zwirn & Co. L.P. was the investment manager for the Fund (the "Zwirn Investment Manager"). Third-Party Respondent DBZ GP LLC was the general partner of the Investment Manager (the "Zwirn Investment Manager GP"). Third-Party Respondent Zwirn Holdings LLC was a holding company that held interests in the

Zwirn Fund GP and the Zwirn Investment Manager GP. Third-Party Respondent Daniel Zwirn was the managing member of Zwirn Holdings LLC and managing partner of the Zwirn Investment Manager. (For ease of reference, the term the "Zwirn Parties" will be used here to refer to all Third-Party Respondents; "Mr. Zwirn" will be used to refer to Daniel Zwirn individually.)

The Highbridge/Zwirn Special Opportunities Fund

In April 2002, the Zwirn Investment Manager launched the Highbridge/Zwirn Special Opportunities Fund L.P., a Delaware limited partnership. The Fund's investment objective was to achieve premium risk-adjusted returns by "'chas[ing] illiquidity' wherever it might be found." (Exhibit A at DBZCO_FTC0022754.) The Fund invested, as a general matter, in several types of extremely illiquid investments, including direct debt investments and special assets. The Fund was available only to extremely well-to-do and sophisticated investors, with a minimum initial investment by a limited partner of $2 million.

Withdrawal Rights Under the Partnership Agreement

Pursuant to the Fund's limited partnership agreement (the "LPA") (Exhibit B) in effect at the time, the right of limited partners to withdraw their investments from the Fund was restricted. Limitations on withdrawal rights are common for hedge funds like the Fund. The ability to lock up capital provides investment fund managers with a stable equity base so that their investment horizons are not unduly constrained, allowing them to invest in the types of illiquid (and potentially more profitable) assets that the Fund purchased. Investors in such funds are willing to sacrifice "liquidity"—that is, their access to their invested capital—to achieve (ideally) higher returns on their investments.

Such withdrawal rights were particularly important in the case of the Fund, given its focus on illiquid investments and its use of leverage (or financing). The management of the Fund needed to ensure sufficient investment horizons for its illiquid investments to mature and thus allow partners to seek the anticipated returns. Leveraging these investments potentially increased returns, but it also amplified the risk of having limited liquidity. Having to liquidate such investments prematurely (for example, to fund withdrawal requests) could cause serious disruptions to the Fund—and lower returns, given the limited number of purchasers typically in the market for such assets. If market participants became aware of a forced sale of assets by an entity like the Fund, the prices they were willing to pay would normally decline substantially, resulting in a so-called "fire sale."

None of this was a secret to the Funds' investors. For example, a May 2003 Confidential Memorandum circulated in connection with an offering of the Fund expressly noted that: "substantial requests for withdrawals by limited partners could induce the Fund to liquidate positions sooner than would otherwise be desirable, which could adversely affect the performance of the Fund." (Exhibit C at DBZCO_FTC0001789.) The memorandum also made clear that "[t]he Fund may borrow money from banks," and that "[s]uch borrowing will increase the Fund's leverage . . . creat[ing] the same risks attendant to purchasing securities on the margin." (*Id.* at DBZCO_FTC0001787.) Finally, potential investors were advised that "reduction in the Fund's Net Assets, and thus in its equity base, could make it more difficult for the Fund to diversify its holdings and achieve its investment objective." (*Id.* at DBZCO_FTC0001789.)

Accordingly, the Fund's LPA provided for various "lock-ups" of investors' capital, subject to certain "window" periods during which withdrawals could be made. Thus, under the LPA, an investor making an investment in the Fund was not allowed to withdraw funds related to that investment, including all associated gains or losses: (a) for a period of at least two years after the limited partner made that investment in the Fund (to be precise, until the last business day of the calendar quarter falling two years after that purchase), and (b) even then, only upon at least 120 days' prior written notice. At the end of that two-year period, the withdrawal "window" would shut and the funds relating to that investment would become ineligible for withdrawal for another two years.

Article IX, Section 9.1 of the LPA thus describes the process for making a complete withdrawal of a limited partner's "Capital Account":

> Complete Withdrawals of Capital Account. Complete withdrawals of a Limited Partner's Capital Account may be made as of the last Business Day of the calendar quarter ending at least two years after the Limited Partner initially purchases Interests and as of the second anniversary of that date thereafter (each, a "Withdrawal Date") upon not less than 120 days' prior written Notice to the General Partner [then, the Zwirn Fund GP]. Distributions in connection with complete withdrawals will be payable in the manner provided by Section 9.4(a), 9.7 and 9.8 and will be equal to such Limited Partner's Capital Account on the effective date of withdrawal. Withdrawals may also be made at such other times with the consent of, and upon such terms of payment as may be approved by, the General Partner in its sole discretion. The withdrawal of a Limited Partner shall not dissolve or terminate the Partnership.

Article IX, Section 9.2 of the LPA describes the process for making a partial withdrawal of a limited partner's "Capital Account":

> Partial Withdrawals of Capital Account. Partial withdrawals from a Limited Partner's Capital Account may be made of the last Business Day of the calendar quarter ending at least

> two years after the Limited Partner initially purchases Interests and as of the second anniversary of that date thereafter; provided, however, such partial withdrawal may be made upon not less than 120 days' prior written Notice to the General Partner. Distributions in connection with partial withdrawals will be payable in the manner provided by Section 9.4(b), 9.7 and 9.8, provided that the Limited Partner's remaining Capital Account balance is not less than $2,000,000, which provision may be waived by the General Partner. Partial withdrawals may also be made at such other times with the consent of, and upon such terms of payment as may be approved by, the General Partner in its sole discretion.

Each time an investor made an investment in the Fund, it was thus acquiring an "Interest" in the Fund, and the investment that was contributed to acquire that Interest was subject to the withdrawal restrictions of Sections 9.1 and 9.2 from the date the Interest was acquired. As discussed further below, the use of the word "Interests" as opposed to "an Interest" indicates that each investment had its own lock-up rather than one lock-up for all.

As an additional restriction on withdrawals, if a substantial number of investors sought to withdraw funds at the same time, the General Partner was authorized to limit the amount of withdrawals payable at that time. In industry parlance, this is called a "gate" and is designed to protect the Fund's ability to operate and manage assets and to prevent a "fire sale" of assets. Specifically, if withdrawal requests for any particular "Withdrawal Date" represented, in the aggregate, more than 20% of the Fund's net asset value, then the General Partner was permitted to reduce the requests pro rata among all the limited partners requesting withdrawals so that no more than 20% of the Fund's net asset value would be paid out. (LPA § 9.6.) Withdrawals could also be suspended during the existence of any state of affairs as a result of which the General Partner was unable to

value or dispose of the Fund's assets (or if, in the opinion of the General Partner, it was not reasonably practicable to do so, or would be prejudicial to limited partners to do so). (*Id.* § 9.7.) Withdrawals could be paid in cash or, in the General Partner's discretion, in kind with securities. (*Id.* § 9.8.)

Jeepers's Five Subscriptions for Investments in the Fund

From April 2002 to January 2005, Jeepers made five separate investments in the Fund, totaling $80 million. At the time of each such investment, Jeepers executed a separate Fund subscription agreement that, by its literal terms, "admitted" Jeepers "as a limited partner [to the Fund] as of [the date of the investment]." (Exhibit D at DBZCO_FTC0000712.)

The First Investment and Subscription Agreement

On April 24, 2002, Jeepers executed a subscription agreement for a $10 million limited partnership interest in the Fund (the "First Investment"). The First Investment was accepted by the Fund on May 1, 2002. On May 1, 2002, Jeepers executed the Limited Partner Signature Page to the LPA of the Fund, agreeing to be bound by the terms of the LPA. Under the terms of the LPA and its lock-up provisions, the First Investment was locked up until June 30, 2004; and, a withdrawal could only be made on that date upon 120 days' advance written notice. If timely notice was not given, and a withdrawal was not effected under the terms of the LPA on June 30, 2004, then the First Investment would "lock up" again for another two-year period (and so on).

The Second Investment and Subscription Agreement

On August 22, 2002, Jeepers executed a second subscription agreement for an additional $10 million limited partnership interest in the Fund (the "Second Investment"). The Second Investment was accepted by the Fund on September 1, 2002,

and Jeepers again executed a Limited Partner Signature Page. Under the terms of the LPA and its lock-up provisions, the Second Investment was locked up until September 29, 2004; and, again, a withdrawal could only be made on that date upon 120 days' advance written notice. If a withdrawal was not effected under the terms of the LPA on September 29, 2004, then the Second Investment would "lock up" again for another two years (and so on).

The Third Investment and Subscription Agreement

On November 29, 2002, Jeepers executed a third subscription agreement for an additional $30 million limited partnership interest in the Fund (the "Third Investment"). The Third Investment was accepted by the Fund on December 1, 2002. On December 1, 2002, Jeepers executed yet another Limited Partner Signature Page to the LPA. Under the terms of the LPA and its lock-up provisions, the Third Investment was locked up until December 31, 2004; again, a withdrawal of funds on that date could only be made upon 120 days' advance written notice. If a withdrawal was not effected under the terms of the LPA on December 31, 2004, then the Third Investment would "lock up" again for another two years (and so on).

