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July 21, 2011

**BY HAND DELIVERY**

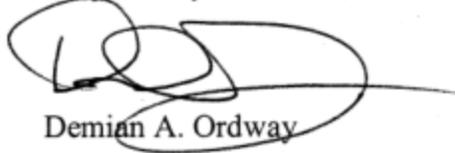
The Honorable Anthony J. Carpinello (Ret.)  
Arbitrator, JAMS  
620 Eighth Avenue, 34th Floor  
New York, NY 10019

Reference No. 1425006537: *In the Matter of the Arbitration Between  
Fortress VRF I LLC, Claimants, and Jeepers, Inc., Respondent*

Dear Judge Carpinello:

Attached you should find: (1) a hard copy of Claimants' Memorandum of Law in Opposition to Financial Trust Company, Inc.'s and Jeepers, Inc.'s Motion *In Limine* "To Exclude Extrinsic Evidence"; (2) a binder of exhibits cited in the memorandum; and (3) a binder of cases cited in the memorandum.

Respectfully submitted,



Demian A. Ordway

Attachments

cc: Harry Susman (counsel for Financial Trust Company, Inc. and Jeepers, Inc.)  
John Siffert and Daniel Reynolds (counsel for Daniel B. Zwirn)  
William Schwartz and William O'Brien (counsel for D.B. Zwirn Partners, LLC;  
D.B. Zwirn & Co., L.P.; DBZ GP, LLC; and Zwirn Holdings, LLC)

**JUDICIAL ARBITRATION AND MEDIATION SERVICE  
NEW YORK, NEW YORK**

IN THE MATTER OF

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

v.

JEEPERS, INC.,  
Respondent

and

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

v.

FORTRESS VALUE RECOVERY FUND I  
LLC,  
Counter-Respondent

and

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

JAMS Reference No. 1425006537

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

**CLAIMANTS' MEMORANDUM OF LAW  
IN OPPOSITION TO FINANCIAL TRUST  
COMPANY, INC.'S AND JEEPERS INC.'S  
MOTION *IN LIMINE* "TO EXCLUDE  
EXTRINSIC EVIDENCE"**

Claimants Fortress VRF I LLC ("VRF I LLC") and Fortress Value Recovery Fund I LLC (f/k/a the D.B. Zwirn Special Opportunities Fund L.P.) (the "Fund") (and together with VRF I LLC, "Claimants") respectfully submit this memorandum of law in opposition to Respondent Jeepers, Inc. and Counter-Claimant Financial Trust Company, Inc.'s ("FTC's") (together, "Jeepers's") motion *in limine* "to exclude extrinsic evidence

related to the breach of contract claims against D.B. Zwirn Special Opportunities Fund, L.P. k/n/a Fortress Value Recovery Fund I LLC ([the] “Fund”), [and] D.B. Zwirn Partners, LLC, D.B. Zwirn & Co. L.P., DBZ GP LLC, Zwirn Holdings LLC, and Daniel Zwirn [together, the “Zwirn Parties”].” (Financial Trust Company, Inc.’s and Jeepers Inc.’s Motion *In Limine* to Exclude Extrinsic Evidence at 1.)

### **Preliminary Statement**

At the outset, we should note that Jeepers’s description of its own motion is inaccurate. To begin with, Jeepers has not asserted any claim for breach of contract against the Zwirn Parties. As to the Fund, Jeepers has asserted two contract claims, one of which is for breach of an alleged “oral contract.” Jeepers’s motion clearly cannot apply to the “oral contract” claim, as the parol evidence rule only operates to exclude evidence where there is an integrated, written agreement, and does not apply to an alleged “oral contract.” *Husband (P. J. O.) v. Wife (L. O.)*, 418 A.2d 994, 996 (Del. 1980) (“The parol evidence rule excludes evidence of additional terms to a *written* contract, when that contract is a complete integration of the agreement of the parties.”) (emphasis added).

