

JAMS ARBITRATION

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. §  
 §  
 D.B. ZWIRN SPECIAL OPPORTUNITIES §  
 FUND, L.P. k/n/a FORTRESS VALUE §  
 RECOVERY FUND I LLC, §  
 Counter-Respondent §  
 §  
 and §  
 §  
 D.B. ZWIRN PARTNERS, LLC, §  
 D.B. ZWIRN & CO., L.P., §  
 DBZ GP, LLC, §  
 ZWIRN HOLDINGS, LLC, §  
 DANIEL ZWIRN, and §  
 Third-Party Respondents §

Case No. \_\_\_\_\_

Arbitrator: \_\_\_\_\_

**JEEPERS INC.'S RESPONSE AND  
 FINANCIAL TRUST COMPANY, INC. AND JEEPER INC.'S  
 STATEMENT OF COUNTERCLAIM AND THIRD-PARTY CLAIM**

**RESPONSE**

1. Respondent, Jeepers, Inc. generally denies all of the allegations in the Claim submitted by the Fortress VRF I LLC and Fortress Value Recovery Fund I LLC.

## **COUNTER- AND THIRD-PARTY CLAIM**

2. Counter- and Third-Party Claimants Jeepers, Inc. and Financial Trust Company, Inc. submit the following statement of claims against D.B. Zwirn Special Opportunities Fund, L.P. k/n/a Fortress Value Recovery Fund I LLC, Fortress VRF I LLC, D.B. Zwirn Partners, LLC, D.B. Zwirn & Co., L.P., DBZ GP, LLC, Zwirn Holdings, LLC, and Daniel Zwirn.

### **Introduction**

3. Over a three-year period beginning in 2002, Jeffrey Epstein (“Epstein”), through a firm he owned and managed named Financial Trust Company, Inc. (“FTC”), made an \$80 million investment in D.B. Zwirn Special Opportunities Fund (k/n/a Fortress Value Recovery Fund I LLC, and referred to in this Statement as the “Fund”). FTC subsequently transferred the investment to its wholly-owned subsidiary, Jeepers, Inc. (“Jeepers”). Counter-Claimants will refer to this investment throughout as belonging to FTC even though ownership was transferred during the events in question to Jeepers.

4. In October 2006, in response to initial revelations of certain irregularities at the Fund, Epstein demanded the complete withdrawal of FTC’s capital account in the Fund. FTC’s investment was worth approximately \$140 Million at the relevant time. FTC had signed an agreement with the Fund that permitted FTC to withdrawal its capital account on March 31, 2007 by giving 120-days notice—*i.e.*, by December 1, 2006. Epstein made this initial demand orally to Daniel Zwirn, who controlled the Fund.

5. Zwirn could ill-afford to have other investors follow FTC’s lead, particularly at a time when Zwirn was determining how to deal with the eventual public disclosure of the Fund’s financial and accounting irregularities. FTC was one of the Fund’s largest and oldest investors. Over the next few months, Zwirn, the Fund and its management employed a combination of misrepresentations and contrived legal arguments to thwart FTC’s withdrawal.

6. To help convince Epstein to change his mind, Zwirn sought the help of his partner, Glenn Dubin, who owned a minority interest in the Fund's general partner. Dubin had a long-standing relationship with Epstein.

7. On November 13, 2006, Zwirn and Dubin held a telephone conference with Epstein. During that call, Epstein again demanded the complete withdrawal of FTC's investment. Zwirn urged Epstein not to completely withdraw from the Fund, as that would precipitate a "run on the bank." Zwirn told Epstein that if FTC would withdraw a lesser amount, the Fund would honor it. Epstein, then, agreed that he would request \$80 million, which was the amount FTC originally invested. Zwirn agreed to honor this request. Based on Zwirn's clear and unambiguous agreement that the Fund would honor the \$80 Million withdrawal demand, FTC submitted a written demand to withdraw \$80 million on November 13, 2006.

8. However, Zwirn and the Fund reneged on the agreement. Over the next few months, Epstein sought Dubin's assistance in effectuating the \$80 Million withdrawal without success. In February 2007, Epstein once again demanded FTC's complete withdrawal from the Fund; this time by submitting a written notice.