The Fourth Investment and Subscription Agreement

On May 30, 2003, Jeepers executed a fourth subscription agreement for an additional $10 million limited partnership interest in Fund (the "Fourth Investment"). The Fourth Investment was accepted by the Fund on June 1, 2003. On May 30, 2003, Jeepers again executed a Limited Partner Signature Page to the LPA. Under the terms of the LPA and its lock-up provisions, the Fourth Investment was locked up until June 30, 2005; again, any withdrawal of funds on that date could only be made upon 120 days' advance written

notice. If a withdrawal was not effected under the terms of the LPA on June 30, 2005, then the Fourth Investment would "lock up" again for another two years (and so on).

The Change to Three-Year Lock-Ups

Thereafter, the Fund changed to a practice whereby each investment made on or after January 1, 2005 would now be subject to a three-year, not a two-year, lock-up. Thus, on November 17, 2004, limited partners were advised pursuant to a Supplement to the 2003 Confidential Memorandum that "[a]ny investment purchased by a limited partner on or after January 1, 2005 will be subject to a 'rolling' *three-year* lock-up." (Exhibit E at VRF 00000081.) The supplement further noted that "any interest prior to January 1, 2005 will indefinitely remain subject to its current lock-up." *Id.*[2]

The Fifth Investment and Subscription Agreement

In late 2004, Mr. Epstein apparently wished to make yet another investment in the Fund (which was performing well at the time). But he did not want the new investment to be subject to the new, longer lock-up period. He therefore asked that the new investment still be subject to a two-year rolling lock-up. The Fund agreed.

Thus, on January 1, 2005, Jeepers executed a fifth subscription agreement for an additional $20 million limited partnership interest in Fund (the "Fifth Investment"). On January 11, 2005, in connection with Jeepers's Fifth Investment, the General Partner agreed in a side letter (the "Side Letter"), which refers specifically to Jeepers's "January 1

---

[2] In 2004, the Fund introduced a "one-year liquidity option." Under that withdrawal option, investors could request withdrawal, upon 120 days' notice, of all or a portion of an investment as of the end of any fiscal year following the one-year anniversary of that investment. Investors, however, would not receive immediate payment of their withdrawn investment; they would receive payments over time as the assets relating to the investment matured or were liquidated.

Investment" in the Fund, that, notwithstanding the general change to three-year lock-ups, Jeepers would be permitted to withdraw its Fifth Investment as of the last business day of the calendar quarter ending *two years* after Jeepers "initially purchases this interest" (*i.e.*, its Fifth Investment). (Exhibit F at HCMARB_00000156).

Summary: Jeepers's Withdrawal Schedule

The dates of Jeepers's subscriptions and its eligible dates of withdrawal are set forth in Table 1:

Table 1 – Jeepers's Investment/Subscription Dates and Eligible Withdrawal Periods

SUBSCRIPTION DATE	AMOUNT INVESTED	ELIGIBLE WITHDRAWAL DATES	WITHDRAWAL NOTICE REQUIRED BY
First Investment May 1, 2002	$10 million	6/30/2004 6/30/2006 6/30/2008	3/2/2004 3/2/2006 3/2/2008
Second Investment September 1, 2002	$10 million	9/29/2004 9/29/2006 9/29/2008	6/1/2004 6/1/2006 6/1/2008
Third Investment December 1, 2002	$30 million	12/31/2004 12/29/2006 12/31/2008	9/2/2004 8/31/2006 9/2/2008
Fourth Investment June 1, 2003	$10 million	6/30/2005 6/29/2007 6/30/2009	3/2/2005 3/1/2007 3/2/2009
Fifth Investment January 1, 2005	$20 million	3/30/2007 3/31/2009 3/31/2011	11/30/2006 12/1/2008 12/1/2010

The Parties' Conflicting Positions About When Investments May Be Withdrawn

There is no dispute that each time an investor signed a subscription agreement for a new investment, the investor was acquiring an "Interest" in the Fund and was invited to become a limited partner in it. There is also no dispute that, in practice, the

Fund treated each subscription—not only by Mr. Epstein but by all other investors—as creating a separate "Capital Account" subject to *its own* lock-up schedule. Thus, the Fund maintained a record of each investor's separate investments (also called "tranches") for the purpose of tracking the redemption rights of the individual investments.

And, the evidence is further clear that the Fund dealt with *all* withdrawal requests from its investors on this basis. Where investors made multiple investments, the Fund permitted withdrawals only in accordance with each investment's two-year lock-up schedule. Accordingly, when an investor submitted a request to withdraw any of its funds, the Fund's Investor Relations department determined which subscription (or tranche) was available for redemption at that time and only permitted investors to redeem whatever tranches were available for redemption at that time (along with gains and losses associated with that investment or tranche).[3]

Jeepers, however, takes the position that all of its multiple investments in the Fund were part of a single "Capital Account," subject to a *single* rolling two-year lock-up. Specifically, Jeepers appears to contend that, at least initially, all of its subscriptions could be withdrawn under the withdrawal cycle set by its *initial* May 1, 2002 investment in the Fund (the "Initial Investment Theory" listed in Table 2 below). Jeepers also appears to suggest that, by virtue of its January 2005 Side Letter agreement, this arrangement was changed such that the withdrawal cycle for its *last* (or fifth) investment would now govern each of its investments and subscriptions (the "Side Letter Theory" in Table 2 below).

---

[3] We are aware of only a few exceptions to this practice, which involved permitting smaller investors to redeem their money from the Fund.

Table 2 – Jeepers's Theories of Withdrawal Periods

SUBSCRIPTION DATE	AMOUNT INVESTED	ELIGIBLE WITHDRAWAL DATES	JEEPERS'S "INITIAL INVESTMENT" THEORY	JEEPERS'S "SIDE LETTER" THEORY
First Investment May 1, 2002	$10 million	6/30/2004 6/30/2006 6/30/2008	6/30/2004 6/30/2006 6/30/2008	-- 3/30/2007 3/31/2009
Second Investment September 1, 2002	$10 million	9/29/2004 9/29/2006 9/29/2008	6/30/2004 6/30/2006 6/30/2008	-- 3/30/2007 3/31/2009
Third Investment December 1, 2002	$30 million	12/31/2004 12/29/2006 12/31/2008	6/30/2004 6/30/2006 6/30/2008	-- 3/30/2007 3/31/2009
Fourth Investment June 1, 2003	$10 million	6/30/2005 6/29/2007 6/30/2009	6/30/2004 6/30/2006 6/30/2008	-- 3/30/2007 3/31/2009
Fifth Investment January 1, 2005	$20 million	3/30/2007 3/31/2009 3/31/2011	6/30/2004 6/30/2006 6/30/2008	3/30/2007 3/31/2009 3/31/2011

Both of Jeepers's theories thus rely on a "single date lock-up" theory (as opposed to separate lock-up schedules for each investment). Yet that theory is contrary not only to the Fund's governing documents, records and practices, but also, as described below, to well-settled industry practice as to how lock-ups operate and to the entire purpose of lock-ups. In addition, it is contrary to the Fund's treatment of every other investor. Importantly, **not a single other investor in the Fund has ever taken Jeepers's position that multiple investments were subject to a single lock-up schedule.**

Further, Jeepers's "single date lock-up" theory makes no sense. It would mean an investor could completely undermine the two-year lock-up by making a minimum

initial investment (say $2 million on January 1, 2002) and then a second, far larger investment 18 months later (say $30 million on July 1, 2003), and be entitled to withdraw all $32 million six months later, thereby completely circumventing the two-year lock-up. (For example, looking at Table 2, it would mean Jeepers had successfully reduced the *two-year* lock-up on its Fourth Investment to a *one-year* lock-up.)

Jeepers's Side Letter Theory suffers from all of these problems – and at least one more. That theory would mean that, by the January 2005 Side Letter, Jeepers intended to *extend* the lock-ups for several of its prior investments. (For example, as illustrated in Table 2, Jeepers's Side Letter Theory would extend the lock-up for Jeepers's First Investment from June 30, 2006 to March 30, 2007 – a *nine-month* extension.) Yet, there was no reason for Jeepers to *extend* any of its lock-ups, and no evidence it wanted or sought to do so.

The 2005 Confidential Memorandum

In May 2005, the Fund issued a new Confidential Memorandum in connection with an offering to investors. The 2005 Confidential Memorandum added a sentence that explicitly stated what the Fund's practice had been all along: the Fund treated each subscription as creating its own "Capital Account" with its own three-year lock-up schedule. Thus, the Confidential Memorandum stated: "For purposes of determining the withdrawal date (the 'Withdrawal Date') with respect to Interests, a separate Capital Account will be established for each Interest purchased (i.e. each capital contribution made)." (Exhibit G at DBZCO_FTC0001835.) This addition of this sentence did not change at all the Fund's practices as to withdrawal rights, and no investor

interpreted it as making any change. It simply clarified the understanding and practice under the LPA.[4]

The Fund's Discovery and Disclosure of Accounting Irregularities

The evidence in this matter indicates that, in the spring of 2006, various potential accounting improprieties were discovered at the Fund. According to the deposition testimony, Lawrence Cutler, the Fund's Chief Compliance Officer, and David Proshan, the Fund's General Counsel, informed Mr. Zwirn of two potential accounting irregularities by June 2006: the early payment of management fees by the Fund (after they had been earned but before they were payable), and the temporary use of Fund moneys to cover a portion of the down payment for the purchase of an airplane to be used by Mr. Zwirn for business travel. Mr. Zwirn then caused the law firm Schulte Roth & Zabel LLP ("Schulte") to undertake an investigation into what had occurred.

