

Cross Exam for: Dan Zwirn

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ATTORNEY-CLIENT WORK PRODUCT

1. From 2002-2007, you were the managing member of the GP of the HB/Z SOF LP and the managing member of the Trading Manager of the HB/Z SOF LP? (X-86)
 - a. The GP was responsible for the management and administration of the Fund generally?
 - b. And the Trading Manager was responsible for all investment activities of the Fund?
 - c. And GD, or a company he controlled, was a partner or member of both the GP and the Trading Manager?
 - d. He was considered a senior advisor to both?
 - e. And he was your boss from 2001 til the end of 2004 when HB was sold to JPMC?

2. GD was the point person at all time with regard to how the Fund dealt with JE? (198)
 - a. He was JE's contact person or point person with the Fund? (201)
 - b. He gave you directions as to who would call JE? (202)
 - c. He would tell you what he wanted regarding JE? (202)
 - d. He would instruct you what should be done and you always did it? (203)
 - e. He was very focused on making sure that any and all communications associated with JE went thru him in some way or was directed by him? (115)
 - f. Therefore you reported to GD on each call or any communication the you had with JE because you knew he wanted to know about them? (157)
 - g. You fully understood that GD wanted you and your partners to keep JE happy and satisfied?

3. Prior to the fall Oct. of 06, you had had only one 15 minute and one 10 minute meeting with JE?
 - a. The first one occurred at his office sometime after he made his first investment in the Fund and it occurred because GD thought you should meet your first and largest investor?
 - b. The second occurred at his home in Manhattan and you went there because again GD asked you to go explain something to JE about how a particular market operated?
 - c. In neither of the meetings was anything substantive discussed, but you saw enough to learn that it would be impossible for you to establish any kind of direct r/s with JE? (X-88)
 - d. So GD was the person who persuaded JE to invest a total of \$80m of 5 different occasions?

- e. GD was the person who persuaded JE to allow the Management Company to increase its fee from 1.5 to 2%?
 - f. GD was the person who persuaded JE to try to assist you in making a deal for former senator George Mitchell to become the Chairman of the Fund?
 - g. All subscription agreements, p/s agreements, offering memos sent to JE were sent thru GD's office?
4. You recognize X-86 and X-144 as the 4/02 OM and the original LPA of the Fund?
- a. That LPA was the agreement in effect when FTC purchased its initial interest in the fund of \$10m and when it made 2 additional capital contributions to the Fund of \$10m each?
 - b. And X-146 and X-147 are the OM and First Amended LPA that went into effect in May 03 and were in effect

when FTC made its 4th and 5th capital contributions in the amounts of \$30m and \$20m respectively in Dec. 03 and Jan. 05?

- c. The language in the sections involving withdrawal of cap accts did not change between the 02 documents and the 03 documents?
 - d. I know you now take the position that those documents provide that each cap contribution of a given LP has its own lockup, but X-314 makes it very clear that even in 2004 Allyson Alimansky, who was in charge of your investor relations, was not sure whether separate investments had the same or different rolling lockup periods?
5. You have been an investor in a number of LPs that are hedge funds?

- a. And you recognize that each fund or LP has its own rules for when and how amts invested can be withdrawn by the ltd ptrs?
- b. And those rules are supposed to be set out in the OMs and the LPAs?
- c. You have produced to us in this case the OMs and LPAs of the investments you personally have made and I'd like to go thru them now:
 - 1) You testified in your deposition that you didn't understand the notion of a total capital account?
(173)
 - 2) Yet you invested in something called Cadmus Capital Ptrs and you recognize X- as the OM for that investment?
 - 3) It is clear that this LP had a non-rolling 1 year lockup til the anniversary of the initial investment

and that there was a single capital account, not traunches?

- 4) And you invested in a fund called Pinehurst Plus LP which was established and managed by Corbin Capital Partners, a company controlled by Msrs Dubin and Swieca and in which you had a small interest?
- 5) And as X- indicates, any investment you made in Pinehurst was subject to a lockup to the end of each calendar year and that at that time no matter how many additional contributions had been made to your capital account, all or part of it was withdrawable?
- 6) Corbin Capital Partners also established and managed a LP called Fort Tryon Equities Fund, in which you invested?

- 7) And the LPA for that investment provided that there was a 1-year non-rolling lockup for each interest purchased? (X-)
- 8) You invested in Jet Capital Arbitrage and Event Fund which had a 1-year non-rolling lockup for each capital contribution made by a LP? (X- , p. 9, 15)
- 9) Indeed, the LPA made it very clear that while each additional contribution would be placed in a separate cap acct that would be subject to its own lock-up period, the separate cap acct would be maintained solely for purposes of applying the applicable lock-up period, but would not be deemed separate for purposes of calculating the LPs incentive allocation? (OM, X- p. 5)
- 10) You also invested in Rockbay Capital Fund?