9. Zwirn delayed a formal response to Epstein's withdrawal demands for another month and a half. On March 26, 2007, the Fund released a carefully worded investor report regarding the results of an internal "investigation" at the Fund. The report described numerous management overcharges and financial, accounting and documentation improprieties with respect to the Fund and other funds and accounts managed by Zwirn's firm.

10. Zwirn then turned his sights on Epstein. On March 27, 2007, the Fund responded in writing to FTC's withdrawal demands. The Fund argued that FTC's \$80 Million demand was deficient because, although given timely, it was for a partial withdrawal. The Fund claimed that the agreement that permitted FTC's withdrawal on March 31, 2007 only applied to complete

withdrawals, as opposed to partial withdrawals. With regard to FTC's complete withdrawal demand made in February 2007, the Fund claimed it was deficient because it was given too late—without the 120-days notice. The Fund took the position that at point, FTC could not withdrawal any of its investment until 2008 at the earliest. In response and without prejudice to its earlier demands, FTC made yet another demand to withdrawal on the dates specified even though the dates fell in 2008 and 2009.

11. By late 2007, the Fund was unable to produce audited financial statements for the year ending December 31, 2006. Apparently, in response to this failure, numerous investors made withdrawal requests. As a result, the Fund suspended all withdrawals and announced a wind-down in early 2008. FTC was never able to withdraw its investment. The Fund is currently valued at a mere fraction of its 2007 valuation.

12. In addition to misleading FTC about its efforts to withdraw, Zwirn mislead FTC about the scope of the problems at the Fund and his involvement in the later-revealed improprieties. Had Zwirn and the Fund provided truthful disclosures to Epstein in 2006 about the problems with the Fund and Zwirn's involvement in those problems, Epstein never would have reduced his withdrawal demand in the first place, and FTC would have received its entire capital account of approximately \$140 Million back in 2007.

#### **Arbitration Provision**

13. Pursuant to the Second Amended and Restated Agreement of Limited Partnership for the Fund, “[t]he Partners agree that in the event of any dispute arising between the parties, such dispute shall be settled by arbitration to be conducted in the county and state of the principal office of the General Partner at the time of such dispute in accordance with the rules of the Judicial Arbitration and Mediation Service (“JAMS”) applying the laws of the State of Delaware.” The principal office of the General Partner is located in New York, New York.

## The Parties

### **Counter- and Third-Party Claimants**

14. Counter- and Third-Party Claimant FTC is a financial consulting firm and, through the work of Jeffrey Epstein, also invests its own funds.

15. Counter- and Third-Party Claimant Jeepers, Inc. is a wholly-owned subsidiary of FTC. On January 1, 2007, FTC assigned its entire interest in the Fund to Jeepers, Inc. with the consent of the Fund. The assignment was made retroactively effective January 1, 2006.

### **Counterclaim and Third-Party Respondents**

16. Counterclaim Respondent D.B. Zwirn Special Opportunities Fund, L.P. k/n/a Fortress Value Recovery Fund I LLC was a limited partnership formed under the laws of the State of Delaware. In July 2009, management of the Fund was turned over to Fortress Investment Group, a publicly-traded investment management firm, and the Fund was converted from a limited partnership to a limited liability company and renamed “Fortress Value Recovery Fund I LLC.”

17. Third-Party Respondent D.B. Zwirn Partners, LLC, was the general partner of the Fund.

18. Third-Party Respondent D.B. Zwirn & Co., L.P. was the investment manager for the Fund.

19. Third-Party Respondent DBZ GP, LLC was the general partner of D.B. Zwirn & Co., L.P. – the Fund’s investment manager.

20. Third-Party Respondent Zwirn Holdings was the managing member of the Fund’s general partner (D.B. Zwirn Partners, LLC) and of DBZ GP, LLC, which in turn acted as the general partner of the Fund’s investment manager (D.B. Zwirn & Co., L.P.).

21. Third-Party Respondent Daniel Zwirn controlled the Fund by virtue of his ownership of Zwirn Holdings, LLC, which gave him control over the Fund's general partner and over the general partner of the Fund's investment manager, D.B. Zwirn & Co., L.P. Zwirn had the power to bind the Fund and his statements are attributable to the Fund. For simplicity, Claimants will use the name "Zwirn" to refer to Daniel Zwirn and the various entities owned and controlled by Zwirn.

