



Paragraph 1 contain argument to which no response is required; and otherwise deny the allegations of Paragraph 1.

2. Aver that in or about the Spring of 2006, the Company learned for the first time that certain Managed Fund assets may have been used to pay non-Managed Fund expenses, which assets were repaid approximately a month and a half later, and that on certain occasions management fees may have been paid to the Company after they had accrued but before they were due; that the Company immediately brought these issues to the attention of its outside counsel Schulte Roth & Zabel LLP (“Schulte”) for review; that subsequently the Company retained Gibson Dunn & Crutcher LLP (“Gibson Dunn”) to conduct an independent review of these issues and self-reported these issues to the United States Securities and Exchange Commission, investors and others; and otherwise deny the allegations of Paragraph 2.

3. Deny the allegations of Paragraph 3, except admit that for a period of time, Plaintiff Perry A. Gruss (“Gruss”) was a partner in the Company and a member of DBZLLC and was the Chief Financial Officer and Chief Administrative Officer of the Company.

4. Aver that Gruss was effectively terminated from the Company and DBZLLC, resigning on the verge of being fired, on or about October 4, 2006, and otherwise deny the allegations of Paragraph 4.

5. Deny the allegations of Paragraph 5.

6. Deny that defendants defamed Gruss, engaged in any wrongful conduct, breached any contract, owe any amount of money to Plaintiff, or are liable to pay damages. The remainder of Paragraph 6 consists of argument to which no response is required.

7. Admit the allegations of Paragraph 7.

8. Deny the allegations of Paragraph 8, except admit that Zwirn lives in New York, New York, and at times was referred to as the “Managing Partner” of the Company; and aver that Zwirn was the managing member of Zwirn Holdings, LLC, which was the managing member of DBZ GP, LLC, which was the general partner of the Company.

9. Admit the allegations of Paragraph 9.

10. Admit the allegations of Paragraph 10.

11. Paragraph 11 states a legal conclusion to which no response is required.

12. Paragraph 12 states a legal conclusion to which no response is required.

13. Deny the allegations of Paragraph 13, except admit that Gruss was hired by Highbridge Capital Management, LLC to be the Chief Financial Officer of Highbridge/Zwirn Capital Management, LLC, a management company; and in 2004 Gruss continued as Chief Financial Officer when Highbridge/Zwirn Capital Management, LLC changed its name to D.B. Zwirn & Co., L.P.

14. Admit the allegations of Paragraph 14, and aver that throughout the time period covered by the Complaint, Gruss was primarily responsible for internal controls, financing relationships, human resources and treasury operations (including the funding process for the Managed Funds’ investments and potential investments as well as the management of the Company’s liquidity).

15. Admit the allegations in Paragraph 15.

16. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in the first sentence of Paragraph 16, except aver that Silvia Wu (“Wu”) and Li Anne Law (“Law”) each held the title of Fund Controller at various times and reported to and were supervised by Gruss; deny the allegations contained in the second sentence,

except admit that Law was a Certified Public Accountant and that Wu was a Certified Financial Analyst; and upon information and belief admit the allegations of the third sentence of Paragraph 16.

17. Deny the allegations of Paragraph 17, except admit that the Fund Controllers and the Operations department reported to Gruss and worked under his supervision; that they had responsibilities concerning accounting and record-keeping; that they worked with the Funds' Administrators, Custodians and Banks; that the Fund Controllers had contact with the Funds' external auditors, PricewaterhouseCoopers ("PWC"), and were involved in the preparation of the Funds' annual financial statements; that the Fund Controllers and their direct reports also worked with business units and the banks when preparing wire transfers for investments and expenses; and that their group was involved in reconciling cash accounts for certain Funds and Managed Accounts.

18. Deny the allegations contained in Paragraph 18, except admit that Michelle O'Hara ("O'Hara"), who reported to Gruss and worked under his supervision, worked in accounts payable and was involved in tracking expenses and paying the Company's bills; and that other employees who reported to Gruss and worked under his supervision had responsibilities concerning administrative and financial matters.

19. Deny knowledge or understanding as to the meaning of the phrase "financing the Company's assets" and otherwise deny the allegations of Paragraph 19, except admit that Zwirn had conversations with Gruss about Gruss's responsibility to ensure that the investments made by the Managed Funds were properly financed, and that Gruss held himself out to be qualified to perform these functions.

20. Admit that Harold Kahn ("Kahn") was hired in April 2005 to serve as the Company's Chief Operating Officer; and otherwise deny the allegations of Paragraph 20, except aver that Gruss was tasked with the responsibility to properly and competently discharge his duties, including managing internal controls, financial reporting, human resources, and treasury operations (such as the funding process for both the Managed Funds' investments and potential investments and the management of the Company's liquidity), and that Kahn was to focus mainly on human resources and infrastructure activities.

21. Deny the allegations of Paragraph 21, except aver that Zwirn performed extensive services on behalf of the Company and DBZLLC.

22. Deny the allegations of Paragraph 22, except admit that Zwirn held weekly meetings during which various matters concerning the Managed Funds were discussed, and that members of the Company's Legal, Tax, Finance, Operations, and/or Compliance departments and others attended some or all of these meetings.

23. Deny the allegations of Paragraph 23, except admit that Zwirn held meetings to discuss the Company's finances and that these meetings were at times attended by Kahn, Tim Wong, Christopher Suan, and Gruss; and admit that Zwirn retained BCRS LLC for his personal finances, and that from time to time BCRS LLC received information from the Company, and deny knowledge or information sufficient to form a belief as to Zwirn's state of mind concerning personal financial planning.

24. Deny the allegations of Paragraph 24.

25. Deny the allegations of Paragraph 25, except admit that on certain occasions, payments of management and performance fees were deferred.

26. Deny the allegations of Paragraph 26.

27. Deny the allegations of Paragraph 27, except admit that Kahn was involved in the purchasing and financing of a Gulfstream airplane to be used for business purposes, negotiating a letter of credit intended for airplane-related expenses, and the purchase of Zwirn's apartment on Central Park South; and aver that Gruss had approved improper payments related to the airplane.

28. Deny the allegations of Paragraph 28, and refer to Paragraphs 159 through 181 of DBZLLC's and the Company's Affirmative Defenses and Counterclaims for an accurate account of what occurred.

29. Aver that in or about the Spring of 2006, the Company learned for the first time that certain Managed Funds' assets may have been used to pay non-Managed Fund expenses, which assets had been repaid approximately a month and a half later, and that on certain occasions management fees may have been paid to the Company after they had accrued but before they were due; that the Company immediately brought these issues to the attention of its outside counsel Schulte for review; that the Company subsequently retained Gibson Dunn to conduct an independent review of these issues and voluntarily self-reported these issues to the United States Securities and Exchange Commission, investors and others; and otherwise deny the allegations of Paragraph 29.

30. Deny the allegations of the first sentence of Paragraph 30; deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in the second and third sentences, and aver that Gruss had approved payments related to the airplane and, as Chief Financial Officer and Chief Administrative Officer, was responsible for the early collection of management fees and for any decision not to document a loan therefore; and admit the allegations of the last sentence of Paragraph 30.

31. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 31, except aver that Gruss was responsible for the early collection of management fees and for improperly causing Managed Fund assets to be used to purchase the airplane, without the Company's knowledge or consent, and for any decision not to document a loan therefore.

32. Deny the allegations of the first sentence of Paragraph 32, except aver that Gruss was effectively terminated from the Company, resigning on the verge of being fired, on or about October 4, 2006; and otherwise deny the allegations of Paragraph 32.

33. Deny the allegations of Paragraph 33, except admit that Gruss was effectively terminated from the Company, resigning on the verge of being fired, on or about October 4, 2006, and that no others were effectively terminated at that time.