- 11) And it had lockup periods of 1, 2 or 3 years that determined the amount of fees payable, but that clearly provided that "each cap contribution by a Member will be treated as the acquisition of a new Interest and will not be aggregated with that Member's existing interests"? (X- p. 3)
6. As you've stated, GD handled the discussions with JE about FTC's investing \$20m in Jan. 05?
- a. X-316 reflects that you asked GD whether you should call JE or whether he would speak to him?
 - b. Given the size of his existing investment, you didn't think that JE would invest new capital, but that if he did, he would have a choice between a 3-yr and 1-yr lockup?
 - c. Nevertheless, GD spoke to JE and got him to agree to put a final \$20m into the Fund? (X-213)

- d. And you know that GD offered JE the opportunity to be the only one who put in new money who got a special deal?
 - e. And X-24 is the letter agreement you signed that memorialized the deal that GD cut with JE?
 - f. That letter was prepared by your assistant GC, Heath Weisberg, who sent it to HB with a copy to GD, yourself, Allyson Alimansky and David Proshan?
 - g. Insofar as you know, FTC had nothing to do with the language that Mr. Weisberg chose to use?
7. As your boss for several years and then a senior advisor, GD was your mentor as well as your partner?
- a. And he was not someone to be trifled with?
 - b. X-94 is an email that begins with GD's complaining about a letter you sent out that he thought showed little

regard to how he and clients might interpret your comments?

- 1) You apologized and offered to send out a redraft?
 - 2) He responds sarcastically that you should have Perry Gruss and David Lee field calls from JE, Bob Rosenkrantz, Michael Sacks, Robert Wood Johnson Foundation etc?
 - 3) Those were "your clients" he says, but you knew that he handled all contact with them?
- c. X-525 is an email where he complains about being livid with your using funds generated by the CLO closing to fund other needs of the management company, HCMZ, rather than paying back the intercompany loan you owed to HB?
- d. He again invokes his special r/s with you to encourage you to be more respectful of his wishes?

- e. Indeed, in X-526, he says that if he does hear about when he will receive the money, he will call William Louis Dreyfus to let him know that HB wouldn't be moving forward with DBZ &Co on some energy joint venture?
 - f. As Mr. Gruss said that was "not good"?
8. X-525 also makes clear that at various times the Fund had a liquidity problem?
- a. X-173 starts with a 11/18/04 email from you to PG asking him to have the officers push stuff to Dec, because on the funding pipelines, you saw no cash? You conclude by asking him: "What are we going to do?"
 - 1) He responds, "It's going to be tight. I really think you have to tell GD that we may draw an additional 50 which we will convert to equity

Dec. 1.” That means borrowing the money from
HB?

- 2) And you spoke to GD and he approved the loan?
- b. X-95 is an email chain that you start on 1/13/05 by
Asking Suzsanne Kelley to go thru the fundings with
you” to which she responds “What?”
- 1) You respond “We have a bulge in the snake
during jan re cash. Best case need to move what
can be moved to Feb.”
 - 2) You also complain to Gruss and Suan that you
didn’t appreciate Ms. Kelley’s “what?”
comment?
 - 3) Gruss then writes that you are panicked re cash—
was that true?
 - 4) Suan then asks: How bad is it? And Gruss
responds “Bad”

- 5) Suan then says “That a bed-shitting. Bad cash management”?
 - 6) And then Gruss responds: “Bullshit. Bad pipeline management. Biting off more than he can chew. We don’t need sourcing capability, we need more onshore money.”
 - 7) Were you unaware that your partners were complaining about the lack of money?
- c. X-217 is an email where you write to Suan that “the bar to get stuff in portfolio higher while we’re tight ...need to get cashier as we can no longer count on HB to fill monthly funding gap like in the past”?
- 1) Suan says it “sucks not to have backstop anymore” and he’s referring to HB?
 - 2) You say “bottom line is that we’re gonna have to run with a bit more cash in hand . . . it was a

luxury to be able to cut it as tight as we have in the past . . . in the jpm era its not gonna happen clearly”?