#### **Relevant Non-Party**

22. As outlined below, non-party Glenn Dubin and his partner, through their own firm (originally called Highbridge Capital Management, LLC and later renamed Dubin & Swieca Asset Management, LLC), owned direct and indirect interests in the Fund's general partner, the Fund's investment manager, and the general partner of the Fund's investment manager.

#### **Statement of the Claim**

23. In 2002, Epstein was introduced to Daniel Zwirn by Glenn Dubin. Dubin and his partner Henry Swieca started Highbridge Capital, a very successful investment management firm. Epstein had a long-standing relationship with Dubin and Highbridge, who provided investment advisory services to Epstein.

24. After working for Highbridge, in 2002, Zwirn started a hedge fund with Highbridge's sponsorship and assistance. Initially, the Fund was called the Highbridge/Zwirn Special Opportunities Fund, L.P. Highbridge not only invested with the Fund but also took substantial direct and indirect ownership interests in the Fund's general partner and its investment manager, and Dubin and Highbridge actively participated in the operations of the Fund. The Fund was formed in April 2002 and commenced operations in May 2002.

25. Zwirn relied on Dubin, as a principal of the Fund, to introduce him to Epstein (and other substantial investors) when Zwirn and Highbridge first launched the Fund. After

making these introductions, Dubin prevailed upon Epstein to invest substantially in the Fund, touting Zwirn's reliability, and business and investment acumen. Epstein invested on the basis of his trusted advisor's recommendations. Epstein believed that Zwirn and the Fund would be closely monitored by Highbridge and Dubin, and that, as sponsors and principals of the Fund, Epstein could look to them to resolve any issues that may arise in connection with FTC's investment.

26. During 2002 and 2003, FTC invested \$60 million in the Fund. On April 4, 2002, FTC invested \$10 million in the Fund. On September 1, 2002, FTC invested another \$10 million. On December 1, 2002, FTC invested an additional \$30 million. FTC made another investment of \$10 million on June 1, 2003.

27. From 2002 to 2004, the Fund reported strong performance. In late 2004, the Fund announced that investments made on January 1, 2005 forward would be subject to a three-year lock-up.

28. In late December 2004, FTC sought to invest an additional \$20 million in the Fund. Since the Fund accepted investments on the first day of the month, the investment would be made effective January 1, 2005. FTC, however, wanted a single, unified withdrawal date to apply to its entire investment.

29. FTC and the Fund therefore agreed to a letter agreement on January 5, 2005 ("2005 Letter Agreement"). The 2005 Letter Agreement provided:

In accordance with Section 9.1 of the Amended and Restated Limited Partnership Agreement, dated as of May 1, 2003 (as amended to the date hereof, the "Agreement") of the Fund, the General Partner hereby agrees that Financial Trust Company, Inc. (the "Company") shall be permitted to withdraw its Capital Account as of the last Business Day of the calendar quarter ending at least two years after the Company initially purchases this Interest . . . upon not less than 120 days' prior written Notice to the General Partner.

Capitalized terms used herein but not defined shall have the meanings ascribed to them in the Agreement.

30. The Limited Partnership Agreement provided that each limited partner had a single “Capital Account.” Specifically, the Agreement defined a “Capital Account” by providing that “[a] ‘Capital Account’ shall be maintained for each Partner,” and that such account shall constitute the Partner’s “Initial Capital Contribution” plus adjustments for performance of the Fund and increased by any “Additional Capital Contribution.” Thus, the 2005 Letter Agreement clearly applied to FTC’s investments in the Fund, which were held in FTC’s single “Capital Account,” as opposed to merely the January 1, 2005 investment.

31. Under the 2005 Letter Agreement, FTC could withdrawal its Capital Account on March 31, 2007 (the quarter ending after the two-year anniversary of the January 1, 2005 investment). FTC would have to give 120-days notice—*i.e.*, notice by December 1, 2006.

32. In October 2006, Zwirn contacted Epstein. The two had not spoken about anything of substance since 2002. Zwirn informed Epstein that the Fund’s Chief Financial Officer, Perry Gruss, had been terminated over an accounting transaction that was “nonmaterial.” Zwirn specifically mentioned that more than \$3 million in investor money had been used to pay for a private Gulfstream 400 jet for Zwirn. Zwirn explained that the money was repaid to investors quickly and that the CFO had approved the transaction without Zwirn’s knowledge. Nevertheless, Zwirn acknowledged this transaction should not have occurred and that the CFO had been terminated as a result. Sensing that something was not right, Epstein responded by demanding the complete withdrawal of FTC’s capital account from the Fund. Zwirn urged Epstein to refrain from withdrawing.