34. Deny the allegations of Paragraph 34, except aver that in October 2006, Zwirn made phone calls to investors upon the Company's learning for the first time that Gruss engaged in further misconduct concerning unauthorized transfers between Funds and informed investors of the improper interfund transfers, the early collection of management fees, and the use of Managed Fund assets to pay for non-Managed Fund expenses; deny that Zwirn made any false statements during those calls; and refer to the article referenced in Paragraph 34 for its content.

35. Deny the allegations of Paragraph 35, except admit that Zwirn had conversations with the Company's lenders, prime brokers and counterparties, and deny that Zwirn made any false statements during those conversations; and refer to the article referenced in Paragraph 35 for its content.

36. Deny the allegations of Paragraph 36, except deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in the third

sentence of Paragraph 36 and aver that Gruss, as Chief Financial Officer and Chief Administrative Officer, was responsible for the early collection of management fees and for any decision not to document a loan therefore.

37. Deny the allegations of Paragraph 37.

38. Deny knowledge and information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 38, except aver that Zwirn made no false statements.

39. Admit the allegations of the first and second sentences of Paragraph 39; deny that Gruss's signature had been forged; and otherwise deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations regarding Gruss in the third and fourth sentences of Paragraph 39.

40. Deny the allegations of Paragraph 40 except admit that Zwirn talked to investors, prime brokers, counterparties, and other people in the financial community in late 2006 and early 2007, and aver that Zwirn made no false statements in those conversations.

41. Admit the allegations of Paragraph 41.

42. Refer to the March 2007 Memo and to the article referenced in Paragraph 42 for their contents; deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegation that the March 2007 Memo was circulated within the financial community; and otherwise admit the allegations of Paragraph 42.

43. Deny the allegations of Paragraph 43, and refer to the March 2007 Memo for its content.

44. Refer to the March 2007 Memo for its content; deny that the statements in the March 2007 Memo were false; deny knowledge or information sufficient to form a belief as to

the truth or accuracy of the allegations in the fifth and sixth sentences of Paragraph 44; admit the last sentence of Paragraph 44; and otherwise deny the allegations of Paragraph 44.

45. Refer to the March 2007 Memo for its content, and otherwise deny the allegations of Paragraph 45.

46. Deny the allegations of Paragraph 46, except admit that Shahid Ramzan raised a question regarding valuation.

47. Deny the allegations of Paragraph 47, and refer to the March 2007 Memo for its content.

48. Deny the allegations of Paragraph 48, except admit that Zwirn made calls to investors, counterparties, prime brokers, and others in the financial community around the time that the March 2007 Memo was distributed to investors, and aver that Zwirn made no false statements during these calls.

49. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 49, except aver that Offit Hall Capital was the representative of at least one investor in the Funds, and aver that Zwirn made no false statements to Offit Hall Capital.

50. Deny the allegations of Paragraph 50.

51. Deny the allegations of Paragraph 51.

52. Deny the allegations of Paragraph 52.

53. Deny the allegations of Paragraph 53.

54. Deny that there were inaccuracies in the March 2007 Memo; admit that the Company did not issue any statement purporting to revise the March 2007 Memo; and otherwise deny the allegations of Paragraph 54.

55. Deny the allegations of Paragraph 55.

56. Deny that the Company or Zwirn engaged in any wrongful conduct, and otherwise deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 56.

57. Admit the allegations of Paragraph 57, and aver that Gruss had obligations to the Company and DBZLLC in addition to those set forth in the unexecuted Supplementary Agreement among D.B. Zwirn & Co., L.P., D.B. Zwirn Partners, LLC and Perry Gruss (the "Supplementary Agreement").

58. Deny the allegations of Paragraph 58, except admit that Gruss was a partner in the Company from January 1, 2006 to October 4, 2006, that the terms of the Supplementary Agreement governed the relationship between Gruss and the Company, that the Supplementary Agreement was not executed and that an unexecuted copy of the Supplementary Agreement, which is incomplete, is attached to the Complaint.

59. Deny the allegations of Paragraph 59, except admit that Gruss was a partner in the Company from January 1, 2006 to October 4, 2006, that the terms of the Supplementary Agreement governed the relationship between Gruss and the Company, and that Gruss received certain payments as a partner in the Company.

60. Admit the allegations of Paragraph 60.

61. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 61.

62. Deny the allegations of Paragraph 62, except that to the extent the allegations purport to describe the Supplementary Agreement, refer to the Supplementary Agreement for its content.

63. Aver that Gruss was effectively terminated from the Company, resigning on the verge of being fired, on or about October 4, 2006, and otherwise deny the allegations of Paragraph 63.

64. Admit that Gruss has made demands that the Company make certain payments; deny that any payments are due to him; aver that others who were paid distributions did not engage in misconduct that would preclude such distributions; and otherwise admit the allegations of Paragraph 64.

**FIRST CAUSE OF ACTION**  
**DEFAMATION (AGAINST ZWIRN AND THE COMPANY)**

65. Repeat and reallege the responses contained in Paragraphs 1 through 64 of this Answer, as if fully set forth herein.

66. Deny the allegations of Paragraph 66.

67. Deny the allegations of Paragraph 67.

68. Deny the allegations of Paragraph 68.

69. Deny the allegations of Paragraph 69.

70. Deny the allegations of Paragraph 70.

71. Deny the allegations of Paragraph 71.

72. Deny the allegations of Paragraph 72.

73. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 73.

74. Deny the allegations of Paragraph 74.

**SECOND CAUSE OF ACTION  
DEFAMATION (AGAINST ZWIRN AND THE COMPANY)**

75. Repeat and reallege the responses contained in Paragraphs 1 through 74 of this

Answer as if fully set forth herein.

76. Deny the allegations of Paragraph 76.

77. Deny the allegations of Paragraph 77.

78. Deny the allegations of Paragraph 78.

79. Deny the allegations of Paragraph 79.

80. Deny the allegations of Paragraph 80.

81. Deny the allegations of Paragraph 81.

82. Deny the allegations of Paragraph 82.

83. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations of Paragraph 83.

84. Deny the allegations of Paragraph 84.

**THIRD CAUSE OF ACTION  
BREACH OF CONTRACT (AGAINST THE COMPANY  
AND D.B. ZWIRN PARTNERS, LLC)**

85. Repeat and reallege the responses contained in Paragraphs 1 through 84 of this

Answer as if fully set forth herein.

86. Admit the allegations of Paragraph 86.

87. Deny the allegations of Paragraph 87.

88. Deny the allegations of Paragraph 88, except admit that Gruss was effectively terminated, resigning on the verge of being fired.

89. Admit that no payment was made to Gruss after he separated from the Company, and otherwise deny the allegations of Paragraph 89.

90. Deny the allegations of Paragraph 90.

**FOURTH CAUSE OF ACTION  
PROMISSORY ESTOPPEL (AGAINST THE COMPANY  
AND D.B. ZWIRN PARTNERS, LLC)**

91. Repeat and reallege the response contained in Paragraphs 1 through 90 of this Answer as if fully set forth herein.

92. Deny the allegations of Paragraph 92.

93. Refer to the Supplementary Agreement for its contents, and otherwise deny the allegations of Paragraph 93, and aver that any right to compensation was subject, among other things, to all the terms and conditions of the Supplementary Agreement.

94. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 94.