Even as to its remaining written contract claim, Jeepers’s motion is misdescribed. As Jeepers has made clear in its Pre-Trial Brief (p. 12), Jeepers is alleging that the Fund breached a January 1, 2005 side letter agreement with Jeepers relating to Jeepers’s fifth (January 1, 2005) investment in the Fund (the “Side Letter”). As Jeepers appears to concede, that Side Letter cannot possibly be interpreted on its own. Even Jeepers concedes that the Side Letter expressly refers to the Fund’s 2003 Restated Limited Partnership Agreement (the “LPA”), thereby allowing consideration of evidence extrinsic to the Side Letter “right off the bat.” To give Jeepers the benefit of the doubt, therefore, its motion would need to be construed as a motion for the exclusion, in considering its claim

for breach of the Side Letter, of all evidence *other than* the LPA. Even as so interpreted, the motion should fail.<sup>1</sup>

According to Jeepers, all of the evidence (other than the LPA) should be excluded on the breach of written contract claim because: (1) the terms of the relevant contract (again, really contracts, as Jeepers would allow the Arbitrator to consider the LPA in addition to the Side Letter) are unambiguous; (2) if those agreement(s) are in fact ambiguous, the doctrine of *contra proferentem* applies and, not only does it apply, but it requires that no extrinsic evidence be considered; and (3) the extrinsic evidence Jeepers anticipates the other parties will use, if they are allowed to introduce extrinsic evidence, is inadmissible. Jeepers makes these arguments on a motion *in limine* despite multiple opportunities to raise the issue previously, including in a motion for judgment on the pleadings, or for summary judgment. If Jeepers truly believed this was a winning argument, presumably it would have brought it earlier and saved all the parties a great deal of time and expense.

The truth, of course, is that it is not a winning argument. As argued in their Pre-Hearing Brief, Claimants' (and the Zwirn Parties') reading of the two agreements at issue—that (a) under the LPA, each investment in the Fund was subject to its own, two-year “lock-up” and (b) the Side Letter was merely intended to allow Jeepers's fifth,

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<sup>1</sup> We also note that Jeepers's motion ignores the fact that the extrinsic evidence it purportedly seeks to exclude may well be admissible as to a variety of other issues in the arbitration, including the breach of the “oral contract” claim and Claimants' claim for a declaration of Jeepers's rights with respect to the Fund. Additionally, we understand that the Zwirn Parties contend that the extrinsic evidence is, in any event, relevant to their “exculpatory clause” defense to Jeepers's fraud and breach of fiduciary duty claims.

January 1, 2005 investment in the Fund to be subject to a two-year, and not a three-year lock-up—is the far more sensible one. At the very least, because Claimants’ and the Zwirn Parties’ reading of these two agreements is certainly reasonable, the documents on their face do not unambiguously favor Jeepers’s position. The law is absolutely clear that, in the event the Arbitrator finds that both Claimants’/Zwirn Parties’ and Jeepers’s interpretations of the documents are reasonable, the Arbitrator may consider extrinsic evidence to determine the meaning of those documents.

Jeepers’s remaining arguments are easily disposed of. Because the Side Letter was the product of bilateral negotiations between the Fund and Jeepers, the doctrine of *contra proferentem*, which is applied in the insurance or similar contexts where one party with superior bargaining position imposes a contract of adhesion on another party (or other parties), has no application here. Indeed, the fact that Jeepers was able to negotiate the Side Letter demonstrates that the LPA itself was not a mere contract of adhesion that Jeepers was required to accept, but rather a document Jeepers felt perfectly free to negotiate over and to amend. The doctrine simply does not apply to either the Side Letter or the LPA.

Finally, Jeepers’s claim that Claimants’ extrinsic evidence is, in any event, inadmissible lacks any merit. As to the Side Letter, there were documents exchanged between the parties leading up to it that make clear the Side Letter only involved Jeepers’s fifth investment. Such documents are clearly admissible under any standard. As to the LPA, there is a substantial body of evidence as to how the Fund not only understood the LPA’s withdrawal provisions but in fact construed them when other investors withdrew their money, not to mention evidence of well-settled customs and practices in the hedge

fund industry that would clearly indicate that the two-year “rolling” lock-ups in the LPA applied on an “investment by investment” basis. Such evidence is also clearly admissible.

### **Background**<sup>2</sup>

Jeepers is an investor in the Fund, a hedge fund that has dissolved and is currently winding up under the supervision of VRF I LLC. Jeepers made five investments in the Fund: (1) \$10 million on May 1, 2002; (2) \$10 million on September 1, 2002; (3) \$30 million on December 1, 2002; (4) \$10 million on June 1, 2003; and (5) \$20 million on January 1, 2005. Each time Jeepers invested in the Fund, it was required to execute a subscription agreement and to execute the Fund’s LPA. Each time, it was “admitted” as a limited partner in the Fund.

Section 9.1 of the LPA states:

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

(LPA, Ex. A.) There is a similar provision (Section 9.2) with respect to partial withdrawals of a Capital Account.

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<sup>2</sup> Claimants summarize the relevant facts here. For a more detailed recitation, Claimants respectfully refer the Arbitrator to pages 4 to 27 of their Pre-Hearing Brief.