33. Epstein telephoned Dubin to advise Dubin of Epstein’s concerns and of Epstein’s demand to Zwirn to withdraw all of FTC’s capital account. Epstein asked Dubin to get to the bottom of the matter.

34. In late October, Zwirn called Epstein again. This time Zwirn informed Epstein that the Fund was going to conduct an internal investigation in the wake of the CFO's firing. Zwirn again maintained that he had no knowledge of any accounting issues, and did not reveal any specific problem, other than the airplane issue. Zwirn also pointed to the continued positive performance reported by the Fund as evidence of the Fund's solid financial condition. Epstein demanded to know why Zwirn previously had characterized the issues as "nonmaterial" when now an independent review was required. Zwirn insisted that he had used the "nonmaterial" language on the advice of counsel, Shulte Roth & Zabel (the Fund's outside counsel). Epstein demanded that Zwirn get the lawyers from Shulte on the phone so that Epstein could confirm Zwirn's story. At the end of the call, Epstein remained concerned about the issues with the Fund.

35. Epstein, then, contacted Dubin and recounted to Dubin what had occurred. Epstein also repeated his demand to withdraw FTC's entire capital account.

36. On or about November 13, 2006, Dubin, Epstein, and Zwirn participated in a three-way call. During the call, Epstein once again demanded to withdraw FTC's entire capital account in the Fund, which at that point Epstein believed to be valued between \$135 Million to \$140 Million. At no time during that conversation did Zwirn ever dispute the fact that Epstein was entitled to FTC's complete withdrawal. To the contrary, Zwirn begged Epstein to refrain from a complete withdrawal because such a withdrawal could cause a "run-on-the-bank." When Epstein indicated that he still wanted his money back, Zwirn proposed as a compromise that Epstein make only a partial withdrawal demand on FTC's behalf. Zwirn agreed that if Epstein made such a demand, the Fund would honor it quickly. Based on Zwirn's agreement that the Fund would promptly comply with such a reduced withdrawal demand and Zwirn's previous description of the issues with the Fund, which allegedly did not implicate Zwirn, Epstein

responded that he would reduce his demand to slightly more than half FTC's total capital account or \$80 Million. (This amount represented the amount of original capital that FTC invested.) Zwirn agreed. Zwirn's agreement to honor the \$80 Million withdrawal demand was clear and unambiguous. Dubin, who participated in the conversation, has confirmed the terms of Zwirn's agreement in an affidavit, a copy of which is attached hereto as Exhibit "\_\_\_\_\_."~~will confirm this.~~

37. As stated above (¶¶ 23-25, supra), Epstein placed trust and confidence in Zwirn in part because he knew that Glenn Dubin, through Highbridge, was importantly involved in the management of the Fund and that Zwirn separately managed significant sums for several of Dubin's Highbridge entities. At the time of the November 13 conversation, Epstein had no reason to believe that Highbridge's relationship to the Fund and Zwirn had materially changed. In fact, however, and unknown to Epstein, (i) in 2005 Highbridge had begun to withdraw its managed accounts from Zwirn, reducing the funds under management from \$\_\_\_\_\_ to \$\_\_\_\_\_ ; and (ii) Highbridge no longer held a 50% ownership interest in the managing partner of the Fund, but in fact had reduced its ownership to a minority position of \_\_\_\_\_%. Had Epstein been aware of these facts, he would have insisted on his full redemption rights and would not have agreed to reduce his redemption to \$ 80 million.

~~37.38.~~ Consequently, ~~o~~ On the evening of November 13, 2006, FTC sent by fax a written notice to Zwirn demanding withdrawal of "\$80 million of Financial Trust Company's interest in D.B. Zwirn Special Opportunities Fund, L.P." The notice also was mailed by certified mail to Zwirn at 745 Fifth Avenue, 18<sup>th</sup> Floor, New York, New York 10151, to comply with the notice provision of the Limited Partnership Agreement.

~~38.39.~~ Between November 13, 2006 and December 1, 2006 (the last day when FTC could have given notice under the 2005 Letter Agreement for a March 31, 2007 withdrawal), neither Zwirn nor the Fund purported to reject the November 13, 2006 notice, nor did they

~~assert~~ explained their later asserted position that this notice somehow failed to comply with the 2005 Letter Agreement or was otherwise technically deficient.