The investigation was apparently completed in mid-September 2006. Thereafter, in early October 2006, the Fund parted ways with its Chief Financial Officer, Perry Gruss. Mr. Zwirn, using a script Schulte had approved, immediately called investors (including Mr. Epstein) to inform them of Mr. Gruss's departure (though he did not tell them the specific nature of the two accounting improprieties).

Very shortly thereafter, a third accounting impropriety came to light: the borrowing of money by the Fund from a related Offshore Fund. As a result, in late October 2006, Mr. Zwirn again called investors (including Mr. Epstein), this time to explain to them the specific nature of all of the accounting improprieties, again using a

---

[4] Indeed a revised LPA went into effect shortly thereafter and contained withdrawal provisions similar to the initial LPA (except as to the change to three-year lock-ups). (Exhibit H.)

script Schulte had approved. The law firm of Gibson Dunn & Crutcher was retained to investigate all of these matters further.

At times, Mr. Epstein has claimed that, in one or both of these calls, he demanded the immediate withdrawal of all of his money in the Fund. There is no record, however, of any kind supporting that assertion. Even assuming this were true, an oral request for withdrawal would not have been proper under the LPA (LPA §§ 9.1, 9.2), nor would all of Jeepers's money have been available for withdrawal under the Fund's lock-up scheme.

As to the accounting irregularities, the SEC ultimately conducted a full investigation after the Fund self-reported the issues in 2006. At the conclusion of its investigation, the SEC elected not to charge Mr. Zwirn or any of the other Zwirn Parties with any wrongdoing, but charged Mr. Gruss with aiding and abetting violations of the Investment Advisers Act for knowingly misusing his authority to direct the improper transfer of funds.

Jeepers's Defective Withdrawal Demands

November 13, 2006 Withdrawal Demand

On November 13, 2006, Jeepers delivered to the Fund by fax a withdrawal demand directing the Fund to "immediately liquidate an interest in the amount of EIGHTY MILLION DOLLARS of [Jeepers's] interest" in the Fund (the "November 2006 Withdrawal Demand") (Exhibit I at JE002000).

But Jeepers was not entitled to withdraw $80 million from the Fund in November 2006. As shown in Table 1, the withdrawal window had already closed for Jeepers's First, Second and Third Investments, including whatever amounts had been earned on those investments. Only two of Jeepers's subscriptions were eligible for

redemption at that time—the Fourth and Fifth Investments, then worth approximately $45 million.

Emails make clear that earlier in the very day that Jeepers made this withdrawal request, the Fund advised Mr. Epstein how the lock-ups on each of his investments worked and the manner in which each could be redeemed. (*See* Exhibit J; Exhibit K.) Yet, Mr. Epstein nonetheless elected to submit an invalid request for the "immediate" withdrawal of $80 million, failing to acknowledge that such funds were not eligible for redemption at that time and failing to comply with the 120-day advance notice provisions contained in the LPA.

Jeepers appears to claim that what happened was that, at some point that day, Mr. Epstein orally demanded the withdrawal of all amounts from the Fund; Mr. Zwirn, fearing a "run on the bank," then orally implored Mr. Epstein not to withdraw all of his investments in the Fund and suggested Mr. Epstein withdraw "half" of these amounts; and that Mr. Epstein and Mr. Zwirn then orally agreed that Jeepers could withdraw $80 million immediately.

As further discussed below, there is, however, no writing documenting this supposed "agreement."[5] Nor is there any explanation for why Mr. Zwirn would agree to it when, in his view, Jeepers did not have any right to withdraw its entire investment, let alone $80 million, and, at the time, under any circumstance, Jeepers would have been required to provide at least 120 days' notice to withdraw any amounts at all. It is thus hard

---

[5] Mr. Epstein points to the words "[a]s per our conversation" on his November 13, 2006 written withdrawal demand. The reference is ambiguous, at best. It is entirely unclear what conversation is being referred to, and there is certainly no reference to any "agreement."

to fathom why Mr. Zwirn would have agreed to such a substantial withdrawal on behalf of the Fund and exercised any discretion granted the General Partner to do so. In fact, Mr. Zwirn has denied any such "agreement," and no one then at the Fund has testified to being told by Mr. Zwirn of any such "agreement."

Also contrary to the "oral agreement" theory is the fact that Mr. Epstein seems to have dropped the entire matter immediately thereafter. Instead, after Jeepers submitted its November 2006 Withdrawal Demand, Mr. Epstein requested the General Partner's consent to transfer all of his limited partnership interests in the Fund from FTC to Jeepers, Inc. The purpose of the transfer was apparently to provide tax benefits for Mr. Epstein's entities. The Fund worked diligently—both internally and with its outside counsel and accountants—to accommodate Mr. Epstein's request. On December 29, 2006, FTC transferred all of its limited partnership interests in the Fund to Jeepers, Inc. The effective date of assignment was January 1, 2006. (*See* Exhibit L at DBZCO_FTC0000856.)

According to the deposition testimony of the Fund's employees, the understanding of the Fund in January 2007 was that Jeepers had abandoned its invalid November 2006 Withdrawal Demand when the Fund consented to the transfer of FTC's interests.

February 14, 2007 Withdrawal Demand

Three months after his November 2006 demand, on February 14, 2007, Jeepers suddenly sent a letter to the Fund's General Partner requesting to withdraw Jeepers's "entire capital account" at the "earliest possible date" (the "February 2007 Withdrawal Demand") (Exhibit M). The letter argued that, under the Side Letter, Jeepers was entitled to withdraw its entire capital account "as of the last day of the calendar quarter

ending at least two years after the date of purchase of the January 1, 2005 investment (*i.e.*, March 31, 2007)." (*Id.* at DBZCO_FTC0002415.)

To the extent Jeepers was attempting to withdraw all of its funds at that time, it was not entitled to do so. The Side Letter only authorized a withdrawal of Jeepers's Fifth Investment on March 30, 2007 (March 31, 2007 was a Saturday)—and the February 2007 Withdrawal Demand did not satisfy the 120-day advance notice requirement with respect to that investment. (Indeed, for this reason, no investments would have been eligible for redemption at that time if the Fund adopted Jeepers's understanding of the Side Letter, pursuant to which all of Jeepers's investments had the same withdrawal rights as the Fifth Investment.) At the time, only one investment was eligible for redemption (the Fourth Investment).

Suspension of Withdrawals and Dissolution of the Fund

Jeepers waited another year before submitting, on February 13, 2008, a final withdrawal request. In this request, Jeepers finally acknowledged the Fund's view as to the redemption schedule for Jeepers's investments. While "reserving its rights," Jeepers asked the Fund to withdraw Jeepers's money under that schedule. But it was too late.

Because of the accounting irregularities discovered in 2006, the Fund's independent auditor, PricewaterhouseCoopers LLP, took until December 2007 to sign off on the Fund's 2006 books. By that time, investors had submitted withdrawals totaling at least $2 billion. The Zwirn Parties suspended withdrawals as of February 2008, and investors were told that they would have to wait for the results of an orderly disposition of the Fund's assets and payment of its liabilities before they could begin to receive any distributions from the Fund.

Specifically, on March 7, 2008, the previous General Partner delivered a letter to the Fund's investors informing the investors that the Fund had received a significant number of withdrawal requests. (Exhibit N at JE001958.) The letter advised the investors that the General Partner had concluded that it was in the best interests of all investors to engage in the dissolution and winding up of the Fund by disposing of the Fund's portfolio in an orderly manner and returning capital to all investors. The letter advised the investors that, given the nature of the relatively illiquid assets and obligations in the Fund's portfolio, the process of realizing the Fund's portfolio in an orderly manner could take approximately two to four years or longer, depending on market conditions and a variety of other factors and that assets would be disposed of in a manner designed to maximize value to the investors, net of obligations to creditors.

To facilitate an orderly dissolution, winding up and final liquidation of the Fund, as well as a pro-rata distribution of net proceeds to all investors, the General Partner elected to suspend all withdrawals, as permitted in the LPA.

The Parties' 2009 Settlement Agreement

A dispute subsequently arose as to Jeepers's right to the withdrawal of its funds. After various negotiations, Jeepers and the Fund entered into a settlement agreement (the "Settlement Agreement"). (Exhibit O.) In exchange for a complete release, Jeepers obtained the right to withdraw its Fourth Investment of $10 million and its Fifth Investment of $20 million, plus accrued earnings on both investments estimated at $15 million. The Settlement Agreement thus reflected a compromise whereby the Fund treated Jeepers's November 2006 Withdrawal Demand as a request for the withdrawal of the $45 million Jeepers could have then withdrawn (as of dates in 2007).

The Agreement entitled Jeepers to receive this $45 million "at the time and on the same terms that the Fund makes withdrawal payments to the Fund's limited partners who [validly withdrew as of December 31, 2007]" and provided that such withdrawals "are to be paid once sufficient moneys are available to the Fund as a result of an orderly liquidation to be conducted by the Fund, and once the debts of the Fund have been paid . . ." (*Id.* at VRF 00000052.) To date, no such payments to investors who validly withdrew as of December 31, 2007, *i.e.*, Redeemers, have been made.