95. Deny the allegations of Paragraph 95.

96. Deny the allegations of Paragraph 96.

97. Deny the allegations of Paragraph 97.

98. Deny the allegations of Paragraph 98.

**AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

**INTRODUCTION**

99. In 2002, Highbridge Capital Management, LLC and Zwirn formed Highbridge/Zwirn Capital Management, LLC to be a hedge fund management company with an innovative strategy: it would seek out a large number of small, idiosyncratic investments that traditional financial institutions had ignored and maximize risk-adjusted returns for the investors in its funds by, among other things, using a variety of funding mechanisms to finance those

investments efficiently. In 2004, Highbridge/Zwirn Capital Management, LLC was renamed D.B. Zwirn & Co., L.P. (the "Company").

100. The investment side of the Company, managed by Zwirn, flourished, as the Company generated strong returns for the funds' investors. As a result, the Company enjoyed significant growth, and the Company's assets under management increased from \$900 million in 2004 to over \$5 billion in September 2006 through investment returns as well as additional capital contributions from investors.

101. Throughout the relevant period, Gruss was the Chief Financial Officer of the Company, who managed the Company's finances and back office. Gruss purported to be and held himself out as competent to do the tasks required of him, which included, among other things, making arrangements for the proper financing of the funds' investments and the management of the Company's liquidity. Gruss did not disclose that in fact he had difficulties performing his duties, or that he engaged in improper conduct.

102. As the Company grew, Zwirn took appropriate steps to strengthen its infrastructure. Among other things, Zwirn caused the Company to hire a Company Controller in December 2005 notwithstanding resistance on the part of Gruss who claimed that it was unnecessary. Within months of being hired, the Company Controller discovered several instances of Gruss's improper conduct: money from funds and managed accounts had been improperly used to finance the purchase of a private airplane and on a number of occasions management fees had been paid to the Company early. The Company brought these issues to the attention of its outside counsel, Schulte Roth & Zabel LLP ("Schulte"), for review. Schulte investigated these issues and concluded that Gruss had been responsible. Shortly thereafter, Gruss was effectively terminated from the Company, resigning on the verge of being fired.

103. After Gruss left the firm, the Company learned of additional practices approved by Gruss involving improper transfers of money between the funds. The Company retained Gibson Dunn & Crutcher LLP (“Gibson Dunn”) to conduct a thorough internal investigation of all potential accounting issues. Gibson Dunn retained Deloitte & Touche as a special accountant for its investigation. The Company made appropriate disclosures and self-reported these issues to the United States Securities and Exchange Commission (“SEC”), which began its own investigation into the conduct.

104. During the next five months, Gibson Dunn and the Company uncovered additional instances of Gruss’s misconduct. Gibson Dunn reviewed over a million pages of Company documents and conducted more than forty interview sessions with twenty-three people. Gibson Dunn concluded that Gruss had directed, approved, or been aware of a number of accounting improprieties relating to transfers of money between funds, use of investor money to finance the airplane purchase, alteration of financial reports, backdating of investment assignments between the funds, early payment of management fees, and use of investor money to fund capital calls for personal investments held by Zwiern and two other individuals affiliated with the Company. Gibson Dunn found no credible evidence that Zwiern was aware of or participated in any of the financial or accounting improprieties.

105. The Company kept the SEC apprised of the progress of Gibson Dunn’s work, and the results of the Gibson Dunn investigation were provided to the SEC as part of the Company’s cooperation with the SEC’s investigation.

106. The Company took various steps to remediate Gruss’s misconduct and make investors whole.

107. Through his misconduct, Gruss violated his duties as Chief Financial Officer, Chief Administrative Officer, and partner in the Company and as a member of DBZLLC, and caused the Company to spend over \$43 million on investigations and remediation.

108. Gruss's misconduct and the resulting internal and SEC investigations cast a shadow over the Company, reduced investor confidence, and materially delayed completion of the funds' 2006 audits. In turn, investors submitted redemptions in excess of \$2 billion, and the Company was forced to put the funds into an orderly dissolution.

### PARTIES

109. Defendant and Counterclaim-Plaintiff the Company is a Delaware limited partnership with its principal place of business in New York, New York. At all relevant times hereto, the general partner of the Company was DBZ GP, LLC, an entity controlled by Zwirn. The Company was an investment management firm that managed the investments of certain investment funds and managed accounts.

110. Defendant and Counterclaim-Plaintiff DBZLLC is a Delaware limited liability company with its principal place of business in New York, New York. At all times relevant hereto, the managing member of DBZLLC was Zwirn Holdings, LLC, an entity controlled by Zwirn. DBZLLC was the general partner of several of the investment funds managed by the Company.

111. Plaintiff and Counterclaim-Defendant Gruss is a former Chief Financial Officer; Chief Administrative Officer and partner in the Company, and a former member of DBZLLC. Upon information and belief, Gruss is a resident of New Jersey.

## BACKGROUND

112. Highbridge Capital Management, LLC and Zwirn formed Highbridge/Zwirn Capital Management, LLC, the predecessor to the Company, in 2002. In 2004, Highbridge/Zwirn Capital Management, LLC was renamed D.B. Zwirn & Co., L.P.

113. The Company primarily made investments through various funds that it managed: D.B. Zwirn Special Opportunities Fund LP (the "Onshore Fund"), D.B. Zwirn Special Opportunities Fund Ltd. (the "Offshore Fund"), D.B. Zwirn Special Opportunities Fund II Ltd. (the "LTD II Fund"), D.B. Zwirn Special Opportunities Fund (TE) LP (the "TE Fund"), and D.B. Zwirn Asia/Pacific Special Opportunities Fund L.P. (collectively, the "Funds"). The Company also made investments for separate individual investment accounts (the "Managed Accounts"), including HCM/Z Special Opportunities LLC ("HCM/Z"), an account managed for the benefit of Highbridge Capital Corporation. The Funds and the Managed Accounts are referred to collectively as the "Managed Funds."

114. The Company's investment strategy was unlike most hedge fund strategies in two key respects: (a) it employed a variety of investment strategies across a broad range of investment products, geographical areas, and industries; and (b) it used numerous types of funding mechanisms to finance those investments efficiently.

115. To identify investment opportunities, the Company employed about twenty-five managing directors with specializations among different products, geographic areas, and industries. The Company also partnered with over one hundred joint ventures throughout the world that helped to identify assets for investment. At its peak, the Company had 16 offices in 12 countries, with over 260 employees. The Company made investments for the Managed Funds in over twenty-five countries.

116. Unlike most hedge fund managers, which fund investments primarily through investor cash and on occasion leverage from prime brokerage firms, the Company arranged financing for the Managed Funds' investments through a large variety of sources. These funding mechanisms included: cash on the Managed Funds' balance sheets; interest received from existing corporate and real estate loans; remittances (collections from investments); repayments recapitalizations, or sales of assets (from when the Managed Funds exited from an investment); asset-specific non-recourse financing; multi-asset non-recourse financing (such as through collateralized loan obligation structures); recourse financing at the Fund level; prime broker leverage; repo financing; inflows of money from new or existing investors; and stand-alone asset platforms with their own funding lines.

117. The Company's business strategy maximized returns for investors in part by making efficient use of numerous funding mechanisms to finance attractive risk-adjusted investments that it had identified.

118. The Company sought to provide the Onshore Fund and the Offshore Fund with equal access to the Company's investments for which they were eligible, and attempted to generate a similar return per unit of risk for the two funds.

119. For mostly tax reasons, however, the Onshore Fund was able to participate in more investments than the Offshore Fund. In addition, the Onshore Fund generally used more leverage than the Offshore Fund. For these reasons, the Onshore Fund tended to have a higher rate of return than the Offshore Fund.

120. The Offshore Fund, however, tended to have more cash than the Onshore Fund because more money came in from offshore investors relative to the investment opportunities available to the Offshore Fund.

121. At times, the Onshore Fund and the Offshore Fund were constrained from making investments due to a lack of cash, though the Offshore Fund tended to have fewer cash constraints.