The term "Capital Account" is defined in Section 6.1 of the LPA:

6.1. Capital Accounts. A "Capital Account" shall be maintained for each Partner. For the Fiscal Period during which a Partner is admitted to the Partnership, the Partner's capital Account will initially equal the Partner's Initial Capital Contribution. For each Fiscal Period after the Fiscal Period in which a Partner is admitted to the Partnership, the Partner's Capital Account will equal the sum of the amount of the Partner's Capital Account as finally adjusted for [profits or losses at the Fund], increased by the amount of any Additional Capital Contribution made by the Partner as of the first day of the Fiscal Period.

The term "Additional Capital Contribution" is defined separately in Section 5.3, which states that "[t]he General Partner . . . in its sole discretion, may permit Limited Partners to make Additional Capital Contributions as of the first Business Day of each month or at such other times and subject to such conditions and minimum amounts as the General Partner shall determine." Mr. Epstein concedes he did not read the LPA prior to investing in the Fund.

Prior to Jeepers's fifth investment in the Fund, the Fund switched from a two-year lock-up on investments in the Fund, to a three-year lock-up system. Learning of this, Mr. Epstein requested that his new investment have only a two-year lock-up, not a three-year lock-up. The parties agreed to that, and the Fund prepared the Side Letter, which was transmitted to Jeepers with a note saying, "Attached please find the side note relating to [FTC's] January 1, 2005 investment [in the Fund]." (Side Letter, Ex. B at 1.) The Side Letter itself states (in its entirety):

Re: January 1 Investment in D.B. Zwirn Special Opportunities Fund, L.P. (the "Fund")

Dear Mr. Epstein,

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 and as of the second anniversary of that date thereafter 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.

Yours truly,

/s/ Daniel B. Zwirn  
Daniel B. Zwirn  
Managing Principal

(Side Letter, Ex. B at 2.) All parties agree that the "Interest" referred to in the Side Letter is Jeepers's January 1, 2005 investment in the Fund. All parties agree that the Side Letter permitted Jeepers to withdraw its fifth investment on a two-year rolling cycle based off the date of that investment.

There is, however, a vigorous debate as to the withdrawal dates on Epstein's first four investments, and whether the Side Letter had any effect on those dates. According to Jeepers, its investments had always had a single withdrawal schedule, set by the date of its very first investment in the Fund on May 2, 2002. It reads Sections 6.1 and 9.1 of the LPA to provide that each investor was assigned a single Capital Account into which all of its investments were placed, and all of the investments could be withdrawn on the single two-year rolling lock-up schedule set by the investor's first investment in the Fund. Jeepers further argues that the Side Letter was thus intended and should be read to

change all of the withdrawal dates for all of its investments to a rolling two-year cycle based on the date of the fifth investment (January 1, 2005).

The Fund strongly disagreed with this position at the time the issue first arose, and Claimants now believe the Fund was correct on this issue. As to the LPA, Claimants believe that the LPA did not set any single withdrawal schedule for each investor, no matter how many subsequent investments it made or when it made those investments. Rather, under Sections 9.1 and 9.2 of the LPA, which refer to the anniversary dates of the investor's "Interests" in the Fund, each investment (or "Interest") received its own two-year lock-up. While admittedly, Section 6.1 of the LPA permitted the General Partner to exercise its discretion to allow further investments to be included in the same "Capital Account" as an initial investment, there is no evidence the General Partner ever exercised such discretion with respect to Mr. Epstein or his entities. (Indeed, the reference to such discretion makes clear that the LPA cannot be interpreted without resort to extrinsic evidence in any event.)

Claimants believe that support for this view is found not only in the language of the LPA, but also in the consistent practice of the Fund's treatment of each investment as subject to a two-year lock-up (even where multiple investments were made by a single investor). Evidence of this shared practice includes numerous internal Fund documents, (*see, e.g.*, E-mail Correspondence between Mr. Zwirn and Allyson Alimansky, Ex. C (Alimansky: "[Investor] asked one question I was not sure about – if they make one investment Sept 1 and then add to the investment Oct 1, do those investments have the same or different rolling lockup periods?" Zwirn: "Each piece of capital has its own lock. No combo."), Internal Fund Spreadsheet of Redemption Schedules, Ex. D (listing separate

redemption dates for each investment)), as well as correspondence with other investors, (see, e.g., E-mail from Allyson Alimansky to Mr. Zwirn, Ex. E (“[Investor] called today – she wants to redeem her entire LP investment asap so that her kid can use it to buy a house. I explained the lockup terms to her (\$250k is redeemable in Aug 05 and \$300k is redeemable in June 06) . . . .”)).