Investors Approve New Management of the Fund

In 2008, the Fund began a search for a replacement investment advisor. Following the search, the Fund and its financial advisors recommended affiliates of Fortress. The Fund initiated a proxy solicitation to investors to approve the change in management. The consent solicitation fully described the state of the Fund, the priorities of creditors and investors—including Redeemers and Non-Redeemers—and the anticipated process for an orderly disposition of the Fund's portfolio over time so as to maximize value for the Fund investors. The vast majority of the Fund's investors voted in favor of the change in management, the conversion of the Fund to an LLC and the continued orderly disposition of the Fund's assets. Pursuant to the terms of the Settlement Agreement, Jeepers was deemed to have voted with the majority in favor of the plan proposed in the consent solicitation. On June 1, 2009, VRF I LLC became the managing member of the Fund.

Purported Termination of the Settlement Agreement

Jeepers thereafter took the position that the Settlement Agreement was terminable at Jeepers's election if Jeepers did not get paid out by a specific date. Jeepers was not paid out as of that date (in fact, as noted above, no Redeemers with "2007 priority

claims" at the time of the management transition have yet been paid out), and Jeepers purported to terminate the Settlement Agreement in January 2010. Jeepers then began to reassert the claims that had been resolved by the Settlement Agreement.

The Parties' Claims

Claimants initiated this proceeding in May 2010 to achieve closure with regard to Jeepers's claims. Based on their review of the evidence established in the case, and the history and practices of the Fund, Claimants believe that Jeepers's withdrawal demands should be declared void and of no effect. Alternatively, Claimants believe that Jeepers's right of withdrawal should be acknowledged solely for the $45 million previously settled upon.

Jeepers responded by filing counterclaims for breach of contract, fraud and promissory estoppel against the Zwirn Parties and the Fund. Jeepers also filed claims for breach of fiduciary duty and negligent misrepresentation against Mr. Zwirn and the other Zwirn Parties. As discussed below, Claimants do not believe there is any merit to these counterclaims.

Payment of Any Potential Monetary Award

Because the Fund has formally dissolved and is in the process of winding up pursuant to Delaware law and its operating agreement, any monetary award to Jeepers as a result of this proceeding should not be paid to Jeepers immediately. Rather, any award should only give Jeepers a claim on the Fund with the same priority as the claims of the Redeemers.

"[T]he termination of a partnership is a three-step process: dissolution, winding up, and then termination." *Insituform Techs., Inc.* v. *Insitu, Inc.*, 99 Civ. 17013, 1999 WL 240347, at *12 n.9 (Del. Ch. Apr. 19, 1999); *see also* Martin I. Lubaroff &

Paul M. Altman, *Lubaroff & Altman on Delaware Limited Partnerships* § 8.1 (2011 Supp.) (hereinafter "Lubaroff & Altman") ("Once dissolved, the business of a Delaware limited partnership continues only to the extent reasonably necessary to wind up gradually the limited partnership's affairs."). Currently, the Fund is winding up, a process being overseen by the Fund's current manager, VRF I LLC. (Because, as approved by investors, the Fund was converted from a limited partnership to a limited liability company after dissolution, the Fund's limited partners have become LLC members.) The process of winding up is governed by Delaware's Limited Liability Company Act (the "LLC Act"), 6 Del. C. §§ 18-101 *et seq.*[6]

Under the LLC Act, assets of an LLC that is winding up shall be distributed according to the following order of priority:

> (1) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members and former members under § 18-601 or § 18-604 of this title;
>
> (2) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under § 18-601 or § 18-604 of this title; and
>
> (3) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

---

[6] The are no material differences between the provisions of LLC Act and those statutory provisions governing the winding up of a limited partnership. *Compare* 6 Del. C. § 17-804 *with* 6 Del. C. § 18-804.

6 Del. C. § 18-804(a). Nothing in the Fund's LLC Agreement changes this result, as Section 12.2(d) of that Agreement identifies the same three priority classes as does the statute.

Hence, the first class described above, which is given first priority in the distribution of the LLC's assets in the winding up process, is comprised of creditors of the Fund, excepting members who are creditors only because they were owed distributions (including distributions to withdrawn members) prior to dissolution; the second class, which is next in terms of priority in the distribution of assets in the winding up, is comprised of members who were owed distributions (including distributions to withdrawing members) prior to dissolution; and the third class, which is treated as the junior class in the winding up, is comprised of members who have equity interests in the Fund and are not owed any distributions (*e.g.*, those who did not withdraw before the suspension of withdrawals).

Accordingly, Redeemers are entitled to distributions in the second class above, while Non-Redeemers share in the remaining net assets of the Fund in the third class, only after satisfaction in full of all amounts owed to creditors and members in the first two classes. *See* Lubaroff & Altman § 8.4 ("In determining the liabilities which are payable to creditors, including partners who are creditors, the liabilities of a limited partnership on account of . . . distributions to former partners upon their withdrawal . . . are subordinated to the claims of other creditors[.]")

The statute further provides that "[i]f there are insufficient assets [to pay all claims against, and obligations of, the LLC], such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the

extent of assets available therefor." § 18-804(b). Because there likely will not be sufficient assets to satisfy all of the claims and obligations of the Fund and return all of the investors' capital contributions, the Fund will likely be required to pay claims ratably within one or more of the classes of its stakeholders, and must ensure that it is not distributing to junior stakeholders before all senior stakeholders' claims are satisfied according to the priority schedule in § 18-804(a). Moreover, in doing so, the Fund "cannot discriminate among claims and obligations of equal priority notwithstanding the fact that one claim has matured and the other claim has not yet matured." Lubaroff & Altman § 8.4.

Any monetary award to Jeepers should thus grant Jeepers a claim equal in priority to those members described in § 18-804(a)(2) above. The award would create a liability for the Fund in favor of Jeepers for a distribution Jeepers was owed prior to dissolution. Although this would technically make Jeepers a creditor, it would not put Jeepers in the priority class described in § 18-804(a)(1) because the provision excludes "liabilities for distributions to members and former members under § 18-601 or § 18-604 [regarding resignations from an LLC] of this title."

Thus, if granted any award here, Jeepers should be treated like Redeemers, *i.e.,* in category § 18-804(a)(2). Specifically, it would be entitled to a priority claim in the Fund's liquidation in the amount set by the Arbitrator and would entitle Jeepers to receive payment pro rata with all other Redeemers when assets are distributed by the Fund in connection with its winding up. This would effectively place Jeepers in the same class with investors who had made valid withdrawal requests effective by the end of 2007—but who have still not been paid their distributions.

Nonetheless, this would still mean that any award to Jeepers has the effect of allowing Jeepers to "cut the line" ahead of all Non-Redeemers who did not withdraw before suspension, *i.e.*, members described in § 18-804(a)(3), even though Jeepers did not withdraw before suspension. Moreover, because the value of the Fund's assets declined significantly since the suspension of withdrawals in 2008, any award that recognizes Jeepers as having made a valid redemption request prior to the suspension has the effect not only of prioritizing the time of payment to Jeepers over other investors but also substantially increasing the amount that Jeepers would recover at the expense of Non-Redeemers. Any award to Jeepers thus results in it being treated more favorably than other investors and functionally takes other investors' money and gives it to Jeepers.

Claimants do not believe Jeepers is entitled to such special treatment.

Argument

I.

THE ARBITRATOR SHOULD DECLARE JEEPERS'S WITHDRAWAL DEMANDS VOID AND OF NO EFFECT, OR VALID FOR NO MORE THAN $45 MILLION

Based on their understanding of the governing documents and practices of the Fund, the documents exchanged during discovery, the deposition testimony of the witnesses in this matter, and their own experience in the hedge fund industry, Claimants believe that Jeepers is simply not entitled to the special treatment that it seeks.

A. Jeepers's Interpretation of Withdrawal Rights Under the LPA Is Wrong

The Fund's reading of the applicable LPA language—to impose a separate two-year lock-up on each investment (or "Interest") in the Fund—appears to be the correct

one. But even if the language is regarded as ambiguous, *all* of the extrinsic evidence favors the Fund's reading.

1. The LPA's Language Supports the Fund's Interpretation

The language at issue in this dispute concerns the withdrawal rights of limited partners of the Fund. Sections 9.1 and 9.2 of the LPA govern withdrawal from the partnership. They both state in pertinent part that "withdrawals of a Limited Partner's Capital Account may be made as of the last Business Day of the calendar quarter ending at least two years after the Limited Partner initially purchases Interests and as of the second anniversary of that date thereafter . . ."

Section 6.1 defines the term "Capital Account," stating that a "capital account shall be maintained for each Partner" and that it "will initially equal the Partner's Initial Capital Contribution." A partner's Capital Account may be "increased by the amount of any Additional Capital Contribution made by the Partner as of the first day of the Fiscal Period." "Additional Capital Contribution" is defined separately in Section 5.3, which states that "[t]he General Partner . . . in its sole discretion, may permit Limited Partners to make Additional Capital Contributions as of the first Business Day of each month or at such other times and subject to such conditions and minimum amounts as the General Partner shall determine."

Jeepers reads the language of these provisions to mean that it could have withdrawn all five of its investments in the Fund on the second anniversary of its initial subscription (or on the second anniversary of its final subscription, under its view of the Side Letter). According to Jeepers, all of its investments in the Fund were part of a single "Capital Account" subject to a single rolling two-year lock-up. According to Jeepers,

investments subsequent to its initial subscription were not new subscriptions, but merely "Additional Capital Contributions" to a single, original "Capital Account."