39.40. In February 2007, the Fund indicated, for the first time that, that it was not going to honor FTC's November 13, 2006 request. The Fund ignored the application of the provisions of the 2005 Letter Agreement. Moreover, the Fund claimed that each of FTC's investment tranches was subject to a different two-year lock-up and that the January 1, 2005 investment tranche was subject to a three-year lock-up.

40.41. As a result of the Fund's apparent unwillingness to abide by its and Zwirn's agreements, on February 14, 2007, Epstein wrote the Fund a letter again demanding the complete withdrawal of FTC's entire capital account. Without limiting the right to the complete withdrawal of FTC's capital account, Epstein's letter noted that, at a minimum, the Fund was required to honor the \$80 million demand made on November 13, 2006.

41.42. On March 26, 2007, the Fund reported the results of the internal investigation that was launched in October 2006. As outlined in more detail below, the results showed that the Fund's internal controls were in disarray.

42.43. The day after this report was issued to investors, on March 27, 2007, the Fund finally responded in writing to FTC's withdrawal demands. After taking months to put forth any legitimate basis for the Fund's refusal to honor FTC's withdrawal demands, the Fund's outside counsel ~~finally~~ provided a tortured explanation for the Fund's position. With regard to the November 13, 2006 demand to withdraw \$80 million, the Fund acknowledged the demand was made within the 120-day notice period. However, the Fund deemed this notice invalid because it was for a "partial" withdrawal. According to the Fund,

The 2005 Letter Agreement did not provide Mr. Epstein with any such right as of March 31, 2007, because partial withdrawals are governed by Section 9.2 of the Limited Partnership Agreement, which was not covered by the 2005 Letter Agreement.

To explain, Section 9.1 of the Limited Partnership Agreement generally addresses “complete withdrawals” and Section 9.2 addresses “partial withdrawals.” (There is no substantive difference between the provisions.) The 2005 Letter Agreement begins with the introductory clause, “In accordance with Section 9.1 of the Amended and Restated Limited Partnership Agreement . . . .” The Fund claimed that as a result of this reference to Section 9.1, the 2005 Letter Agreement only authorized “complete withdrawals.”

[43.44.](#) The Fund’s position was inexplicable. The only reason that FTC demanded a partial withdrawal—as opposed to a complete withdrawal—in November 2006 was because the Fund requested it. To induce FTC to reduce its complete withdrawal demand, Zwirn had agreed expressly and unambiguously to honor a *partial* withdrawal demand.

[44.45.](#) Worse, the Fund waited to express its view that the 2005 Letter Agreement authorized only complete withdrawals until after the deadline expired for FTC to change the November 13, 2006 request from a partial to complete request.

[45.46.](#) The Fund’s reading of the 2005 Letter Agreement also was baseless. To begin with, the introductory phrase “In accordance with Section 9.1” simply acknowledged that the 2005 Letter Agreement was authorized pursuant to the penultimate sentence of Section 9.1, which gave the General Partner the discretion to alter withdrawal rights in general. *See* Limited Partnership Agreement § 9.1 (“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.”). Moreover, the Limited Partnership Agreement is careful to distinguish between a “complete” and “partial” withdrawal when intending to distinguish between the two. Had the Fund intended to limit FTC’s rights, it knew how to do so. The 2005 Letter Agreement, however, gives FTC the right to “withdraw” without any limiting language (that is, FTC may withdraw either partially or completely). Indeed, it makes no sense that the Fund would have

agreed to give FTC special rights to withdraw only its entire capital account but not a lesser amount. Obviously, a partial withdrawal is much preferable from the Fund's perspective to a complete withdrawal.

46:47. With regard to FTC's February 14, 2007 demand for a complete withdrawal, the Fund declared that it was not timely because 120-days notice was not given. According to the Fund,

[T]he 2005 Letter Agreement permitted Financial Trust to withdrawal under Section 9.1 as of March 31, 2007 (and as of the second anniversary of that date thereafter) on 120 days prior written notice. Because the February 14, 2007 Letter seeking complete withdrawal was not provided 120 days prior to March 31, 2007, it did not constitute valid notice.