Indeed, when the Fund clearly explained its position to investors (including Jeepers) in memoranda to investors in 2004 and 2005, not one investor objected. (See Memorandum to Investors dated November 2004, Ex. F at 1 (“Any interest purchased by a limited partner on or after January 1, 2005 will be subject to a “rolling” three-year lock-up. . . . Any *interest* purchased prior to January 1, 2005 will indefinitely remain subject to *its* current lock-up.” (emphasis added)); 2005 Confidential Memorandum, Ex. G at 8 (“For purposes of determining the withdrawal date (the “Withdrawal Date”) with respect to Interests, a separate Capital Account will be established for each Interest purchased (i.e., each capital contribution made).”)).

Claimants believe it would therefore be grossly unfair to treat Jeepers in a manner differently than other investors were treated. Indeed, Claimants’ expert will testify that no reasonable investor in the industry would invest in a hedge fund like the Fund and believe that withdrawal rights would operate the way Jeepers claims they operated here. And indeed the Fund’s reading of the LPA is far more logical because Jeepers’s reading would mean an investor could completely thwart the two-year lock-up scheme by investing a minimal amount of money “up front,” and then investing the bulk of its funds a year (or more) later, in which case the two-year lock-up would be entirely defeated.

In addition, Jeepers's reading of the Side Letter makes no sense at all. As noted above, and as the transmittal document for the Side Letter made clear, the Side Letter dealt only with Jeepers's fifth, January 1, 2005 investment. That is certainly how the Fund understood and treated it. There is no evidence that, at the time of the Side Letter, Mr. Epstein wanted to change any of the lock-up dates on his prior investments. Indeed, under Jeepers's reading of the Side Letter, the Letter would have *extended* lock-ups on a number of Jeepers's prior investments when there would have been no reason to do so. That reading just does not work.

### **Argument**

#### **I.**

### **CLAIMANTS' INTERPRETATION OF THE AGREEMENTS IS THE MOST REASONABLE ONE**

As noted, Claimants (and the Zwirn Parties) read the Side Letter to address only the withdrawal of Jeepers's January 1, 2005 investment. Indeed, just from reading the face(s) of the Side Letter and the LPA, Claimants' reading emerges as by far the most reasonable one. Where the contract terms "establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language," then "[the] [c]ontract terms themselves will be controlling." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). A court determines whether an interpretation is "reasonable" from the perspective of a third party. *Dittrick v. Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007) ("[If] a reasonable third party would be unable to determine the meaning of certain contractual provisions, the agreement is considered ambiguous.").

On its face, the Side Letter states the subject of the agreement in the very first line: “Re: January 1 Investment in D.B. Zwirn Special Opportunities Fund, L.P.” In no other year did Jeepers make an investment on January 1st, and the letter itself is dated January 11, 2005, just days after the January 1, 2005 investment. The Side Letter makes no references to other “Interests” or past investments. The most natural reading of the language, therefore, is that the letter grants Jeepers the option to withdraw the value of its January 1, 2005 investment at two-year intervals or, equivalently, according to its own two-year “lock-up.”

This reading is also the only reading that makes sense in light of the fact that, at the time the Side Letter was executed, the Fund had just switched from a two-year lock-up to a three-year lock-up for all new investments made on or after January 1, 2005. Because Jeepers made its last investment on January 1, 2005, that investment would have been subject to a three-year lock-up had the Side Letter not expressly made that investment subject to a two-year lock-up. Given these undisputed circumstances surrounding its execution, the Side Letter is most naturally read to effect only this change. Again, Mr. Epstein would have no reason to change any lock-ups on any prior investments.

In contrast, Jeepers’s interpretation would essentially re-write the first line of the letter to read “Re: January 1 Investment in D.B. Zwirn Special Opportunities Fund, L.P. and All Previous Investments.” Given the absence of any reference to any investment besides the January 1, 2005 investment, there is absolutely no justification for such an interpretation. Further, Jeepers has no explanation for why either it or the Fund would modify the lock-up schedule for all of Jeepers’s investments when only investments made

on or after January 1, 2005 would be affected by the Fund's switch from two-year to three-year lock-ups.<sup>3</sup>

While Jeepers argues that the Side Letter needs to be read in conjunction with the LPA, those provisions support Claimants' reading, not Jeepers's. Rather than providing that subsequent investments by a Fund investor are automatically added to a single investor Capital Account, the document requires the General Partner of the Fund to exercise its discretion to do so. There is no evidence the General Partner ever exercised this discretion for Jeepers.