This reading, however, conflicts with other provisions of the LPA. The language of Sections 9.1 and 9.2 trigger withdrawals off of the end of the calendar quarter ending "at least two years after the Limited Partner initially purchases *Interests* and as of the second anniversary of that dated thereafter." (Emphasis added.) The plural form of "interests" contemplates multiple subscriptions, each of which will trigger its own withdrawal schedule. Jeepers's reading would re-write that language to tie all of an investor's withdrawals to the date on which a Limited Partner "initially purchased *its first Interest*" in the Fund, which is not what the provision says.

The Fund has therefore consistently read the LPA to mean that each investment (and subscription) created a separate "Capital Account" for that investment. In the Fund's view, each "Capital Account" included the investor's investment at the date of subscription, plus any gains or losses associated with that investment. Although the General Partner could, using the discretion granted under Section 5.3, allow "Additional Capital Contributions" to be added to a particular "Capital Account" after the date of subscription, it did not exercise this discretion.[7]

---

[7] Indeed, the record reflects an instance where Mr. Zwirn specifically refused to permit an investment made merely one month after a prior investment to be treated as part of the same "Capital Account." The investor had asked "if [it] make[s] one investment Sept 1 and then add[s] to the investment Oct 1, do those investments have the same or different rolling lockup periods?" Mr. Zwirn immediately responded: "Each piece of capital has its own lock. No combo." (Exhibit P at DBZCOPR-00541659.) While some Fund documents may have used the term "additional contribution" loosely to refer to investments made by an investor subsequent to its first investment, those investments were not treated as "Additional Capital Contributions" under the terms of the LPA.

The result is that each investment (or subscription) had a separate lock-up period described in Sections 9.1 and 9.2 that ran from the date each such investment (or subscription) was made. If there was any doubt on that score, the 2005 Confidential Memorandum confirmed the Fund's interpretation: "For purposes of determining the withdrawal date (the 'Withdrawal Date') with respect to Interests, a separate Capital Account will be established for each Interest purchased (i.e. each capital contribution made)."

2. Alternatively, the Language is Ambiguous, and the Extrinsic Evidence All Favors the Fund's Reading

The LPA calls for the application of Delaware law for its interpretation. LPA § 15.8. Under that law, "when [courts] may reasonably ascribe multiple and different interpretations to a contract, [they] will find that the contract is ambiguous." *Osborn* v. *Kemp*, 991 A.2d 1153, 1160 (Del. 2010). A court determines whether an interpretation is "reasonable" from the perspective of a third party. *Dittrick* v. *Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007) ("[If] a reasonable third party would be unable to determine the meaning of certain contractual provisions, the agreement is considered ambiguous.").

"[I]f there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended." *AT&T Corp.* v. *Lillis*, 953 A.2d 241, 253 (Del. 2008); *accord Jana Master Fund, Ltd.* v. *CNET Networks, Inc.*, 954 A.2d 335, 339 (Del. Ch. 2008). "Sources of such evidence include overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry." *Dittrick*, 948 A.2d at 406 (internal quotation marks omitted). In addition, "any course of performance accepted or acquiesced in without objection [by the parties] is given great

weight in the interpretation of the agreement." *Sun-Times Media Grp., Inc.* v. *Black*, 954 A.2d 380, 398 (Del. Ch. 2008). Where extrinsic evidence renders an ambiguous contract clear enough that an "objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties," the law requires "enforce[ment of] the objectively reasonable interpretation that emerges." *United Rentals, Inc.* v. *RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).

As we now discuss, if the Arbitrator examines the LPA from the perspective of a third person with any knowledge of hedge funds, the practices of the Fund, the purposes of the lock-up provisions and general industry custom and practice, the Fund's reading is the far more reasonable interpretation.

a) The Fund's Practice Was to Treat Each Investment as Having its Own Capital Account with its Own Withdrawal Cycle

In particular, Jeepers's interpretation is entirely inconsistent with the practices of the Fund. *Dittrick*, 948 A.2d at 406 (extrinsic evidence includes "overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry"). In practice, the Fund established a new "Capital Account" each time an investor submitted a new subscription agreement, and each new subscription for an investment was treated as a separate "tranche," with its own cycle of rolling lock-ups. (*See* Exhibit Q; Exhibit R.)

Mr. Zwirn, David Lee (former President and acting CFO of the Fund manager) and Elise Hubsher (former head of the Marketing and Investor Relations Group for the Fund manager) all testified at their depositions in this matter that the Fund treated each investment separately for the purpose of determining its withdrawal schedule. (Exhibit S at Dep. Tr. 211:7-11 (Zwirn: "[I]n all of our practice [] it was tranche by

tranche[.] [T]hat would be the only way that would make sense in terms of maintaining liquidity."); Exhibit T at Dep. Tr. 145:7-8 (Lee: "Every investor at each tranche had a two-year lock-up."); Exhibit U at Dep. Tr. 55:17-20 (Hubsher: "The withdrawals generally apply to each tranche as it's invested, and each tranche . . . has its own withdrawal rights based on the subscription date."); *id.* Dep. Tr. 38:8-12 (Hubsher: "For each subscription, they would have a two-year window with 120 days' notice they could get their money out based upon the quarter end following the two-year anniversary.").)

Significantly, *every other investor in the Fund was treated in a manner consistent with the Fund's interpretation*—and no one, save Mr. Epstein, ever raised any issue with it. Exhibit S at Dep. Tr. 209:10-13 (Zwirn: "That's the way we always did it. That's how we treated every investor. That's how every investor, to my knowledge interpreted it.") According to Ms. Hubsher, until Mr. Epstein raised this dispute about his withdrawal rights, the Fund never even had an internal discussion about any approach other than a "tranche-by-tranche approach." (Exhibit U at Dep. Tr. 39:17-20)

The following written withdrawal request by an investor appears to be typical of every other investor's interpretation of its withdrawal rights:

> I am writing to provide notice of withdrawal of [my] entire investment . . . It is my understanding that [I] invested $115,000 on 9/1/03 and another $75,000 on 4/1/04. Both investments are subject to the 2-year rolling lockup. Accordingly, the next withdrawal date for the 9/1/03 investment is 9/30/07 and the next withdrawal date for the 4/1/04 investment is 6/30/08. . . Please let me know (1) if you are in agreement with my understanding of the withdrawal mechanics and (2) that you agree that this notice of withdrawal will be effective as to both investments.

(Exhibit V at VRF 00001394; *see also* Exhibit W at VRF 1389 (". . . the 6/1/04 investment is available at 6/30/08 under the 2 year Rolling liquidity option, the 8/1/04 investment is

available at 9/30/08 under the 2 year Rolling liquidity option and the 11/1/04 investment is available at 12/31/08 under the 2 year Rolling liquidity option. In order to process these redemptions, we will need you to complete one form for each account and for each available redemption date.").)

As noted above, the parties' course of performance under a contract provision is entitled to "great weight" in interpreting it. *Sun-Times Media Grp., Inc.*, 954 A.2d at 398. Here, Jeepers's withdrawal theory is inconsistent with the way in which the Fund treated every investor's withdrawal requests, and the way every other investor understood its withdrawal rights. Its interpretation is therefore disfavored.

Further, Mr. Epstein and FTC, Jeepers's predecessor in interest, were alerted to the way the Fund treated withdrawal requests when they received the 2005 Confidential Memorandum. Yet, they did not, at the time, raise any issue with this practice. This too favors the Fund's interpretation.

b) Industry Practice Was to Treat Each Investment as Having its Own Capital Account with its Own Withdrawal Cycle

The Fund's treatment of each investment as having a separate "lock-up" is also consistent with industry practice, and with the general purposes of lock-ups, especially with respect to a fund with illiquid investments like the one at issue here. In such situations, the fund manager needs to have a reliable timeline for deploying the capital of each subscription. Allowing investors to withdraw all investments on a single withdrawal cycle would completely undermine the purpose of a lock-up, constrain the fund's investment strategy and drag the fund's performance.

Hedge funds that have a lock-up or some other rolling redemption cycle track subscriptions separately to protect the fund from a forced liquidation of its portfolio.

Where, as here, a fund invests in relatively illiquid investments, the fund needs to be structured such that investments are treated separately for purposes of a lock-up because the liquidity of a hedge fund needs to correspond with the investment strategy and portfolio of the hedge fund. In return for consenting to such a lock-up, the investor gains the potential for the higher returns presented by illiquid investments. (*See* Exhibit X, Expert Report of Henry Bregstein, at 4-8.)

Table 3 illustrates this point. If an investor invests $10 million on May 1, 2002 (as Jeepers did) under a rolling two-year lock-up schedule (again assuming that lock-ups expire at the end of the relevant calendar quarter), the fund manager knows that it has 26 months to deploy that $10 million before the investor may withdraw its funds. Under Jeepers's theory, however, if that same investor invests $30 million a year and a half later, on January 1, 2004, the fund manager will likely not be able to invest that money in the same way that it could invest the earlier subscription because the investor could, under Jeepers's theory, seek to redeem the second subscription on the very same date that the initial subscription could be withdrawn, even though such date was just *six months* after the date the second investment was made.

This unusual arrangement would undermine the entire point of a lock-up. The Fund would be unable to invest in illiquid investments with the later money (contrary to its overall investment strategy) or borrow against it. And, if the Fund was therefore compelled not to invest the $30 million in a similar, illiquid manner, such treatment would cause a substantial drag on the Fund's performance. The more illiquid and leveraged the fund's investment strategy, the greater the problems these issues would present.