122. The Company had several ways to address any funding constraints, including (a) obtaining additional funding through the various possible funding mechanisms (for example, by gaining more leverage from a prime broker, finding additional non-recourse financing for an individual asset or a group of assets, or refinancing an individual asset or a group of assets); (b) obtaining funds for new investments by selling existing assets; (c) postponing investments; (d) funding investments at a lower amount than originally planned; (e) syndicating investments (sharing them with other investors); or (f) deciding not to make certain investments.

### **THE ROLES OF ZWIRN AND GRUSS IN THE COMPANY**

#### **A. Zwirn's Role**

123. Zwirn's primary responsibility was to determine what investments, based upon risk-adjusted return, the Managed Funds should make, subject to the approval of others who considered factors not related to the risk-adjusted return.

124. Zwirn had weekly "pipeline" meetings with the officers, staff, and asset managers from various investment teams, during which he reviewed the teams' portfolios and discussed potential future investments. Zwirn participated in these meetings from wherever he was in the world, and with people located all over the world. In connection with these meetings, Zwirn reviewed weekly treasury reports that listed illiquid investments that the Managed Funds had funded during the month, and illiquid investments that the Managed Funds might fund in the future.

125. Zwirn also reviewed a number of monthly reports relating to the Managed Funds' investments and the Company's finances.

126. Zwirn's work for the Company required him to spend about one week per month traveling all over the world, in addition to substantial domestic travel.

127. In addition to the foregoing, Zwirn chaired the management committee of the Company and found investors for the Funds. Zwirn left the day-to-day management of the Company to others who were responsible for various aspects of the Company's operations.

**B. Gruss's Role**

128. In July 2002, Gruss was hired by Highbridge Capital Management, LLC as Chief Financial Officer of Highbridge/Zwirn Capital Management, LLC, the predecessor of the Company.

129. Gruss was the Company's Chief Financial Officer until on or about October 4, 2006. He was also the Company's Chief Administrative Officer from April 2005 to on or about October 4, 2006, and was a partner in the Company and a member of DBZLLC from January 2006 until on or about October 4, 2006.

130. Gruss was responsible for managing the Company's finance, accounting, and treasury operations. He supervised the Company's "back office."

131. One of Gruss's primary responsibilities was to manage the funding process, described in Paragraph 116, to ensure that the Managed Funds' investments were properly financed. This responsibility included: (a) determining the logistics of how specific investments would be funded; (b) determining how investments would be allocated among the Managed Funds; and (c) identifying new sources from which to finance investments (for example, by arranging non-recourse funding lines). It was also Gruss's responsibility to inform Zwirn of funding limitations on all of the investments that the Company had identified as otherwise satisfying the Company's risk-adjusted return criteria, in which case it was necessary to explore the options identified in Paragraph 122.

132. The Company relied on Gruss to manage properly and in good faith the funding process for investments.

133. As Chief Financial Officer of the Company, Gruss supervised a number of employees. Silvia Wu and Li Anne Law, who were financial controllers for the Funds, reported to Gruss and worked directly under his supervision.

### **THE COMPANY'S GROWTH**

134. The Company enjoyed significant growth between 2004 and September 2006. During that period, the Company's assets under management increased from \$900 million to over \$5 billion.

135. Throughout this period, Gruss continued to hold himself out as competent to discharge his duties and to manage properly and in good faith the funding process for investments and the Company's liquidity.

136. In truth and in fact, unbeknownst to the Company, Gruss took shortcuts to arrange funding for investments and for the Company's expenses.

137. During this period, Gruss engaged in numerous instances of serious misconduct that covered a number of different areas, as described below.

### **SPECIFIC INSTANCES OF GRUSS'S MISCONDUCT**

#### **A. Gruss directed improper transfers of money between the Managed Funds.**

138. Gruss directed and approved numerous improper transfers of money between the Managed Funds (the "Interfund Transfers").

139. The Interfund Transfers were not properly accounted for or documented as loans between the Managed Funds, and prior to their discovery no interest was paid in connection with the Interfund Transfers.

140. The Interfund Transfers had the effect of diminishing the returns of the investors in one Fund, while at the same time increasing the returns of investors in another Fund.

141. Gruss began approving the Interfund Transfers no later than the first quarter of 2005.

142. Gruss has admitted that the Interfund Transfers were improper, and has admitted that he approved Interfund Transfers.

143. Gruss knew at the time that the Interfund Transfers were indeed improper, and Gruss concealed the practice from Zwirn.

144. Gruss has admitted that he had no recollection of speaking with Zwirn or other senior managers about the Interfund Transfers. Gruss has further admitted that he had been hesitant to give Zwirn bad news on this issue and that he did not want senior management at the Company to know about the Interfund Transfers.

145. The Interfund Transfers were not a secret among accounting personnel who reported to Gruss.

146. Gruss's concealment of the issue from senior management was not a secret to accounting personnel. In an April 18, 2005 email—after Gruss had approved yet another improper transfer—Li Anne Law suggested that Gruss “get all the partners/top mgmt in the loop (i.e. REALITY) and then have them make a joint decision.”

147. Law's predecessor, Silvia Wu, indicated to Law that she resigned from the Company in June 2005 because she was uncomfortable with the Interfund Transfer practice.

148. When Law left the Company for the same reason in June 2006, she advised her successor, Alisa Butchkowski (who also reported to Gruss), not to allow herself to get drawn into the practice of making Interfund Transfers.

149. At least four of the Interfund Transfers were made such that the assets of one Fund were used to repay loan obligations of another Fund under a 75-day revolving credit facility (the "Swingline Facility").

150. On January 9, 2006, Gruss approved such a transfer.

151. On that date, Gruss typed "Ok pag" in response to wire transfer instructions requesting this Interfund Transfer. The subject line of the email referred to repayment of the Swingline Facility, and when Jason Pecora, a Company employee who reported to Gruss, asked in an email what the transfer was for, Gruss specifically stated that it was for "[r]epayment of 75day swingline revolver."

152. On March 3, 2006, Gruss again approved another such Interfund Transfer by which the assets of one Fund were used to fulfill a repayment obligation of another Fund under the Swingline Facility.

153. The wire instructions Gruss approved specifically requested a transfer from "the Ltd # 721600 to # 721599;" that is, a transfer from the account of one Fund to the account of another Fund. The subject of the email containing Gruss's approval referred to repayment of the Swingline Facility.

154. On May 26, 2006, Gruss again approved, via email, an Interfund Transfer by which the assets of one Fund were used to fulfill the repayment obligation of another Fund under the Swingline Facility.

155. Numerous additional Interfund Transfers were made so that the assets of one Fund were used for the purpose of funding investments of another Fund.

156. For example, on April 18, 2005, Gruss approved such a transfer. In an email exchange that day, Li Anne Law specifically asked Gruss whether the Company should fund an investment of one Fund with the assets of another Fund. Gruss responded, "Yes, pls."

157. On May 5, 2005, Gruss again approved a transfer through which the assets of one Fund were used for the purpose of funding investments of another Fund. An email from that date shows that Gruss wrote "Ok pag" in response to Law's instructions to "transfer [funds] from the Ltd acct # 721600 to the LP acct # 721599."

158. Zwirn did not know of, did not participate in, and did not authorize any improper Interfund Transfers.

**B. Gruss was aware of and approved the use of investor money to fund the purchase of an airplane.**

159. In 2005, it was determined that, given Zwirn's extensive business travel, it made sense to purchase a private airplane.

160. Harold Kahn, the Company's Chief Operating Officer, was put in charge of the airplane purchase.

161. Kahn and Gruss discussed getting a revolving credit line in the Company to fund the purchase of the airplane and pay for related expenses.