Indeed, as Claimants explained in their Pre-Hearing Brief, the language of the LPA is best read to mean that each investment created a separate "Capital Account" for purposes of withdrawals. At the end of the quarter following two-year anniversaries of each investment, the investor could withdraw the value of that investment. Section 9.1 states that an investor may withdraw its "Capital Account" at two-year intervals "after the Limited Partner *initially purchases Interests.*" The use of the plural "Interests" indicates

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<sup>3</sup> In a 2004 memorandum to all investors, including Jeepers, the Fund was explicit that the switch to a three-year lock-up was *not* retroactive. (Memorandum dated November 17, 2004, Ex. F at 1 ("Any interest purchased by a limited partner on or after January 1, 2005 will be subject to a 'rolling' three-year lock-up. To illustrate, an interest purchased on January 1, 2005 by a limited partner (including by an existing limited partner) may be withdrawn by such limited partner on December 31, 2007, December 31, 2010, December 31, 2013, and so on. Any interest purchased prior to January 1, 2005 will indefinitely remain subject to its current lock-up."))

In fact, the switch to three-year lock-ups makes clear that Jeepers's reading of the LPA cannot be correct. As even Jeepers would concede, investors who invested both prior to and following January 1, 2005 clearly had investments in the Fund with different lock-up dates. As a result, Jeepers's "single Capital Account"/"single lock-up" theory does not work.

that the two-year intervals were measured not from a single date but multiple dates, or, put another way, were measured from the purchase of each “Interest.”

Jeepers’s reading of the LPA is unreasonable because it re-writes the language of the LPA. Jeepers would re-write Section 9.1 to read “after the Limited Partner initially purchased *its first Interest*,” requiring that the two-year lock-up always be measured from the date of the initial investment. But the provision simply does not say what Jeepers wants it to say. Again, the better reading is that (a) each investment created a separate Capital Account, and (b) the Side Letter meant that Jeepers could withdraw amounts attributable to Jeepers’s January 1, 2005 investment on a rolling, *two-year* basis, not a three-year one.

Ironically, should the Arbitrator agree with Claimants that theirs is the *only* reasonable interpretation of the Side Letter and the LPA, Jeepers is correct that extrinsic evidence should be excluded. In that case, judgment on Jeepers’s written contract claim should be entered *against* Jeepers.

## II.

### **AT THE LEAST, THE DOCUMENTS ARE AMBIGUOUS, AND THUS EXTRINSIC EVIDENCE IS ADMISSIBLE**

Jeepers argues that the Arbitrator must exclude extrinsic evidence related to the agreement(s) because the Side Letter and the LPA unambiguously support its position. Jeepers relies on the principle that where an integrated, written contract is unambiguous, “extrinsic evidence may not be used to interpret the intent of the parties.” *Eagle Indus., Inc.*, 702 A.2d at 1232. Because Jeepers has failed to demonstrate that the contract unambiguously supports its position, this argument fails.

Jeepers's argument that the agreements here could only reasonably be read unambiguously in its favor is essentially one for summary judgment on Jeepers's written contract claim. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("The proper construction of any contract . . . is purely a question of law."). A contract is ambiguous "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings." *Eagle Indus., Inc.*, 702 A.2d at 1232. Accordingly, for Jeepers to prevail on this point, it must demonstrate, as a matter of law, "that its construction of the . . . agreement is the *only* reasonable interpretation." *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007). But, if Claimants' interpretation is also reasonable, "consideration of extrinsic evidence is *required* to determine the meanings the parties intended." *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008); *accord Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 339 (Del. Ch. 2008).

As discussed above, Jeepers's interpretation is not reasonable, let alone the only reasonable interpretation. Its interpretation re-writes both the Side Letter and the LPA and provides no explanation for why the Side Letter would modify the lock-up cycle for Jeepers's other investments, given that the Fund's switch from two to three-year lock-ups affected only investments made on or after January 1, 2005. *Eagle Indus., Inc.*, 702 A.2d at 1232 n.7 (noting that it would not violate the bar on extrinsic evidence to "consider some undisputed background facts to place the contractual provision in its historical setting"). In contrast, Claimants' interpretation gives the relevant provisions their plain meaning and is entirely consistent with the context of the Side Letter and the LPA. At the

very least, Claimants' interpretation is reasonable, and there are thus two reasonable interpretations of the documents. Accordingly, Jeepers's argument fails.

In that event, extrinsic evidence may be considered. Evidence is "extrinsic" if it is relevant to "determining the parties' reasonable intentions at the time of the contract" and includes "overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry." *Dittrick*, 948 A.2d at 406. This is precisely the type of evidence Claimants (and the Zwirn Parties) believe should be heard—and will make clear that their interpretation is by far the more reasonable one. See *United Rentals, Inc.*, 937 A.2d at 834.