Table 3 - Illustration of Constraint on Investment Strategy If Investments Were Aggregated for the Purpose of Determining the Withdrawal Cycle

	Date of Investment	Amount	First Eligible Withdrawal Date According to Jeepers	Time from Investment to Withdrawal
Subscription #1	May 1, 2002	$10 million	June 30, 2004	26 months
Subscription #2	January 1, 2004	$30 million	June 30, 2004	6 months

In short, Jeepers's interpretation makes no sense. The entire purpose of a lock-up would be defeated, as follow-on investments (possibly for larger sums of money) would be subject to shorter and shorter lock-up periods. The fund manager's ability to make illiquid investments would be constrained, and investment returns would diminish.

Finally, it bears noting that hedge funds typically track investments separately in any event so that they can calculate the profits and losses on each capital contribution. Hedge funds (like this one) typically charge a 20% (or similar amount) "incentive fee" on all gains. But each investment may have a different point (usually called the "high water mark") from which gains are measured. (For example: if an investor invested $100, and the Fund lost 10% or $10 the first year; and the investor then invested another $100; and the Fund then went up 10% the second year; the manager would only be entitled to a 20% "incentive fee" on the second investment; it should not receive any incentive fee payment as to the first investment unless and until that investment exceeded a value of $100, its "high water mark.") This practice was adopted in the LPA (§ 6.2) and underscores the need for the Fund to track investments separately in any event.

Accordingly, whatever ambiguity exists on the face of the LPA disappears when the Arbitrator considers evidence of the parties' own actions, industry practice, the 2005 Confidential Memorandum and simple logic. Claimants therefore believe the Arbitrator should enforce the Fund's reading of the LPA as "the objectively reasonable interpretation that emerges" upon consideration of all of the relevant evidence. *United Rentals, Inc.*, 937 A.2d at 835.

B. Jeepers's Withdrawal Demands Were Invalid

Accordingly, neither Jeepers's November 2006 Withdrawal Demand nor its February 2007 Withdrawal Demand were valid requests for redemption. Despite Jeepers's request for the "immediate" redemption of $80 million in November 2006, $80 million was not available for redemption at that point. Only two of Jeepers's subscriptions were in fact eligible for redemption at that time—the Fourth and Fifth Investments. Thus, the demand was invalid.[8]

Similarly, Jeepers's February 2007 request for the redemption of all of its funds was invalid, as all of those funds were not then available for withdrawal. Instead,

---

[8] Delaware courts have not imposed on general partners a duty to correct or cure a deficient request from limited partners. *See, e.g.*, *BASF Corp.* v. *POSM II Props. P'ship, LP*, 09 Civ. 3608, 2009 WL 522721, at *5 (Del. Ch. March 3, 2009); *In re Mesa Ltd. P'ship Preferred Unitholders Litig.*, 91 Civ. 12243, 1991 WL 262669, at *5 (Del. Ch. Dec. 10, 1991); *see also* 6 Del. C. § 17-603 (withdrawal before dissolution is not permitted absent provision in the partnership agreement). In fact, here, Section 9.9 of the LPA specifically provided a remedy if a limited partner's notice was deficient: where "proper Notice of such withdrawal is not received by the General Partner within [the period specified in Section 9.1 or 9.2]," the "effective date of any partial withdrawal will be . . . the second Withdrawal Date following the date on which the Notice was given." The second Withdrawal Date following Jeepers's November 2006 Notice of Withdrawal would have been long after the suspension of all withdrawal rights.

only one subscription was eligible for redemption in February 2007—the Fourth Investment.

And, Jeepers's last withdrawal request, in February 2008, simply came too late.

C. Jeepers's Allegation of an "Oral Agreement" Does Not Hold Up

Jeepers alternatively claims that its November 13, 2006 fax was a proper withdrawal request because it was made pursuant to an "oral agreement" between Mr. Zwirn and Mr. Epstein earlier that day. It does not appear that this agreement, however, ever existed. There is no evidence that the alleged "agreement" ever took place—apart from highly suspect testimony, and no reason why Mr. Zwirn would have entertained such an agreement.

According to Mr. Epstein, in phone calls with Mr. Zwirn and, separately, with Glenn Dubin, the source of Mr. Epstein's original introduction to Mr. Zwirn and a co-owner of the Fund's General Partner through an entity called Dubin & Swieca Asset Management, LLC, Mr. Epstein demanded the withdrawal of all the money he had in the Fund. These communications allegedly culminated in a November 13 conference call among Mr. Epstein, Mr. Zwirn, and Mr. Dubin, in which Mr. Zwirn, worried that a complete withdrawal by Mr. Epstein would precipitate a "run on the bank," allegedly promised Mr. Epstein that the Fund would honor an $80 million withdrawal request if Mr. Epstein left the balance of his investment in the Fund. According to Jeepers, Mr. Epstein's subsequent fax was allegedly sent pursuant to this "oral agreement" and requested the immediate withdrawal of $80 million.

This version of events suffers from a variety of problems. First, it is simply implausible. Mr. Zwirn did not fear a "run on the bank" at the time, as virtually no other

investors were demanding the return of their funds, and the Fund was still posting large gains at the time so there was no reason for any such fear. Second, Mr. Zwirn knew that, under the LPA, Mr. Epstein was not entitled to the "immediate" withdrawal of all his money from the Fund, and not even entitled to withdraw $80 million; so why would he agree to give Mr. Epstein special treatment in this manner? Indeed, giving Mr. Epstein special treatment would have created a precedent leading to issues with other investors. There was thus no reason for Mr. Zwirn to acquiesce to Mr. Epstein's improper demand (assuming Mr. Epstein even made the demand).

In addition, the evidence does not support Jeepers's version of events. As noted above, e-mails from the same day the of the November 13, 2006 fax clearly indicate that the Fund explained the lock-up schedule to Mr. Epstein and Harry Beller, Mr. Epstein's accountant, who sent the withdrawal request. (*See* Exhibit J at HCMARB_00000049; Exhibit K at HCMARB_00000052.) Jeepers has offered no explanation for why the Zwirn Parties would take the time to explain the lock-up schedule to Mr. Epstein on the same day Mr. Zwirn allegedly waived all of the requirements of that schedule in an "oral agreement."

Finally, no document records or reflects any such agreement. Indeed, for three months after Jeepers made the November 2006 Withdrawal Demand, there is no record of any written follow-up or other inquiry from Mr. Epstein regarding any "agreement." When Mr. Epstein finally wrote to the Fund about withdrawals in February 2007, he writes only of the prior request and says nothing about any "agreement." In fact, in his February 14, 2007 letter to Mr. Zwirn, Mr. Epstein argues that his $80 million request should be honored not because Mr. Zwirn "agreed" that it would

be, but because it constituted proper notice of withdrawal under the LPA and the 2005 Side Letter. If this oral agreement had existed, it is inconceivable that Mr. Epstein would have failed to mention it in his subsequent correspondence to the Fund.

Jeepers's current version of events also relies upon inconsistent and unreliable testimony from Mr. Epstein, Mr. Beller, and Mr. Dubin. At his deposition, Mr. Epstein testified both that he expected to be paid "immediately" after making his request and that he expected to be paid the following March. (Exhibit Y at 160:13-15; *id.* at 171:20-23.) He also conceded, at one point, that Mr. Beller relayed a conversation he had with Mr. Zwirn concerning lock-ups at the Fund on or about November 13, 2006, (*id.* at 168:4-8), while elsewhere claiming he believed he could withdraw all his money at once. Mr. Beller, incredibly, repeatedly testified that he remembered very little about the events throughout this period, but the one thing he did remember was that he did *not* have a conversation about lock-ups with Mr. Zwirn until February 2007.[9]

As for Mr. Dubin, apparent personal conflicts and his relationship with Mr. Epstein require that his testimony be viewed with an acknowledgment that he could have reason to favor Mr. Epstein's position. Mr. Epstein is a close personal friend of Mr. Dubin's and the godfather of Mr. Dubin's children. Mr. Epstein also apparently introduced Mr. Dubin to JPMorgan Chase in connection with the transaction in which JPMorgan Chase acquired Mr. Dubin's hedge fund, Highbridge, making Mr. Dubin a

---

[9] Although Mr. Epstein testified twice at his deposition that Mr. Beller had the conversation about lock-ups with Mr. Zwirn in November 2006, he nevertheless subsequently submitted an errata sheet "correcting" this testimony to say that the conversation occurred in February 2007. An e-mail from Mr. Zwirn to Mr. Dubin, however, confirms that those conversations did, in fact, take place in November 2006. (Exhibit J.)

billionaire (and for which Mr. Dubin paid a $20 million "fee" to Mr. Epstein). We understand that Mr. Epstein invested in the Fund on the recommendation of Mr. Dubin, and it is possible that Mr. Dubin could feel responsible for Mr. Epstein's losses in this investment. Also, Mr. Dubin subsequently had a falling out with Mr. Zwirn, and the two have been in litigation over another matter. Finally, it appears that Mr. Epstein prepared an affidavit in this matter that Mr. Dubin simply signed, without changing a comma.

In contrast, Mr. Zwirn, as well as Fund employees David Lee and Elise Hubsher, have consistently testified that no oral agreement existed and that Jeepers's November 13, 2006 fax came as a surprise to everyone at the Fund. Claimants therefore believe the evidence will show that no "oral agreement" existed, and that any claim depending on its existence should fail.