- d. X-218 is an email written by David Lee, your new COO/CFO, dated 11/15/06, two days after you got a demand from FTC for an immediate withdrawal of \$80m?
 - 1) He says “cash is tight from onshore. Still have HCMZ, KBC liquidity (just in case)”—what was that?
 - 2) He also says “Our policy for allocations during this period is no onshore unless contractual claims or impairment to existing LP investments/platforms”?
- 9. Now I want to focus on the events that lead to the SEC investigation and ultimate demise of the DB Zwirn SOFs—

- a. In March of 2006, David Proshan, your Gen Counsel, and Lawrence Cutler, your chief compliance officer, came to you and told you that Tim Wong, a controller hired in Dec. 05 to conduct an internal audit of the management company, told them that management fees may have been paid prematurely and that money from the funds may have been used to pay expenses relating to the purchase of your plane? (X-92; Depos. 127)
- b. And they told you that they wanted to do more investigation of these issues, which you approved?
- c. But you didn't mention a peep about this to investors, or even GD, your partner?
- d. In May 06, Cutler directed Wong to conduct an analysis to determine the amount of fees taken from each fund prematurely, the dates on which the money

was taken prematurely and how much each of the funds would have earned had the management fees remained in the accounts? (X-92, p. 3)

- e. Wong was also directed to conduct an analysis of the plane expenses by determining how much money was taken from the funds, who directed that the money should be taken from the funds, when the money was taken from the funds and whether and how much of the money was returned to the funds? (X-92, p. 10)
- f. By the end of May, Wong had completed his work and has quantified the amount of the management fees that had been taken early and the amount of client money used to make payments on your plane? (X-138, p. 2)
- g. In early June, you were informed of the results of Mr. Wong's work, but instead of notifying investors about

Wong's conclusions, you decided to hire SRZ to investigate further?

- h. Wong concluded that these things had happened and quantified them, but he did not conclude who was responsible for them happening?
 - i. That was the job assigned to SRZ?
 - j. You immediately reported to GD about Wong's findings and to get his concurrence on your hiring SR to investigate whom and why?
10. Now SRZ didn't report to you the results of its investigation til 9/17/06?
- a. Now that timing was convenient, because had the SRZ investigation resulted, as indeed it ultimately did, in your having to report various financial irregularities to your bankers, investors and the SEC and had those reports resulted in requests for redemptions by

investors, you understood that 2/3ds of the assets of the onshore and offshore fund were subject to withdrawal at the end of the year, if redemption requests were made by the end of August?

- b. X-92 is a redacted copy of the talking points they used in making their report?
 - 1) SR first finding is that the management company was perpetually cash short; that expenses were outstripping management and incentive fees; that excessive management and incentive fee deferrals was done to provide tax advantages, but left the company without enough cash to pay expenses? (p3)
 - 2) SR concluded that Gruss approved the premature payment of management fees and the use of fund monies to pay your plane expenses?

- 3) SR also concluded that your COO, Harold Kahn, was willfully blind to the premature payment of management fees because he knew that the management company was constantly cash strapped, knew that management fees were being deferred and knew that the company was having a hard time getting a loan for \$10m in the fall of 05 because of its negative cash flow? (p. 9)
- 4) SR also concluded that “at a minimum, Kahn was willfully blind to the fact that client money was being used to buy the plane, because he assumed the management company was paying for the plane, but knew it couldn’t meet its daily expenses and “as an auditor and partner at a major accounting firm for many years, it’s

unlikely that he would not pay attention to where millions of dollars were coming from.” (12-13)

- 5) Now you testified at your deposition in this case that you didn't recall whether you agreed or disagreed with SR's conclusions about the management company being perpetually short of cash (137-8), you didn't know about the reasons for the deferrals of management fees (138), and that whatever you knew about these things came from SR and then Gibson Dunn (139)
11. The next day you met with GD to bring him up to speed on the SR findings and to help you decide what to do about them? (141)
12. What was decided was that you would simply fire Perry Gruss and then call all the investors and tell them about the departure, but not disclose the reasons for his departure,

and only, if pressed, state that his conduct had no effect on investments or portfolio? (X-100)

13. Now you spoke to JE on 10/10 (the Tuesday after Columbus Day) and you stuck to your script, even though he pushed you for more info? (121, 123)
 - a. That was the first time you had spoken to JE in over a year and the first time you spoke to him substantively about the Fund?
 - b. In fact, it was the only time you ever initiated a call to him?
14. You had another call with investors, including JE, on 10/30, and again you stuck to a script that SR prepared for you? (X-106)
 - a. No one listened in to your first or second call with JE?
(165)
 - b. You took no note of either?