162. Merrill Lynch offered non-recourse financing for 90 percent of the transaction but required a \$1.9 million letter of credit.

163. Citibank agreed to provide the letter of credit as part of a \$10 million revolving line of credit for the Company's operations. Gruss and Kahn expected the Citibank revolver, including the letter of credit to help finance the purchase of the plane, to be in place by September 30, 2005.

164. Up until September 27, 2005, all payments related to the airplane had been advanced by the Company.

165. Beginning on September 27, 2005, there was a series of four wire transfers related to airplane expenses that were made from either the Onshore Fund or the HCM/Z managed account.

166. On September 27, 2005, Kahn emailed Li Anne Law, copying Gruss: "LL -- can you pls arrange to have the \$1.9MM wired to Citi asap for the issuance of the LC. This will only be a short-term deposit in that once the Citi revolver is in place (should be w/in a week) we will credit the amount against the line."

167. On September 28, 2005, Gruss authorized the \$1.9 million payment from the HCM/Z account to Citibank.

168. Gruss knew that this transfer was to pay for expenses related to the airplane purchase.

169. On September 27, 2005, Kahn emailed Law, copying Gruss, requesting a wire transfer to Merrill Lynch of an \$80,250 facility fee.

170. The next day, Gruss signed a wire transfer form authorizing \$80,250 to be wired from the HCM/Z account at Bear Stearns.

171. Gruss knew that this transfer was to pay for expenses related to the airplane purchase.

172. In an email exchange on September 29, 2005, Kahn wrote to Law, copying Gruss, asking her to wire \$1,681,350 to Insured Aircraft Title Insurance: "we are trying to do the close late-morning/mid-day."

173. That same day, \$1,681,350 was transferred from the Onshore Fund with Gruss's knowledge and approval.

174. Gruss knew that this transfer was to pay for expenses related to the airplane purchase.

175. On September 30, 2005, Kahn emailed Law and Michelle O'Hara (who worked with Law), copying Gruss, asking Law to wire \$112,575 in broker fees relating to the airplane purchase.

176. That same day, \$112,575 was transferred from the Onshore Fund with Gruss's knowledge and approval.

177. Gruss knew that this transfer was to pay for expenses related to the airplane purchase.

178. In an October 25, 2005 email, O'Hara wrote to Gruss seeking approval for payment in connection with the airplane purchase: "Please approve - \$163,267.50 for DZ airplane expense. Fyi, I am now out completely of cash. ... I have about 2MM of invoices holding on my desk waiting to be paid." Gruss replied, "ok pag. Pls move \$ from Ltd."

179. The Citibank revolver was finally in place on November 4, 2005, and \$8.1 million was credited to the Company's account.

180. When Gruss subsequently directed the return of the funds to the Onshore Fund and the HCM/Z managed account, he did not ensure that those repayments included interest, and the initial transfers were never documented as loans from the Managed Funds to the Company.

181. Zwirn did not know of, did not participate in, and did not authorize the use of money from the Onshore Fund and the HCM/Z managed account for the plane purchase.

**C. Gruss directed his subordinates to alter financial reports.**

182. In March 2006, Gruss became concerned about the difference in the rate of return between the Onshore Fund and the Offshore Fund for the previous month.

183. Gruss did not discuss the issue with Zwirn; instead, Gruss altered reports in order to conceal the magnitude of the difference from Zwirn.

184. In March 2006, Gruss instructed Law to decrease the Offshore Fund's monthly expenses by \$500,000. This adjustment increased the Offshore Fund's February 2006 returns. Law was uncomfortable with the instruction, but inserted the adjustment into an Excel spreadsheet used to calculate the Offshore Fund's Net Asset Value ("NAV"). The increased NAV was sent to the Offshore Fund's investors.

185. In April 2006, Gruss approached Law with "ideas" about how to collapse the gap between the funds' monthly returns. Gruss instructed Law to decrease the Offshore Fund's expenses by \$3.5 million and to increase the Onshore Fund's expenses by a corresponding amount. Following Gruss's instructions, Law reversed the \$500,000 February adjustment and inserted the adjustment of \$3.5 million for the March 2006 returns. The altered NAVs were sent to the investors in the Onshore Fund and the Offshore Fund.

186. In the same April 2006 conversation, Gruss instructed Law to remove three investments from an internal schedule that Law prepared, which contained the investments most responsible for the performance gap between the funds. Law removed the three investments from the internal schedule, making the performance gap on the internal investment schedule consistent with the performance gap in the returns sent to investors and concealing the \$3.5 million expense adjustment.

187. Gruss's deception caused the projected difference in rate of return (referred to internally at the Company as the "delta") between the funds to shift from 106 basis points to 53 basis points.

188. Gruss did not inform Zwirn of any of these adjustments.

189. Zwirn did not know of, participate in, or authorize any of these adjustments.

190. On another occasion, in calculating the August 2005 returns, Law accidentally omitted a \$3.6 million Offshore Fund incentive fee when calculating the Offshore Fund's NAV. The omission incorrectly increased the Offshore Fund's monthly returns.

191. Thirty minutes after the Company circulated monthly returns to investors, Law realized her mistake and informed Gruss. Law asked Gruss if the Company could circulate a revised calculation.

192. Gruss decided not to send out revised returns. Instead, Gruss directed Law to correct the omitted incentive fee over the subsequent four months.

193. Gruss never informed Zwirn of this instance of misconduct.

194. Zwirn did not know of, participate in, or authorize this accounting misconduct.

**D. Gruss falsified the assignment of investments from the Onshore Fund to the Offshore Fund.**

195. In August 2006, Gruss directed the transfers of three investments from the Onshore Fund to the Offshore Fund.

196. Despite the fact that the transfers took place in August, Gruss directed that the transfers be made effective as of July 1, 2006.

197. Gruss signed the Master Assignment and Acceptance Agreement documenting the transaction, which is dated August 24, 2006.

198. Because Gruss improperly directed that the transfers be effective as of the prior month, interest and prepayment fees that the investments had accrued to the Onshore Fund in July 2006 were improperly shifted from the Onshore Fund to the Offshore Fund.

199. Gruss's improper direction to make the transfers effective as of the prior month caused the NAV of the Offshore Fund to be improperly increased and caused the NAV of the Onshore Fund to be improperly decreased.

200. Gruss did not disclose to investors or to Zwirn that Gruss had improperly directed that the transfers of the three investments be effective as of the prior month.

201. Zwirn did not know of, participate in, or authorize making the transfers of investments effective as of the prior month.

**E. Gruss directed the early payment of management fees from the Funds.**

202. At Gruss's direction, management fees were paid from the Onshore Fund, the Offshore Fund, the LTD II Fund, and the TE Fund after they were earned but before they were payable on 25 occasions between May 2004 and March 2006. The early fee payments totaled \$22.5 million.

203. Gruss has admitted that it was his decision to withdraw management fees from the funds that were not yet payable.

204. Gruss has characterized what he did as, in effect, no harm, no foul.

205. Gruss has also admitted that he did not tell Zwirn or anyone in senior management about the practice.

206. Zwirn was not aware of the early payment of management fees until Company Controller Tim Wong brought this issue to the Company's attention in the Spring of 2006.

207. Zwirn did not participate in or authorize the early payment of management fees.

**F. Gruss directed the use of investor money to fund capital calls made to Zwirn and two other individuals.**

208. Prior to February 2005, the Onshore Fund at times made investments in opportunities identified by a certain investment manager.

209. Around February 2005, that investment manager created a private equity fund. The Company made a determination not to invest in that fund and did not do so.

210. Around February 2005, Zwirn and two others affiliated with the Company made personal investments in the private equity fund through an investment vehicle formed for that purpose.