Of course, this ignores the fact that Epstein had repeatedly given Zwirn notice of his demand for a complete withdrawal well within that 120-day period. The only reason that FTC had not provided written notice for the complete withdrawal within that period was that in November 2006, Zwirn had induced FTC to change the request. The Fund clearly knew of Epstein's true desire to withdrawal the entire investment well before the 120-day period.

47:48. Even if the Fund's explanation of FTC's contractual rights were accepted, then the Fund should have paid FTC approximately \$45 million in 2007, leaving FTC with a remaining interest in the Fund. Based on even the Fund's version of FTC's contractual rights, FTC had the undisputed right to withdraw two of its investment tranches in 2007: (1) FTC's January 1, 2005 investment tranche could have been withdrawn on March 31, 2007 by giving notice before December 1, 2006; and (2) FTC's June 1, 2003 investment tranche could have been withdrawn on June 30, 2007 by giving notice before March 3, 2007. As confirmed by the Fund, the combined values of those two investment tranches on their respective withdrawal dates was approximately \$45 Million. On November 13, 2006, FTC gave notice of its demand to withdraw \$80 million. Given that the Limited Partnership Agreement provides no rule on the form notice

must take (even if such a requirement existed, compliance with such a formality would be excused under Delaware law), this demand for \$80 million was sufficient to put the Fund on notice of FTC's desire to withdraw at least the \$45 million that the Fund concedes FTC had the right to withdraw. Yet, the Fund refused to pay even this money out to FTC.

48-49. Between the end of March 2007 and the end of 2007, the Fund continued to report good performance. However, due to the Fund's problematic accounting issues reported in March 2007, the Fund was unable to produce audited financial statements for 2006. According to the Fund, at the end of 2007, it received massive requests for withdrawals by investors who were frustrated by the inability of the Fund to produce audited financials. As a result, in February 2008, the Fund announced that it would suspend all withdrawals and withdrawal payments. In March 2008, the Fund announced that it would wind down the Fund. FTC now was stuck in the Fund along with all other investors.

49-50. During 2008 and 2009, the Fund's investments suffered greatly and the value of the Fund dropped precipitously from the 2006 and 2007 valuations.

50-51. In July 2009, management of the Fund was taken over by Fortress Investment Group, and Zwirn was removed from direct involvement in the Fund.

51-52. It now appears that Zwirn and the Fund were not honest with Epstein in the October 2006 about the scope of the Fund's problems and Zwirn's involvement in those problems. To begin with, Zwirn had learned of the initial problems—the temporary use of investor money to buy a plane for Zwirn and early payment of management fees—back in the Spring of 2006. By the time Zwirn contacted FTC in October 2006, the Fund's law firm had been engaged in an investigation for many months. Yet, Zwirn told FTC that the events leading to the CFO's departure were recently discovered.

52.53. Zwirn also was well aware that the problems were more significant than he revealed to FTC. As noted above, in March 2007, the Fund issued a report that revealed the most glaring problem was that the Fund had been borrowing money from D.B. Zwirn Special Opportunities Fund, LTD, an offshore sister fund of the Fund, and other managed accounts without any documentation. The advances totaled over \$100 million. Upon information and belief, FTC alleges that the reason in part for the \$100 million intra-fund transfer was that Zwirn was not properly allocating investments between the Fund and its sister Offshore fund. As a result, the Fund ended up with a disproportionate amount of illiquid investments while the Offshore fund received a right to be repaid in cash with interest. The Fund also explained that Zwirn's management company had overcharged the Fund for operating expenses by \$12 million. The Fund also reported that there were additional examples of Fund money being used to pay personal expenses of management.

53.54. While the Report claimed that Zwirn was not aware of these issues, the Fund's former CFO recently sued Zwirn, claiming this statement was untrue. The claim is also inconsistent with reported accounts of Zwirn's management style. According to the article published in the November 2008 issue of Institutional Investor's Alpha, Zwirn was a micro-manager. His former employees report that Zwirn "insisted on signing off on every deal and every detail down to the exact furnishings of DBZ's Mayfair offices in London." Upon information and belief, FTC alleges that Zwirn was well-aware in October 2006 of the improprieties detailed in the March 2007 report.

54.55. Had the Fund or Zwirn been honest with Epstein in October and November 2006 about the scope of the problems and Zwirn's role, Epstein certainly never would have reduced, and would have given timely formal written notice of, FTC's original demand for a complete

withdrawal of FTC's capital account, which according to the Fund's March 27, 2007 letter, the Fund would have been obligated to honor.