- c. JE again wanted more info than was scripted? (168-9)
 - d. But you refused to deviate from the script?
 - e. You do recall that he wanted to talk to one of the Fund's attorneys and in response to that request, you asked Harry Davis of SR to call JE? (167)
15. You don't recall any call with JE between 10/10, the first scripted call and 10/30, the second scripted call? (157)
16. You don't recall having any other call with JE until after 11/13 when you received his written request for the immediate withdrawal of \$80m from the Fund?
- a. You might have had a 3-way conversation prior to that time with JE and GD, but you just don't recall one? (179)
 - b. But the fax'd 11/13 withdrawal request was the first time you had any inkling that JE wanted to withdraw

any portion of his capital account, either from JE himself or from GD? (206)

- c. It came as a total surprise to you?
17. You do recall having a conversation with HB in November on the subject of lockups? (206-7)
- a. You don't recall what prompted that discussion or who initiated the call? (207)
 - b. Or why you were having the discussion with HB rather than JE? (208)
18. You recall sending X-110 to all investors on 11/3?
- a. That memo itself doesn't provide any specifics as to "certain accounting issues that" had been discussed with the investors in the 10/27-29 phone calls?
 - b. The script of your 10/8-10 calls does not provide any details of why Mr. Gruss was leaving, nor does it disclose any irregularities?

- c. The script of your 10/27-30 calls with investors (X-106) is the sum total of your disclosures of specifics to investors?
- d. Your memo does tell investors that you had personally spoken with investors representing over 95% of capital under management and were you gratified by their support and encouragement?
- e. It also specifically asks investors and creditors to “treat this info with the appropriate sensitivity” and to “limit this info to individuals within your organization who need to have this info”?
- f. Nor does the script anywhere mention the fact that the non-fund expenses paid for by fund monies were you're the expenses of your buying a \$20m private plane?

- g. X-138 are Talking Points that SR prepared for a meeting on 11/15 with the SEC?

 - 1) You agree, do you not, that, as stated on p. 19, “the fact that the non-fund expenses related to a plane was no specifically mention to anyone outside DBZ except the SEC, PwC and JPMorgan/Highbridge”?
 - 2) GD certainly knew about it back in early June?
19. Would you please look at X-62, State of the Firm Talking Points (10/30)?
- a. Para. 2 refers to “rumors about our firm needing to sell assets in order to meet a large investor redemption”—wasn’t the rumor regarding FTC?
 - b. And when you say the rumor was false, do you mean there wasn’t going to be a redemption request or that you had sufficient assets to cover one?

- c. You did caution employees not to respond to rumors or press inquiries?
20. Now on the morning of 11/13 at 11:26am you got an email that HB was on the phone and at 11:30 an email saying that HB had “celled” from JE’s office, and you forwarded these emails to DL? (X-25)
- a. You also send a copy to Mr. Cutler your Chief Compliance Officer because you expected that there was going to be some type of dispute with FTC?
 - b. Within a half hour, at 12:06pm, you reported to GD that you spoke calmly as possible to harry re the facts of lockups, etc, and that it would be good for GD to call JE? (X-17)
 - 1) The reason you report this to GD immediately is that he had told you that JE was demanding his

money back and you could expect a call from HB?

- 2) You used shorthand because you knew GD would know what you were talking about?
- 3) The reason you were talking to HB about lockups was that he was telling you the JE wanted all his money out of the Fund?
- 4) You didn't have before you a redemption schedule for FTC, but you generally explained the facts about lockups to HB?
- 5) You knew he was agitated and that's why you spoke as calmly as possible to HB?
- 6) You also knew that HB was simply a bookkeeper for JE and that he didn't know what you were talking about, and why you told GD it would be good for him to call JE?

- c. After your call with HB, you ask DL for a document showing every piece of capital from JE and its liquidity? (X-549)
- d. And DL then ask Elise Hubsher for a redemption schedule? (X-38)
- e. She sent one to you and DL at 12:42pm (X-40)
- f. And you immediately sent it to GD? (X-22)
 - 1) You didn't notice that it showed that FTC's 1/05 investment was subject to a 3 year redemption date which was clearly wrong?
 - 2) Or that each of the investments needed to be adjusted for the growth that you created for it?
- g. A few minutes later you sent to GD an email asking him to note that you had made JE \$47m in gains in 50 consecutive up months? (X-111)
- h. You don't recall why you sent this to GD? (249-50)

- i. And don't recall whether you sent the redemption schedule to FTC? (ibid)
- j. You have no written record or log of ever having sent HB the redemption schedule you sent to GD?
- k. At 1:36pm, Glenn calls you back? (X-135)
- l. You don't know what that call was about or whether you even talked to him then?
- m. It's possible that you took that call and the JE was then conferenced into or already on the line?
- n. At 3:19pm HB calls you again? (X-26)
 - 1) You don't recall talking to him a second time on the 13th?
 - 2) It must have been a significant event because you sent that email message to Mr.Cutler for his records? (X-134)