211. Advances were made from the Onshore Fund to pay for capital call payments for Zwirn and two other individuals.

212. Zwirn spotted the issue in a treasury pipeline report in September 2005, and in a September 18, 2005 email directed Gruss to fix the error, "ASAP." Gruss replied via email that same day, "I'll fix."

213. However, unbeknownst to Zwirn, Gruss continued to authorize advance payments out of the Onshore Fund for these capital calls even after Zwirn had raised the issue with Gruss and Gruss had told Zwirn that he would fix it.

214. Gruss approved the use of the Onshore Fund to advance payments for capital calls made to Zwirn and two other individuals on December 15, 2005, January 3, 2006, and July 6, 2006, totaling \$95,513.

215. Two individuals besides Zwirn were directed to make reimbursements for the capital calls by writing checks to the Onshore Fund.

216. However, Gruss directed Zwirn to reimburse the Company for advance payments for the capital calls by writing checks to the Company. Furthermore, Gruss failed to transfer

these reimbursements from the Company to the Onshore Fund, which had actually made the advance payments for the capital calls.

217. Zwirn did not know of, did not participate in, and did not authorize Gruss's continued use of the Onshore Fund to pay capital calls for Zwirn and two other individuals.

#### **DISCOVERY OF GRUSS'S IMPROPRIETIES**

218. As the Company grew from 2004 to September 2006, Zwirn took steps to strengthen the infrastructure of the Company and to create greater transparency in its structure and finances. As part of this process, Zwirn raised with management the need to hire a Controller for the Company and to have an audit of the Company.

219. Gruss resisted Zwirn's suggestion to hire a Company Controller and claimed that an audit was unnecessary.

220. In spite of Gruss's resistance, the Company hired Tim Wong as Company Controller in or around December 2005.

221. Within months of joining the Company, Wong discovered that funds from the Onshore Fund and the HCM/Z managed account had been used improperly to finance the purchase of a private airplane. The Onshore Fund and the HCM/Z managed account had been repaid after about a month, but without interest.

222. Wong also noticed that, on a number of occasions, management fees had been paid to the Company early—after they had been earned (which was on a monthly basis), but before they had become payable (which was on a quarterly basis, in arrears).

223. Wong informed the Company's General Counsel and Chief Compliance Officer of what he had discovered.

## THE SCHULTE, GIBSON DUNN, AND SEC INVESTIGATIONS

224. Upon learning of the information provided by Wong, the Company immediately brought these issues to the attention of its outside counsel, Schulte, for review.

225. Prior to being informed by senior management of Wong's discovery, Zwirn had not been aware that money from the Managed Funds may have been used to finance the airplane purchase and that management fees may have been paid early.

226. In the course of its four-month investigation, Schulte interviewed a number of Company employees (including Gruss and Zwirn) and reviewed hundreds of relevant documents.

227. Schulte determined that Gruss knew of and approved payments from the Onshore Fund and the HCM/Z managed account to finance the airplane purchase and that Gruss had caused the Funds to advance management fees to the Company after they had been earned but before the fees had become payable.

228. Schulte communicated these findings to the Company in September 2006.

229. As a result of these findings, Gruss was effectively terminated from the Company on or about October 4, 2006, resigning on the verge of being fired.

230. Within several days after Gruss's departure, Alisa Butchkowski, who was then the Controller of the Onshore Fund, informed senior management at the Company that there had been improper transfers of money between the Managed Funds.

231. In October 2006, the Company retained Gibson Dunn to conduct an independent investigation of the issues that had come to light, with the assistance of Deloitte & Touche as special accountant. The Gibson Dunn partners assigned to this investigation were a former Executive Vice President for Enforcement of NASD, who had also formerly served as Chief

Litigation Counsel at the SEC, and a former federal prosecutor. The Company also notified the SEC about its internal investigation into these issues.

232. In October 2006, based on Schulte's findings, Zwirn orally disclosed to investors, creditors, prime brokers, auditors, counterparties, and employees that management fees had been advanced early, that fund assets had been used to pay for non-fund expenses, and that Gruss had separated from the Company. Zwirn also disclosed that the Company had learned about improper transfers of money between the Funds and that the Company had hired Gibson Dunn to conduct an independent review of all the issues that had come to light.

233. The statements made in these disclosures were true.

234. Gibson Dunn conducted a thorough, five-month investigation from November 2006 to March 2007 into these issues and other issues that surfaced during the investigation. In the course of its investigation, Gibson Dunn conducted more than forty interview sessions with twenty-three people, including all members of senior management, virtually every employee in the finance department, and personnel in the Controller's office and operations departments. The individuals interviewed by Gibson Dunn included Zwirn, Gruss and several people who reported to Gruss at the Company, including Alisa Butchkowski, Li Anne Law, Michelle O'Hara, and Jason Pecora.

235. In addition, a team of approximately thirty attorneys under the supervision of Gibson Dunn reviewed more than one million pages of Company documents.

236. Deloitte & Touche undertook a detailed review of the books and records of the Company and the Managed Funds, analyzed thousands of transactions, and participated in the Gibson Dunn interviews.

237. Gibson Dunn's conclusions affirmed Schulte's original findings and included additional instances of misconduct by Gruss.

238. Gibson Dunn concluded that Gruss had directed, approved, or been aware of improper conduct relating to transfers of money between the Managed Funds, use of investor money to finance the airplane purchase, alteration of financial reports, backdating of investment assignments between the funds, early payment of management fees, and use of investor money to fund capital calls for an investment held by Zwirn and two other individuals, as set forth in Paragraphs 138 through 217 above.

239. Gibson Dunn found no credible evidence that Zwirn was aware of or participated in any of the improprieties.

240. Gibson Dunn presented its findings to the SEC in early 2007.

241. On March 26, 2007, the Company issued a memorandum to investors in the Managed Funds ("March 2007 Memo"), reporting on, among other things, the Gibson Dunn / Deloitte & Touche review. The March 2007 Memo announced the completion of the Gibson Dunn / Deloitte & Touche review, and summarized the findings that Gibson Dunn made.

242. The statements made in the March 2007 Memo were true and accurate.

243. Around the time that the March 2007 Memo was distributed to investors, Zwirn made oral disclosures to investors, counterparties, prime brokers, and others in the financial community relating to Gibson Dunn's findings.

244. Zwirn made no false statements during these disclosures.

#### **THE EFFECT OF GRUSS'S MISCONDUCT**

245. Gruss's misconduct caused the Company to initiate two internal investigations, both of which required the services of attorneys, accountants and other professionals. As a

result, the Company incurred substantial fees and expenses to the attorneys, accountants and other professionals.

246. The Company disclosed Gruss's misconduct to the SEC, which commenced an investigation of the Company in or around March 2007. As a result, the Company incurred further substantial fees and expenses to additional attorneys, accountants and other professionals.

247. In connection with these investigations, the Company incurred costs in excess of \$34.8 million.

248. In addition, the Company took various steps to remediate Gruss's misconduct. To make such remediation, the Company incurred costs in an amount to be proven at trial, but believed to be in excess of \$8.5 million.

249. In light of the Company's investigations, in December 2006, the Company decided to stop accepting money from new investors.

250. Further, in light of the internal investigation caused by Gruss's misconduct, PricewaterhouseCoopers' 2006 audit of the Funds was materially delayed, and was not completed until December 2007.

251. As a result of the disclosure that the Company made to the SEC, investors in the Managed Funds, and auditors, as well as the significant delay in the audit, there were \$1.4 billion in investor redemptions from the Funds between September 2006 and November 2007. Eventually, investors submitted redemptions in excess of \$2 billion from the Funds.