### III.

#### **JEEPERS MISAPPLIES THE DOCTRINE OF *CONTRA PROFERENTEM***

Jeepers also argues that, even if the Arbitrator were to find the documents ambiguous, the Arbitrator should nonetheless exclude extrinsic evidence because of the doctrine of *contra proferentem* (from the Latin, for "against the offeror"). The doctrine, which is traditionally applied to insurance contracts or other contracts of adhesion, holds that, where ambiguity in an agreement exists, it should be construed against the drafter. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998) ("It has long been established that ambiguous provisions in contracts of insurance are to be construed against the insurer."). Relying largely on *SI Management L.P. v. Wininger*, Jeepers argues that the doctrine also applies to ambiguities found in limited partnership agreements and requires the exclusion of extrinsic evidence here. Jeepers is wrong on several counts.

In *SI Management*, a limited partnership was formed for the purpose of acquiring all the stock of a company named Synthetic Industries, Inc. Approximately 1,850 investors contributed money to the partnership and became limited partners. At

some point, Synthetic Industries made a public offering and disagreements arose concerning how to maximize the value of the partnership. The partnership's general partner responded by proposing a plan of withdrawal and dissolution that would compensate investors. Certain investors, however, sued to block the plan, claiming that it violated the limited partnership agreement. In affirming the Chancery Court's ruling in favor of the suing investors/limited partners, the Delaware Supreme Court applied the doctrine of *contra proferentem* to construe ambiguities in the contract against the general partner in its dispute with the limited partners, and excluded extrinsic evidence.

In so doing, the Court explained the purpose of the doctrine, relying principally on the analogy to insurance agreements:

The policy behind this principle is that the insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear. Convolved or confusing terms are the problem of the insurer or issuer—not the insured or investor.

*SI Mgmt L.P.*, 707 A.2d at 42. Reasoning from this policy, the Court noted that the limited partnership agreement at issue “was not a bilateral negotiated agreement.” *Id.* at 43.

Rather, it appeared that “the General Partner solicited and signed on 1,850 investors to the Agreement that those investors had no hand in drafting.” *Id.* “Based on that premise, the principle of *contra proferentem* applies.” *Id.*

This case is clearly distinguishable from *SI Management* in numerous ways. To begin with, *SI Management* has nothing at all to do with the Side Letter, which is supposedly the foundation of Jeepers's contract claim. The Side Letter was clearly a

“bilateral negotiated agreement.” *Id.* Mr. Epstein himself has testified that he requested an exception be made for him regarding his January 1, 2005 investment because he did not want his money locked up for more than two years (Ex. H at 22:17-25, 26:1-19), and internal documents confirm that the Side Letter was drafted as an accommodation for Mr. Epstein.<sup>4</sup>

Indeed, there is no question here that, although the Fund prepared the draft of the Letter, Jeepers had every opportunity to negotiate that document. The Side Letter was not a contract of adhesion.

The law is clear that it is not material that it was the Fund’s in-house lawyers who actually put the words of the Side Letter on paper. *See I.U. N. Am., Inc. v. A.I.U. Ins. Co.*, 896 A.2d 880, 885 (Del. Super. 2006) (“Where all parties to a contract are knowledgeable, there is no reason for [construing ambiguities] against the party who drafted the final provision.”). Both sides were represented by counsel, and there is no issue here of unequal bargaining power or of any unconscionability. *See Wilmington Firefighters Ass’n, Local 1590 v. City of Wilmington*, 02 Civ. 19035, 2002 WL 418032, at \*10 (Del. Ch. Mar. 12, 2002) (rejecting application of *contra proferentem* when “parties of equal bargaining power . . . had more than ample opportunity to make amendments or otherwise modify [an agreement’s] terms”).

The fact that Jeepers did not specifically negotiate for a modification of the draft Side Letter’s terms is also irrelevant. *See Tenneco Automotive Inc. v. El Paso Corp.*,

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<sup>4</sup> Extrinsic evidence is always admissible to determine whether a contract was negotiated. *See ConAgra Foods, Inc. v. Lexington Ins. Co.*, --- A.3d ---, 2011 WL 1599621, at \*8 (Del. Apr. 28, 2011) (refusing to apply *contra proferentem* before consideration of extrinsic evidence for the purposes of resolving ambiguity when the same evidence demonstrated that the contract was negotiated).