D. The Side Letter Did Not Alter the Withdrawal Cycle for Any of the Investments

Alternatively, Jeepers now argues that the January 11, 2005 Side Letter from the Fund to Jeepers in connection with Jeepers's Fifth Investment restarted the withdrawal cycle for all of Jeepers's tranches and made all of the tranches subject to the withdrawal cycle of the last tranche. In fact, the Side Letter did nothing of the sort.

The Fund's records indicate that the sole purpose of the Side Letter was simply to give Jeepers a two-year rolling lock-up for its Fifth Investment instead of the new three-year lock-up that all the other investors in the Fund, as well as new investors in the Fund, were being required to use for new subscriptions starting January 1, 2005. Emails from the week before the Fund executed the Side Letter confirm that the Fund had agreed only to make the Fifth Investment "two year money" and not to adjust the withdrawal schedule for Jeepers's other subscriptions. (*See* Exhibit Z at

DBZCO_FTC0003246 ("FTC in for $20 mil jan 1 LP . . . this is the last 2 year money will take from anyone of course"); Exhibit AA at DBZCO_FTC0003242 ("Addt'l Jan 1 $20mm FTC is subject to 2 yr lock not 3 yr"); *see also* Exhibit F at HCMARB_00000155 ("Attached please find the side note relating to Financial Trust Company, Inc.'s *January 1, 2005 investment* in D.B. Zwirn Special Opportunities Fund, LP") (emphasis added).)

There are two additional problems with Jeepers's current reading of the Side Letter. First, as noted above, if, in fact, the Side Letter was meant to restart the clock on the withdrawal cycle of all of Jeepers's tranches, it would have had the effect of *extending* the lock-up period for the first three of Jeepers's investments. Under Jeepers's current reading of the Side Letter, the Side Letter would have had the effect of locking up Jeepers's First, Second and Third Investments for *nine months longer* than their original withdrawal dates. It is difficult, if not impossible, to believe Mr. Epstein would have agreed to *extend* the existing lockups for his prior investments in the Fund beyond two years—especially when no one seems to have asked him to do so. (*See* Exhibit Y at Dep. Tr. 21:7-9 (Epstein: "Everyone knows I am very disciplined about not investing money basically with lock-ups and especially for more than two years.").) At his deposition, Mr. Epstein had no explanation for why he would want to *extend* the dates of any prior lock-ups.

Second, according to Jeepers's current reading of the Side Letter, *none of the five subscriptions* would have been eligible for redemption when Jeepers submitted its February 2007 Withdrawal Demand. If, in fact, the Side Letter was meant to restart the clock on all of Jeepers's subscriptions, to withdraw those subscriptions Jeepers would have been required to submit a notice of withdrawal by November 30, 2006, more than two

months before Jeepers submitted its February Demand. For this reason as well, Jeepers's reading of the Side Letter does not appear to be correct.

II.

THERE IS NO MERIT TO JEEPERS'S COUNTERCLAIMS

In its response to Claimants' Demand for Arbitration, Jeepers filed counterclaims for (1) breach of contract, (2) promissory estoppel, (3) fraud, (4) breach of fiduciary duty, and (5) negligent misrepresentation. Financial Trust Company, Inc.'s and Jeepers, Inc.'s Statement of Counterclaim and Third Party Claim dated May 21, 2010 ("Jeepers's Response"), ¶¶ 61-81. Jeepers asserts the first three claims against the Zwirn Parties and the Fund. The breach of fiduciary duty and negligent misrepresentation claims are only asserted against the Zwirn Parties.

For the reasons stated above, Jeepers's contract claims fail because neither the LPA nor the Side Letter were breached when the Fund rejected Jeepers's withdrawal demands as defective, and because no "oral agreement" existed. For the reasons below, Jeepers's remaining claims also fail.

A. Jeepers Has No Claim for Promissory Estoppel Because There Was No Promise

"Under the doctrine of promissory estoppel, a plaintiff must demonstrate by clear and convincing evidence that: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise." *Chrysler Corp.* v. *Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003).

Jeepers's purported claim for promissory estoppel fails because the evidence does not show that any promise was made. Jeepers alleges that on November 13, 2006, "Zwirn and the Fund promised to honor FTC's November 13, 2006 request to withdraw $80 million." Jeepers's Response ¶ 67. Just as Jeepers cannot establish that an "oral agreement" to honor Jeepers's $80 million request existed, it cannot establish that the promise allegedly made by Mr. Zwirn in that same oral agreement was ever made.[10]

B. Jeepers Has No Claim for Fraud Because Mr. Zwirn Fully Disclosed All Accounting Irregularities and Made No Misrepresentations to Mr. Epstein

To prove common law fraud, a claimant must establish: "(1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance." *Stephenson* v. *Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Alternatively, "one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading." *Id.*; *accord Schmeusser* v. *Schmeusser*, 559 A.2d 1294, 1295-96 (Del. 1989).

Jeepers appears to be pursuing a purported fraud claim under several different theories. Jeepers first appears to claim that Mr. Zwirn misrepresented his

---

[10] The claim also fails due to a lack of reasonable reliance. Although Jeepers claims it reasonably relied on the alleged promise in not insisting on a complete withdrawal of all of its funds, (a) Jeepers was not entitled to such a complete withdrawal at the time, and (b) it would not have been reasonable for Jeepers to rely on any such "promise."

"knowledge and participation in the Fund's financial and accounting irregularities" when he allegedly told Mr. Epstein that he did not cause the irregularities or have contemporaneous knowledge of their causes. Jeepers's Response ¶ 71. Second, Jeepers claims that Mr. Zwirn misled Mr. Epstein regarding the "nature and scope of the problems" at the Fund by allegedly omitting material information when he spoke with Mr. Epstein on the telephone in October 2006. *Id*.

To begin with, there is a good reason to reject Jeepers's fraud claim on both of these theories right at the outset. If these theories were valid, they would apply equally to *all* investors. If Mr. Zwirn communicated false or misleading information (or failed to convey accurate information), he did so not just with respect to Mr. Epstein but with respect to all investors in the Fund. Because other investors are not parties to this dispute, however, granting an award to Jeepers based on either of these theories would once again take money away from investors and give it to Jeepers even when its claim is not in any way different than, or superior to, those of other investors.

In any event, there is no evidence to support Jeepers's purported fraud claim—under either theory. Mr. Zwirn denies participation in or contemporaneous knowledge of the improprieties. Jeepers has adduced no evidence to the contrary. It is undisputed that the SEC investigated Mr. Zwirn for his role in the irregularities at the Fund ultimately did not charge him with any responsibility for (or contemporaneous knowledge of) these improprieties. In fact, in its complaint against Mr. Gruss, the SEC specifically alleged that Gruss did not inform Mr. Zwirn of the "Inter-fund Transfer practice" or of when "client funds had been used for the aircraft purchase." *SEC* v. *Gruss*, 11 Civ. 2420 (S.D.N.Y. April 8, 2011), Complaint ¶¶ 23, 46.

Jeepers's original allegations that Mr. Zwirn must have participated in the commission of the irregularities because he was a "micromanager" were based "upon information and belief" rather than any specific facts that would contradict the SEC's position. Jeepers's Response ¶¶ 58-59. In the absence of proof that Mr. Zwirn had contemporaneous knowledge of, or involvement with, the irregularities at the Fund, he could not have misled Mr. Epstein when he told him that he had no such knowledge of, or involvement with, those irregularities.

Nor does Jeepers's second theory make any sense, given that Mr. Zwirn fully disclosed the irregularities at the Fund by the end of October 2006. There were three types of irregularities discovered at the Fund: (1) the collection of management fees from the Fund before they were payable; (2) the temporary use of Fund money to cover equity in an airplane Mr. Zwirn used for business travel; and (3) the borrowing of money from the Offshore Fund for use by the Onshore Fund. Although Mr. Epstein appears to make a great deal of the fact that the specific nature of the first two types of irregularities were not disclosed by Mr. Zwirn in the first round of October calls to investors (when Mr. Gruss's separation from the Fund was disclosed), there is no dispute that the specific nature of all three irregularities was fully disclosed in the second round of October calls to investors—including Mr. Epstein. Thus, Jeepers has failed to identify any information that Mr. Zwirn omitted from his communications with Mr. Epstein that would render those communications false or misleading—apart from Mr. Zwirn's alleged involvement in the irregularities (and Claimants are unaware of any evidence to support that allegation). *See Stephenson*, 462 A.2d at 1074.

During the course of this case, Jeepers has suggested yet another version of its fraud claim, this one based not on Mr. Zwirn's failure to disclose certain information about the irregularities, but on his delay in disclosing that information. Jeepers has suggested that Mr. Zwirn first knew about the irregularities in spring 2006 and was obligated to disclose what he knew then. This new version has other problems of its own. In particular, it appears that all Mr. Zwirn knew in the spring was that there were *potential* irregularities, and he promptly turned over what he knew to counsel to investigate. That is not fraud.

Further, under either of Jeepers's own interpretations of the contract, Jeepers could have withdrawn its investment only if it gave notice by March 2, 2006 (if the two-year lock-up is keyed to Jeepers's initial investment) or by November 30, 2006 (if the two-year lock-up is keyed to its January 1, 2005 investment). Accordingly, it would have made no difference for the purposes of withdrawal whether Jeepers had the information in spring 2006 or October 2006. (Nor would the difference have mattered under what the Fund believes to have been the proper withdrawal schedule.) Because there was no possibility of withdrawing earlier if disclosure occurred earlier, Mr. Zwirn's alleged delay caused no damage. *See In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A.2d 808, 827 n.61 (Del. Ch. 2005) (to prove common law fraud, "[the] plaintiff must have suffered substantial damage, not simply nominal damages, before the cause of action can arise") (internal quotation marks omitted).