252. In February 2008, the Company announced that it was winding down the Funds.

253. In June 2009, the Managed Funds' remaining \$2.5 billion in assets were transferred to an affiliate of Fortress Investment Group LLC, which took over managing those assets.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

254. Plaintiff has failed to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

255. Plaintiff's defamation claims are barred because the allegedly defamatory statements are expressions of opinion.

**THIRD AFFIRMATIVE DEFENSE**

256. Plaintiff's defamation claims are barred because the allegedly defamatory statements are true.

**FOURTH AFFIRMATIVE DEFENSE**

257. Plaintiff's defamation claims are barred because the allegedly defamatory statements are within the sphere of legitimate public concern and, in making the alleged statements, the Company and DBZLLC acted reasonably, in good faith, and in reliance on the conclusions reached as a result of the review conducted by outside counsel Schulte and the independent internal investigation conducted by Gibson Dunn.

**FIFTH AFFIRMATIVE DEFENSE**

258. Plaintiff's defamation claims are barred because the allegedly defamatory statements were privileged under the self-interest and common interest privileges, and the Company's and DBZLLC's actions, respecting the subject matters alleged in the causes of action, were undertaken in good faith, with the absence of malicious intent to injure Gruss, and constituted lawful, proper and justified means to further the sole purpose of engaging in and continuing the Company's and DBZLLC's business.

### SIXTH AFFIRMATIVE DEFENSE

259. Gruss held the position, responsibilities and title of Chief Financial Officer of the Company from July 2002 to October 4, 2006. Gruss also held the position, responsibilities and title of Chief Administrative Officer of the Company from approximately April 2005 to October 4, 2006. Gruss was also a partner in the Company and a member of DBZLLC from January 1, 2006 to October 4, 2006.

260. As Chief Financial Officer of, Chief Administrative Officer of, partner in the Company and/or member of DBZLLC, Gruss was assigned and had the duty and responsibility to supervise, and controlled, among other things, the financial affairs of the Company and the Managed Funds which the Company managed. These duties and responsibilities included, among other things, managing the Company's finance, accounting and treasury operations; supervising the Company's "back office;" assuring that the financial relations between the Company and the Managed Funds were proper and in accordance with the agreements and other documents regulating those relations; assuring that the financial relations between or among the Funds and Managed Accounts were proper and in accordance with the agreements and other documents regulating those relations; assuring that investments made by the Managed Funds were financed in a proper manner; assuring that financial transactions between the Company and the Managed Funds and between the Managed Funds were properly documented; and assuring that the financial affairs and rates of return of the Managed Funds were accurately and properly reported.

261. By virtue of the foregoing, the Company and DBZLLC placed special trust in Gruss, relied on his judgment, entrusted him with the power to manage and control the property of the Company and of the Managed Funds, and relied on him to discharge his duties and

responsibilities fully, properly and in good faith. Gruss owed a special duty to protect the interests of the Company and of the Managed Funds.

262. By virtue of the foregoing, Gruss owed a fiduciary duty to the Company and DBZLLC. Gruss's fiduciary duties included a duty of care, to exercise the amount of care that ordinarily careful and prudent persons would use in similar circumstances. His fiduciary duties also included a duty of good faith, to act in the best interest of and with an honesty of purpose and a genuine care for the Company and the Managed Funds.

263. By virtue of Gruss's actions, inactions and conduct set forth in Paragraphs 1 through 253 above, Gruss breached his fiduciary duties to the Company and DBZLLC. Gruss violated his duties and responsibilities to the Company and the Managed Funds. Gruss acted intentionally and/or with gross negligence; he consciously and intentionally disregarded his responsibilities, and his conduct constituted reckless indifference to and/or deliberate disregard for the interests of the Company and the Managed Funds, and Gruss acted outside the bounds of reason. Gruss also failed to act with an honesty of purpose and a genuine care for the Company and the Managed Funds. He intentionally acted with a purpose other than advancing the best interests of the Company and the Managed Funds and failed to act in the face of a duty to act.

264. By virtue of the foregoing, Gruss's breach of contract and promissory estoppel claims against the Company and DBZLLC are barred.

#### **SEVENTH AFFIRMATIVE DEFENSE**

265. Gruss was a partner in the Company and a member of DBZLLC from January 1, 2006 to October 4, 2006.

266. Certain rights and obligations of a partner in the Company are set forth in the Limited Partnership Agreement of D.B. Zwirn & Co., L.P., dated as of March 24, 2004 ("LP

Agreement”), as it may be amended. Certain rights and obligations of a member of DBZLLC are set forth in the Amended and Restated Limited Liability Company Agreement of Highbridge/Zwirn Partners, LLC, dated as of March 24, 2004, (“LLC Agreement”) as it may be amended.

267. Section 2.03 of the LP Agreement provides, in part, that each partner shall perform such duties relating to the Company and its investments as may be reasonably assigned to him from time to time by the General Partner, and that each partner agrees to perform his duties thereunder diligently, faithfully and loyally.

268. Section 2.04 of the LLC Agreement, provides, in part, that each member shall perform such duties relating to DBZLLC and its investments as may be reasonably assigned to him from time to time by the Managing Member, and that each member agrees to perform his duties thereunder diligently, faithfully and loyally.

269. DBZ GP, LLC, the General Partner of the Company, and Zwirn Holdings, LLC the Managing Member of DBZLLC, assigned Gruss the position and title of Chief Financial Officer and Chief Administrative Officer of the Company together with the duties and responsibilities of said positions, as set forth above.

270. By virtue of the actions, inactions, and conduct described in Paragraphs 1 through 253 above, Gruss did not perform his assigned duties and/or failed to perform his duties diligently, faithfully and loyally.

271. Gruss failed to perform his material obligations under the LP Agreement and the LLC Agreement.

272. Accordingly, Plaintiff’s breach of contract and promissory estoppel claims are barred.

### EIGHTH AFFIRMATIVE DEFENSE

273. In connection with Gruss's partnership in the Company and membership in DBZLLC, a "Supplementary Agreement Among D.B. Zwirn & Co., L.P., D.B. Zwirn Partners LLC and Perry A. Gruss" (the "Supplementary Agreement") and a Partner Confidentiality, Noncompete and Nonsolicit Agreement Among D.B. Zwirn & Co., L.P., D.B. Zwirn Partners, LLC, DBZ GP, LLC, Zwirn Holdings, LLC and Perry A. Gruss ("Confidentiality Agreement") were prepared. Although these agreements were not fully executed, the parties intended to be bound by their terms. The Supplementary Agreement and the Confidentiality Agreement, among other things, amended certain provisions of the LP Agreement and the LLC Agreement.

274. As amended, Section 6.02 (b)(i) of the LP Agreement provides that in the event that a partner such as Gruss is terminated for a Forfeiting Event, or voluntarily withdraws for other than a "Good Reason" as defined in the Supplementary Agreement, Gruss "shall not be entitled to any unpaid Management Fees, Incentive Fees or any other Net Income in which Gruss would otherwise share...."

275. As amended, Section 6.02(b)(i) of the LLC Agreement provides that in the event that a Member such as Gruss is terminated by DBZLLC for a Forfeiting Event, or voluntarily withdraws for other than a "Good Reason" as defined in the Supplementary Agreement, "such Member shall not be entitled to any portion of the unpaid Incentive Allocation or any other Net Income in which the Member would otherwise share...."

276. As amended, the LP Agreement and the LLC Agreement define a Forfeiting Event to mean when the partner or member has, among other things, (a) willfully failed to substantially perform his duties under, among other things, the LP Agreement or the LLC Agreement; (b) willfully and materially breached the LP Agreement or the LLC Agreement; (c)

acted grossly negligently or with willful misconduct; or (d) exhibited conduct tending to bring the Company into substantial disgrace or disrepute.