04 Civ. 18810, 2004 WL 3217795, at \*8 (Del. Ch. Aug. 26, 2004) (refusing to apply *contra proferentem* when “[t]here is no evidence from which the Court can conclude that El Paso, if it had taken the time or had the inclination, would not have been able to negotiate for other words or terms in the Insurance Agreement”); *Wilmington Firefighters Ass'n, Local 1590*, 2002 WL 418032, at \*10.

Second, even as to the LPA itself, *SI Management* is distinguishable because the dispute over the LPA is not one between a drafter with all of the bargaining power and a powerless victim of a contract of adhesion. Indeed, the Side Letter is but one piece of evidence among many that, far from being an anonymous investor who could only “take it or leave it,” Mr. Epstein had significant bargaining power in his dealings with the Fund. (See, e.g., E-mail from Mr. Zwirn to Mr. Dubin, Ex. I (“We have done back flips for Jeffrey [Epstein] and, as a large, early and important investor, will continue to do so at his convenience.”).) As Mr. Epstein likes to point out, he was the first and largest investor in the Fund. (See Ex. H at 31:9-17, 41:23-42:10.)

Indeed, Jeepers has boasted of the fact that Mr. Epstein would mark up documents received from the Fund to suit his purposes. (Jeepers’s Pre-Hearing Brief at p. 10.) Thus, for example, Jeepers has pointed to its handwritten modifications to certain Fund documents. (Subscription Documents, Ex. J.) And, the very existence of the Side Letter itself shows that Mr. Epstein was perfectly capable of modifying the LPA when Mr. Epstein wished to do so.

Third, *SI Management* was a dispute between a general partner in a partnership and the limited partners, in which the general partner had developed a form agreement, and thousands of investors had no choice but to sign on or forego investing in

the partnership. The dispute here, in reality, involves the proper allocation of the Fund's assets *among investors*. The real parties-in-interest here are those investors in the Fund who stand to lose money if Jeepers is successful on its claims. Indeed, were the Arbitrator to apply *contra proferentem*, it is not the drafter of the LPA that would be penalized, but the Fund's other investors—the very parties the doctrine is supposed be protecting.

The other authorities Jeepers cites are similarly distinguishable because the contracts at issue were not bilaterally negotiated or reached by parties with equal bargaining power. *See, e.g., Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392 (Del. 1996) (contract for redemption rights drafted exclusively by majority shareholder); *Stockman v. Heartland Indus. Partners L.P.*, 09 Civ. 4227, 2009 WL 2096213 (Del. Ch. July 14, 2009) (claim for indemnification by company officers who did not negotiate the indemnity's terms); *Greco v. Columbia/HCA Healthcare Corp.*, 99 Civ. 16801, 1999 WL 1261446 (Del. Ch. Feb. 12, 1999) (same).

Accordingly, *contra proferentem* does not even apply to this case, let alone prohibit the consideration of extrinsic evidence here.

#### IV.

#### **CLAIMANTS' EXTRINSIC EVIDENCE IS ADMISSIBLE**

Assuming the Arbitrator considers extrinsic evidence, Jeepers finally argues that the evidence Claimants plan to submit is irrelevant and therefore inadmissible. Specifically, Jeepers argues that (1) evidence of the Fund's understanding of the Side Letter and the LPA is irrelevant, (2) evidence of the understanding of other investors is irrelevant, (3) testimony from Claimants' expert concerning custom and usage in the hedge fund industry is irrelevant, and (4) the Fund's 2005 Confidential Memorandum is irrelevant. As an initial matter, Jeepers's argument fails as to "all" extrinsic evidence

because these four categories do not exhaust the extrinsic evidence Claimants plan to submit. But even as to the evidence in these categories, Jeepers's arguments are simply not supported by the case law.

The purpose of extrinsic evidence is to "render an ambiguous contract clear so that an objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be." *United Rentals, Inc.*, 937 A.2d at 835 (internal quotation marks omitted). Where both parties had the same understanding of the contract's meaning "relevant extrinsic evidence is that which reveals the parties' intent *at the time they entered into the contract.*" *Eagle Indus., Inc.*, 702 A.2d at 1233 n.11 (emphasis in original). Where the evidence is not conclusive of the parties' shared intent, "a court may consider [evidence of] the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party." *United Rentals, Inc.*, 937 A.2d at 835. This evidence may include "overt statements and acts of the parties, the business context [of the contract], prior dealings between the parties, business custom, and usage in the industry." *Dittrick*, 948 A.2d at 406.