- 3) It's possible he was calling to tell you that FTC was sending in a redemption request for \$80m?
- o. At 5:41pm, you told Ms. Hubsher to redo the redemption schedule to adjust each piece for the growth that we created for it? (X-42)
 - p. Why did you need that?
 - q. In any event you copy that email chain to Mr. Cutler also?
 - r. At 5:59pm GD is on the line to talk to you? (X-136)
 - s. It's possible he was calling you to alert you to the fact that JE was about to send in a redemption request?
 - t. Or to ask you whether you had received one?
 - u. Indeed, at 6:09pm on the 13th, you did receive FTC's \$80m redemption request? (X-5)
21. Now you definitely recall a conversation you had with JE on 11/14?

- a. GD told you to call him? (X-555)
- b. GD then emailed you to find out whether you had done so? (X-27)
- c. And you said you had and that it had turned out reasonably well? (X-27)
- d. The conversation was to tell him that you had some deliverables to give to him and he said you could come to his office?
- e. The deliverables had something to do with the NAV of the fund?
- f. There was obviously no discussion about the \$80m redemption demand that you had received the night before, or you would have reported that to GD?
- g. And clearly you didn't tell JE on the 14th that you didn't intend to honor his redemption request?

22. You originally set up a meeting to give the deliverables to JE on 11/20 but he cancelled it?
23. So you called him on 11/21 to tell him about all the effort you put in putting together a team for the 11/20 meeting and he half apologized for cancelling it? (X-67)
 - a. You told him you had done some work to think thru his NY sourced income issue and had linked one of his advisors with DP, your GC, on it?
 - b. He wanted to reschedule the meeting for the following week?
 - c. You reviewed it all with GD?
 - d. You told DL that you were showing extreme fealty which is what GD wants?
 - e. That it was critical to keep JE happy?
 - f. There was no discussion during your call about his redemption request?

25. On 1/26/07, you got a letter from GD of HB informing you that HB was terminating you as its investment Advisor and asking you to transfer to its designee all liquid assets and funds in the HB managed account? (X-83)
- a. Your response was “what on earth is GD doing”? (X-333)
 - b. Mr. Culter replied that “this is correct based on letter we received Friday”?
 - c. You said that “this is no different than JE saying he wants his \$80m. He simply has no right per our contract”?
 - d. And then: “We have every right to hold the assets; the account was structured as consideration for their interest in the firm’s earnings; it is unclear they are owed further distributions until they recognize that”?

- e. Your lawyers responded by saying that they will treat the letter as a demand for reduction in assets that has been occurring since March 8, 2006, pursuant to your explicit verbal request”? (X-216)
 - f. Indeed, before HB was notified of accounting issues, it submitted a full redemption request? (256; X-118)
 - g. HB, however, had a 3-year lockup on its Managed Account? (231)
 - h. HB, unlike JE, was able to redeem its entire investment with you and in addition, the management company ended up paying HB \$30m for its p/s interest in the company?
26. On the morning of 2/14/07, as a result of HB calling up to find out when Jeepers would get its \$80m, you sent GD a copy of the email you had sent him back on 11/13/06? 9X-74)

- a. Your email to GD claims you also sent the redemption schedule to HB on 11/13 and that you reviewed it with him, but you have no written proof that you sent it to HB back then and you damn sure couldn't have reviewed it with him, since you didn't even get a redemption schedule from Ms. Hubsher til after you calmly spoke to HB about the facts of the lockups?
- b. X-76 is an email report you made to GD at 11:53am?
 - 1) You told him you talked to HB and sent him a copy of the detailed lockup schedule? X-75 is the sheet you sent him at 11:30am?
 - 2) You tell GD that Harry called back after reviewing the sheet (less than 30 minutes after you sent it to him) and asked for immediate redemption yet again despite the fact he has absolutely no contractual rights to that?

- 3) The “yet again” referred to the 11/13 \$80m request? So the 2/14 demand by HB was simply a reiteration of the earlier request?
 - 4) You assure GD that “we have done back flips for Jeffrey, and as a large, early and important investor, will continue to do so?”
 - c. Within 3 hours of your telling HB that he has absolutely no contractual right to a redemption, JE sent you X-10.
27. Now you are aware that on 2/20, JE’s assistant called you several times to set up a meeting? (X-77)
- a. But you elected to neither meet nor talk to him again?
 - b. And insofar as you know, the next time JE heard from the Fund about his demand for a full redemption request was 45 days later when SR sent Darren Indyke X-117 in response to JE’s 2/14 letter?