277. Gruss's actions, inactions and conduct, as set forth in Paragraphs 1 through 253 above, were Forfeiting Events because he (a) willfully failed to substantially perform his duties under the LP Agreement and the LLC Agreement, (b) willfully and materially breached the LP Agreement and LLC Agreement, (c) acted grossly negligently and with willful misconduct, and (d) exhibited conduct which tended to bring the Company into substantial disgrace or disrepute.

278. Gruss was terminated from the Company and DBZLLC because of Gruss's actions, inactions and conduct constituting a Forfeiting Event.

279. In the alternative, Gruss voluntarily withdrew from the Company and DBZLLC for reasons other than Good Reason.

280. By reason of the foregoing, Gruss is not entitled to and has forfeited any right to any unpaid portion of Management Fees, Incentive Fees, Incentive Allocation, or any other Net Income in which he would otherwise share.

## **COUNTERCLAIMS**

### **FIRST COUNTERCLAIM** **Breach of Fiduciary Duties**

281. The Company and DBZLLC repeat and reallege the allegations of Paragraphs 1 through 280, above.

282. Gruss held the position, responsibilities and title of Chief Financial Officer of the Company from July 2002 to October 4, 2006. Gruss also held the position, responsibilities and title of Chief Administrative Officer of the Company from approximately April 2005 to October 4, 2006. Gruss was also a partner in the Company and a member of DBZLLC from January 1, 2006 to October 4, 2006.

283. As Chief Financial Officer of, Chief Administrative Officer of, partner in the Company and/or member in DBZLLC, Gruss was assigned and had the duty and responsibility to supervise, and controlled, among other things, the financial affairs of the Company and the Managed Funds which the Company managed. These duties and responsibilities included, among other things, managing the Company's finance, accounting and treasury operations; supervising the Company's "back office;" assuring that the financial relations between the Company and the Managed Funds were proper and in accordance with the agreements and other documents regulating those relations; assuring that the financial relations between or among the Managed Funds were proper and in accordance with the agreements and other documents regulating those relations; assuring that investments made by the Managed Funds were financed in a proper manner; assuring that financial transactions between the Company and the Managed Funds and between the Managed Funds were properly documented; and assuring that the financial affairs and rates of return of the Managed Funds were accurately and properly reported.

284. By virtue of the foregoing, the Company and DBZLLC placed special trust in Gruss, relied on his judgment, entrusted him with the power to manage and control the property of the Company and of the Managed Funds, and relied on him to discharge his duties and responsibilities fully, properly and in good faith. Gruss owed a special duty to protect the interests of the Company and of the Managed Funds.

285. By virtue of the foregoing, Gruss owed a fiduciary duty to the Company and DBZLLC. Gruss's fiduciary duties included the duty of care, to exercise the amount of care that an ordinarily careful and prudent persons would use in similar circumstances. His fiduciary duties also included a duty of good faith, to act in the best interest of and with an honesty of purpose and a genuine care for the Company and the Managed Funds.

286. By virtue of Gruss's actions, inactions and conduct set forth in Paragraphs 1 through 253 above, Gruss breached his fiduciary duties to the Company and DBZLLC. Gruss violated his duties and responsibilities to the Company and the Funds and Managed Accounts. Gruss acted intentionally and/or with gross negligence, and his conduct constituted reckless indifference to and/or deliberate disregard for the interests of the Company and the Funds and Managed Accounts under its management, and Gruss acted outside the bounds of reason. Gruss also failed to act with an honesty of purpose and a genuine care for the Company and the Funds and Managed Accounts.

287. Gruss's actions, inactions and conduct arose out of and/or is attributable to gross negligence, willful misconduct and/or bad faith by Gruss.

288. Gruss's breaches of his fiduciary duties caused the Company enormous injury. Gruss's misconduct required and caused the Company to have two internal investigations performed. The investigations necessitated the services of attorneys, accountants and other professionals and caused the Company to incur substantial fees and expenses to said professionals. In addition, the Company disclosed Gruss's misconduct to the United States Securities and Exchange Commission, which commenced an investigation of the Company in March 2007 and which investigation is not completed. As a result, the Company incurred yet further substantial fees and expenses to attorneys, accountants and other professionals. To date, Company's expenditures for such fees and expenses total at least \$34.8 million.

289. In addition, the Company took various steps to remediate Gruss's misconduct. To make such remediation, the Company incurred costs in an amount to be proven at trial, but believed to be in excess of \$8.5 million.

290. By reason of the foregoing, Gruss has damaged the Company in an amount to be determined at trial, but believed to be in excess of \$43.3 million.

**SECOND COUNTERCLAIM**  
**Breach of Contract**

291. The Company and DBZLLC repeat and reallege the allegations of Paragraphs 1 through 290, above.

292. Gruss was a partner in the Company and a member of DBZLLC from January 1, 2006 to October 4, 2006.

293. Section 2.03 of the LP Agreement provides, in part, that each partner shall perform such duties relating to the Company and its investments as may be reasonably assigned to him from time to time by the General Partner, and that each partner agrees to perform his duties thereunder diligently, faithfully and loyally.

294. Section 2.04 of the LLC Agreement, provides, in part, that each member shall perform such duties relating to DBZLLC and its investments as may be reasonably assigned to him from time to time by the Managing Member, and that each member agrees to perform his duties thereunder diligently, faithfully and loyally.

295. DBZ GP, LLC, the General Partner of the Company, and Zwirn Holdings, LLC, the Managing Member of DBZLLC, assigned Gruss the position and title of Chief Financial Officer and Chief Administrative Officer of the Company together with the duties and responsibilities of said positions, as set forth above.

296. By virtue of the actions, inactions, and conduct described in Paragraphs 1 through 253 above, Gruss did not perform his assigned duties and/or failed to perform his duties diligently, faithfully and loyally.

297. By virtue of the foregoing, Gruss breached the LP Agreement and the LLC Agreement.

298. Gruss's actions, inactions and conduct arose out of and/or is attributable to gross negligence, willful misconduct and/or bad faith by Gruss.

299. Gruss's breaches of his contractual obligations caused the Company enormous injury. Gruss's misconduct required and caused the Company to have two internal investigations performed. The investigations necessitated the services of attorneys, accountants and other professionals and caused the Company to incur substantial fees and expenses to said professionals. In addition, the Company disclosed Gruss's misconduct to the United States Securities and Exchange Commission, which commenced an investigation of the Company in March 2007 and which investigation is not completed. As a result, the Company incurred yet further substantial fees and expenses to attorneys, accountants and other professionals. To date, Company's expenditures for such fees and expenses total at least \$34.8 million.

300. In addition, the Company took various steps to remediate Gruss's misconduct. To make such remediation, the Company incurred costs in an amount to be proven at trial, but believed to be in excess of \$8.5 million.

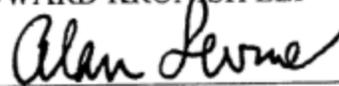
301. By reason of the foregoing, Gruss has damaged the Company in an amount to be determined at trial, but believed to be in excess of \$43.3 million.

WHEREFORE, the Company and DBZLLC respectfully request judgment against plaintiff dismissing the Complaint in its entirety with prejudice; granting judgment against plaintiff on the counterclaims asserted herein in an amount to be determined at trial, but believed to be in excess of \$43.3 million; and granting other relief as this Court may deem just and proper.

Dated: October 5, 2009  
New York, NY

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**CERTIFICATE OF SERVICE**

I certify that the foregoing Answer and Counterclaims of Defendants D.B. Zwirn & Co., L.P. and D.B. Zwirn Partners, LLC, dated October 5, 2009, was served by electronic means through the Court's ECF system on October 5, 2009 and by Federal Express upon:

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Dated: New York, New York  
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s/ Alan Levine  
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