As noted above, there is a great deal of extrinsic evidence satisfying these principles and relevant to the interpretation of the Side Letter, almost none of which is mentioned among Jeepers's four categories. Such evidence includes memoranda sent to all investors (including Jeepers), (*see, e.g.*, Memorandum to Investors dated November 2004, Ex. F), prior and contemporaneous e-mails concerning the Side Letter, (*see, e.g.*, December 2004 E-mail Correspondence between Mr. Zwirn and Mr. Dubin, Ex. K (Mr. Zwirn: "we're done, ftc in for \$20mil jan 1 L.P. . . . This is the last 2 year money will

take from anyone of course”; Mr. Dubin: “of course”), the e-mail transmittal note accompanying the Side Letter itself, (E-mail from Heath Weisberg to Harry Beller, Ex. B at 1) (“Attached please find the side note relating to [FTC’s] January 1, 2005 investment in [the Fund].”), as well as the testimony of Fund employees as to the Side Letter. All of this evidence is clearly probative of what the parties to the Side Letter intended at the time of its execution both subjectively and as they objectively manifested it. *See Eagle Indus., Inc.*, 702 A.2d at 1233 n.11; *United Rentals, Inc.*, 937 A.2d at 835.

As to the LPA, and contrary to Jeepers’s assertions in its motion, in showing that the Fund and all of its other investors understood the LPA to provide for lock-ups that applied to each investment individually, the Fund is not offering evidence of an unexpressed, purely subjective understanding of the LPA. Rather, it is offering evidence of the *shared understanding* possessed by *the Fund and numerous investors*. Such evidence is clearly relevant to what an “objective reasonable party” would have understood its withdrawal rights to be when it executed the Side Letter and the LPA. *United Rentals, Inc.*, 937 A.2d at 835. This evidence includes, among other things, not only internal Fund records tracking redemptions, (*see, e.g.*, Ex. D), but also e-mail correspondence regarding investor communications (*see, e.g.*, Ex. E).

There is also no merit to Jeepers’s argument concerning Claimants’ proposed expert testimony. Jeepers appears to argue that Claimants’ proposed expert testimony is not admissible because Claimants have not demonstrated that it is the uniform practice in the hedge fund industry that every lock-up of every hedge fund uniformly employs a tranche-by-tranche approach in all circumstances and for all purposes. This is wrong for a number of reasons.

First, this is a matter that needs to be explored at trial. Whether or not the practices testified to are part of a well-settled industry custom and practice is a matter of fact that Claimants (and Jeepers) should be free to explore at trial.

Second, evidence of “business custom and usage in the industry” is classic extrinsic evidence admissible to understand how a reasonable investor would have read both the Side Letter and the LPA. *Dittrick*, 948 A.2d at 406. Use of expert testimony to interpret a contract in a complex, technical industry is far from uncommon. *See, e.g., Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 94 Civ. 89C-SE-35, 1994 WL 7211642 at \*1-2 (Del. Super. Apr. 13, 1994) (denying motion *in limine* to preclude expert testimony from aiding the court in interpreting an insurance contract).

Third, Jeepers appears to be misstating Claimants’ expert’s opinion, which instead involves the opinion that, in funds of the type at issue here, lock-ups would invariably apply (and be understood to apply) on a “by investment” basis.

Finally, there is no basis for the exclusion of the 2005 Confidential Memorandum. Like the Fund’s other evidence of the shared understanding of lock-ups between investors and the Fund, this document reflects a clear expression of the Fund’s views as to investors’ withdrawal rights that was neither questioned nor objected to. The Fund did not hear a single complaint from investors—including Jeepers—after its distribution, no doubt because it changed nobody’s understanding of their withdrawal rights. Jeepers’s claim that extrinsic evidence that post-dates an agreement is always inadmissible is simply not true. *See Eagle Indus., Inc.*, 702 A.2d at 1233 n.11 (noting that “backward-looking” evidence is not “usually helpful,” not that it is “inadmissible”). Certainly, there are many situations where post-contract correspondence or conduct aids in

the proper interpretation of a contract. Indeed, all course of performance evidence, one of the strongest forms of evidence as to how a contract should be construed, is “backward-looking” in this sense. *See Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008) (course of performance is given great weight in the interpretation of an agreement).

**Conclusion**

For the reasons given above, Claimants’ (and the Zwirn Parties’) reading of the Side Letter and the LPA is the most reasonable interpretation. If the Arbitrator nonetheless finds both sides’ interpretations to be reasonable, the Arbitrator should admit all of the extrinsic evidence to determine the correct reading of those agreements.

Dated: July 20, 2011  
New York, New York

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document has been served on all counsel of record by Electronic Mail, this 20th day of July, 2011.