A fourth—and final—"fraud" theory Jeepers has occasionally raised is that Mr. Zwirn (and through him, the Fund) orally promised to allow Mr. Epstein's $80 million withdrawal, when they had no intention of doing so. This one fails for a host of reasons.

Not only does the theory fail because, as noted above, the evidence does not support the existence of such a promise, but there is no basis to believe Mr. Epstein reasonably relied on such a promise or was damaged as a result.

C. Jeepers's Claim for Breach of Fiduciary Duty or Negligent Misrepresentation Against Mr. Zwirn and the Other Zwirn Parties

Jeepers's breach of fiduciary duty and negligent misrepresentation claims appear to be asserted against Mr. Zwirn and the other Zwirn Parties, and not against Claimants. Claimants do not respond to those claims here, but note that those parties vehemently deny them. In addition, Claimants interpret the 2005 LPA to preclude Jeepers from recovering against Mr. Zwirn or the other Zwirn Parties in the absence of "willful misfeasance, bad faith or gross negligence"—none of which appears to have occurred here.

III.

JEEPERS IS NOT ENTITLED TO PRE-JUDGMENT INTEREST

Jeepers has recently argued that, in the event it receives an award from the Arbitrator, it is entitled to pre-judgment interest on the award dating from its alleged withdrawal date, March 30, 2007. Although Claimants believe the Arbitrator need not reach this issue because no award is due to Jeepers, in the event the Arbitrator does grant Jeepers any award, the law does not support Jeepers's demand for pre-judgment interest.

To begin with, the result is directly contrary to the LPA. Section 9.8 of the LPA states that, even after a limited partner's withdrawal is effective, "[n]o interest will be paid on withdrawal proceeds pending distribution to the withdrawing limited partner." *See also* LPA § 6.6 ("No Interest to Limited Partners. The Partnership shall not pay to any Limited Partner, and no Limited Partner shall be entitled to, interest on the amount of such

Limited Partner's Capital Account.").[11] Other Redeemers from the Fund with priority claims do not earn any interest on those claims, and no Redeemer has protested this fact since it was communicated to them no later than December 2009. (*See* Exhibit BB at VRF 00000586 ("Amounts owed to the 2007 Redeemed Investors have an aggregate value of approximately $82 million as of June 30, 2009 *and do not accrue interest*.") (emphasis added).)

Second, had this case been brought in the Delaware courts, it would have been brought in Delaware Chancery Court. Although the statute grants concurrent rather than exclusive jurisdiction in the Superior and Chancery Courts, disputes concerning the interpretation of a partnership agreement are uniformly brought in Chancery Court. *See, e.g.*, *Hillman* v. *Hillman*, 910 A.2d 262 (Del. Ch. 2006) (interpreting limited partnership agreement); *Lazard Debt Recovery GP, LLC* v. *Weinstock*, 864 A.2d 955 (Del. Ch. 2004) (same); *Alpine Inv. Partners* v. *LJM2 Capital Mgmt., LP*, 794 A.2d 1276 (Del. Ch. 2002) (same). This is likely true because "the general rule [is] that an action at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions unless there has been an accounting or settlement of the partnership affairs." *Mack* v. *White*, 165 A. 150, 150 (Del. Super. 1933); *accord* *Strickler* v. *Sussex Life Care Assocs.*, 541 A.2d 587, 589 (Del. Super. 1987).

The Court of Chancery is vested with considerable discretion to determine whether pre-judgment interest should be awarded. Thus, the Court of Chancery "is empowered to grant such relief as the facts of a particular case may dictate." *Am. Gen.*

---

[11] The same provisions were carried over into the LLC agreement, which investors specifically approved and adopted as part of the management transition.

Corp. v. *Continental Airlines Corp.*, 622 A.2d 1, 13 (Del. Ch. 1992) (internal quotations and citations omitted). "Depending on the circumstances, [the Court of Chancery] has awarded pre-judgment interest from the date on which an amended complaint had been filed in the litigation, and, in another instance, [the Court] refused to award pre-judgment interest." *Wacht* v. *Continental Hosts, Ltd.*, 94 Civ. 7954, 1994 WL 728836, at *2 (Del. Ch. Dec. 23, 1994). In evaluating a demand for pre-judgment interest, the Chancery Court considers "the nature of the plaintiff, the nature of the wrong to be remedied, and the peculiar facts of the case." *Summa Corp.* v. *Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. Ch. 1988). In the event pre-judgment interest is appropriate, "a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied." *Id.*

The equities here counsel strongly in favor of the Arbitrator's exercising his discretion to deny any award of pre-judgment interest. Any award to Jeepers would merely give it a priority claim, and it would be grossly unfair to award pre-judgment interest for that claim when other holders of priority claims (Redeemers) are not entitled to any interest. This is especially true where, as noted above, Fund investors, under Section 9.8 of the LPA cited above, have no right to interest on their redemptions.

Further, any award of interest would, again, be equivalent to taking money away from those limited partners (now LLC members) who are waiting for their pro-rata share of the remaining assets according to the residual value of each limited partner's investments—again without any additional interest. Even if the Arbitrator finds that Jeepers should receive a higher priority on its claim than other limited partners on theirs, it

does not follow, as a matter of equity, that Jeepers should receive a windfall in the form of significant pre-judgment interest at the expense of other investors.[12]

Finally, it would also be improper to award Jeepers pre-judgment interest because it is far from clear how that interest should be calculated. Where pre-judgment interest is appropriate, it is generally paid from the date payment to the creditor was due. *Citadel Holding Corp.* v. *Roven*, 603 A.2d 818, 826 (Del. 1992). But even if Jeepers effectively withdrew on March 30, 2007 (the withdrawal date effective under its Side Letter theory), the LPA does not provide a fixed date on which payment is due. Section 9.8 reads (emphasis added):

> Payment of not less than 90% of the aggregate withdrawal proceeds will generally be effected within 45 calendar days after the applicable Withdrawal Date, *subject to the right of General Partner to delay payment of such withdrawal proceeds, as necessary in the General Partner's sole discretion, in order to effectuate an orderly withdrawal from any investment*.

Thus, the General Partner could exercise its power to delay payment in its sole discretion to effectuate an orderly withdrawal (provided doing so was consistent with its fiduciary duties), and the LPA does not require notice to the limited partners for this exercise.

Here, there is ample reason to believe that, if the General Partner had determined that Jeepers was entitled to withdraw all of its tranches—a conclusion it clearly did not reach—it would have at least exercised its delay power and its suspension power.

---

[12] In addition, even in Delaware Superior Court, judges will deny pre-judgment interest where there have been delays in seeking relief. *Citadel Holding Corp.* v. *Roven*, 603 A.2d 818, 826 (Del. 1992) ("[T]he trial court has some discretion in fixing the amount of interest where there has been inordinate delay caused by one of the parties."). Given that Mr. Epstein's claim has been lingering for some time until Claimants were required to commence this proceeding to resolve it, no pre-judgment interest should be awarded.

The value of Jeepers's investments was in excess of $120 million as of March 30, 2007, and the unexpected, sudden liquidation of very illiquid assets to pay such a redemption could have jeopardized the value of those assets. Delaying payment or suspending all withdrawals would have been wholly in keeping with the General Partner's fiduciary duties to the Fund's limited partners.

It is, however, impossible to determine with any certainty whether the General Partner would have delayed payment or suspended withdrawals, or, if it had, how long that delay or suspension would have lasted. Payment to Jeepers would not have been due during any period of delay or suspension, and therefore there is no certainty with which the Arbitrator could calculate a date from which pre-judgment interest would be due.

For all of these reasons, Claimants urge the Arbitrator to deny any award of pre-judgment interest.

Conclusion

For all of the reasons set forth above, Claimants respectfully submit that the Arbitrator should find that the withdrawal demands Jeepers submitted were invalid and that Jeepers is therefore entitled only to its pro-rata share of the liquidation proceeds of the Fund. In the alternative, Claimants submit that the Arbitrator should declare that Jeepers's right of withdrawal is limited to $45 million, entitling Jeepers at most to a $45 million priority claim in the Fund's liquidation. Claimants also submit that the Arbitrator should enter a judgment in their favor on Jeepers's counterclaims.

Dated: July 11, 2011
New York, New York

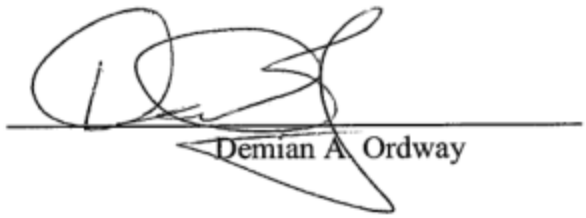
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Allan J. Arffa
Jennifer A. Spiegel
Hannah S. Sholl
Demian A. Ordway
1285 Avenue of the Americas
New York, New York 10019-6064
Phone: [redacted]
Fax: [redacted]
Email: [redacted]

Attorneys for Claimants Fortress VRF I LLC and Fortress Value Recovery Fund I LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on all counsel of record by Electronic Mail, this 11th day of July, 2011.



Demian A. Ordway