### **Causes of Action**

#### **First Cause of Action: Breach of Contract**

[55.56.](#) Counter-Claimants and Third-Party Claimants repeat and incorporate by reference all of their allegations set forth above.

[56.57.](#) FTC had three contracts with the Fund: the 2005 Letter Agreement, the Limited Partnership Agreement, and an oral agreement formed on November 13, 2006. The Fund breached these agreements by refusing to honor FTC's withdrawal requests.

[57.58.](#) All conditions precedent have been performed. In the alternative, to the extent FTC did not comply with the notice requirements, compliance is excused by—among others—the inequitable conduct of the Fund and Zwirn and the fact that otherwise an inequitable forfeiture would result.

[58.59.](#) As the general partner of the Fund, Zwirn is liable for the breach.

[59.60.](#) As a result of this conduct, FTC suffered damage.

### **Second Cause of Action: Promissory Estoppel**

~~60-61.~~ Counter-Claimants and Third-Party Claimants repeat and incorporate by reference all of their allegations set forth above.

~~61-62.~~ To the extent the November 13, 2006 withdrawal request was not authorized copy under the contracts mentioned above, the request is enforceable under the doctrine of promissory estoppel. Zwirn and the Fund promised to honor FTC's November 13, 2006 request to withdrawal \$80 million. The promise was clear and unequivocal. FTC relied on the promise by not seeking a full redemption.

~~62-63.~~ As the general partner of the Fund, Zwirn is liable for the obligations of the Fund.

~~63-64.~~ As a result of this conduct, FTC suffered damage.

### **Third Cause of Action: Fraud**

~~64-65.~~ Counter-Claimants and Third-Party Claimants repeat and incorporate by reference all of their allegations set forth above.

~~65-66.~~ Zwirn and the Fund made false statements and omitted material information when convincing FTC to reduce its withdrawal request in the Fall of 2006. Zwirn and the Fund had a duty to speak. Zwirn acted in a fiduciary capacity to FTC. As well, Zwirn and the Fund had a duty to reveal information to make statements they made not misleading.

~~66-67.~~ FTC reasonably relied on these misrepresentations and omissions.

~~67-68.~~ As a result of this conduct, FTC suffered damage.

#### **Fourth Cause of Action: Breach of Fiduciary Duty**

[68-69.](#) Counter-Claimants and Third-Party Claimants repeat and incorporate by reference all of their allegations set forth above.

[69-70.](#) Zwirn owed a fiduciary duty to FTC arising from Zwirn's status as and control over the Fund's general partner.

[70-71.](#) Zwirn breached this fiduciary duty to FTC by, among other things, failing to make full disclosure about the Fund's internal issues and FTC's withdrawal rights.

[71-72.](#) As a result of this conduct, FTC suffered damage.

#### **Fifth Cause of Action: Negligent Misrepresentation**

[72-73.](#) Counter-Claimants and Third-Party Claimants repeat and incorporate by reference all of their allegations set forth above.

[73-74.](#) Zwirn made false statements when convincing FTC to reduce its withdrawal request in the Fall of 2006. Zwirn had a duty to FTC. At a minimum, Zwirn was negligent in not discovering the true facts underlying its statements and in not revealing the truth to FTC.

[74-75.](#) FTC reasonably relied on these misrepresentations.

[75-76.](#) As a result of this conduct, FTC suffered damage.

#### **Conclusion**

56. As a result of Zwirn's and the Fund's fraudulent and otherwise unlawful conduct, FTC has been damaged in an amount equal to approximately \$140 Million plus prejudgment interest, punitive damages, and are also entitled to rescissionary damages, plus interest, together with the attorneys' fees and costs of this proceeding.

Dated: New York, New York  
May \_\_, 2010

Respectfully submitted,

SUSMAN GODFREY L.L.P.

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Attorneys for Respondent Counter-Claimants  
and Third-Party Claimants Financial Trust  
Company, Inc. and Jeepers, Inc.

**PROOF OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument has been served by email and first class mail, this \_\_\_\_\_ day of \_\_\_\_\_, on:

Brad S. Karp  
Allan Arffa  
Paul, Weiss, Rifkind, Wharton & Garrison LLP  
1285 Avenue of the Americas  
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