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April 21, 2011

**VIA EMAIL**

The Honorable Anthony J. Carpinello  
JAMS  
620 Eighth Avenue, 34<sup>th</sup> Floor  
New York, NY 10018

Re: **FORTRESS VERF I LLC and FORTRESS VALUE RECOVERY vs.  
JEEPERS, INC.**  
JAMS Ref. No.: 1425006537

Dear Judge Carpinello:

Financial Trust Company, Inc. and Jeepers, Inc. (collectively "FTC") submit this letter requesting an order to compel Daniel Zwirn, [REDACTED]. Zwirn Partners, LLC, [REDACTED]. Zwirn & Co., [REDACTED], DBZ GP, LLC, Zwirn Holdings, LLC, [REDACTED]. Zwirn Special Opportunities Fund [REDACTED]. k/n/a Fortress Value Recovery Fund I LLC (the "Fund") and Fortress VRF I LLC (collectively, the "Zwirn Entities") to produce the following documents that are responsive to FTC's First Set of Document Requests, dated August 17, 2010: (a) the Schulte Roth & Zabel LLP internal investigation of the Zwirn Entities commencing in the Spring of 2006; (b) the witness interview notes collected during Gibson, Dunn & Crutcher's internal investigation of the Zwirn Entities; and (c) the Clifford Chance tax and fairness opinion assessing the tax consequences of the interfund transfers.

These documents are all highly relevant because they reflect investigations conducted into the same conduct that forms the basis of FTC's breach of fiduciary duty claims in this matter. The parties have exchanged several emails to try to resolve this matter, but have been unable to do so.

**I. Schulte Roth Investigation**

As Your honor is aware, this case revolves around FTC's ability to withdraw its investment in the Zwirn Fund. In October 2006, upon learning of certain improprieties at the Fund, FTC began demanding its money back, and after a series of discussions, FTC ultimately agreed to reduce its demand to \$80 million. The Fund now takes the position that FTC did not have the right to withdraw its money in October 2006, claiming that FTC's redemption rights consisted of a "rolling schedule" of dates based on the rolling two-year anniversary of when FTC made each investment. Because a large portion of FTC's investments were made in 2002, FTC did not have time in late 2006 to give the required 120-days notice to get these investments out. And, the Fund claims the next window would not open until 2008—at which point no investor could withdraw.

Even under the Fund's interpretation (which FTC disputes vigorously), however, FTC could have withdrawn these 2002 investments during 2006 if FTC started the withdrawal process earlier in 2006.

It is undisputed that at the latest, Daniel Zwirn and the Fund learned of the improprieties that first caused FTC to demand its money back in the Spring of 2006. By May of 2006, for example, the Fund apparently tasked the law firm of Schulte Roth & Zabel to conduct an investigation into these improprieties. Inexplicably, Zwirn and the Fund waited until October 2006 to inform investors. This delay prevented FTC from withdrawing the vast majority of its investments even if one accepts the Fund's version of FTC's withdrawal rights.

Zwirn has claimed that he delayed revealing the information to investors based on the advice of counsel. To the extent Zwirn and the Fund intend to rely of the advice of counsel, including specifically that of Schulte Roth, as a basis for not disclosing, any claim of privilege is waived, and FTC is entitled to all documents relating to the investigation conducted by Schulte Roth during 2006 and specifically any advice given to the Fund about disclosing to investors. See *U.S. v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) (holding that if defendant gave testimony asserting to the jury his belief in the lawfulness of his actions, fairness would require that the prosecutor have access to the advice he in fact received from his attorneys because this evidence might impeach his claim of innocent state of mind and noting broadly that "the attorney-client privilege cannot at once be used as a shield and a sword"); *Village Bd. of Vil. of Pleasantville v. Rattner*, 130 █.2d 654, 655 (2d Dep't 1987) ("Where a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought"). Accordingly, the Zwirn Entities should either produce all documents relating to the Schulte Roth internal investigation or be precluded from asserting any defense that relies in any way on the advice of Schulte Roth.

## II. Gibson Dunn Interview Notes

In late 2006, the Fund decided that it needed to conduct an “independent” investigation into the improprieties at the Fund. As a result, the Fund hired Gibson Dunn, which had not done work for the Fund previously, to conduct the investigation. Gibson Dunn conducted a series of interviews of central witnesses to the Fund’s mismanagement beginning in late 2006 and into early 2007, including several employees and former employees of the Zwirn Entities. The Zwirn Entities refuse to produce these near-contemporaneous factual interview notes on the ground of work-product privilege. Under Federal Rule of Civil Procedure 23(b)(3), even if the Zwirn Entities can meet their “heavy burden of establishing” that the privilege applies, *In re Grand Jury Subpoena dated July 6, 2005*, 510 F.3d 180, 184 (2d Cir. 2007), the notes still must be produced because there is a “substantial need” for them and their “substantial equivalent” cannot be obtained without undue hardship. Further, because the interview notes record the factual testimony of witnesses, they are “fact work product,” which is entitled to less protection than opinion work product. See *In re Grand Jury Subpoena*, 510 F.3d at 183-84.<sup>1</sup>

There is a substantial need for the interview notes because they record the near-contemporaneous testimony of the individuals with most knowledge of the Fund’s mismanagement and so they are clearly “central to the substantive claims in litigation.” *Johnson v. Bryco Arms*, 2005 WL 469612 \*4 (██████████, 2005) (finding a substantial need for witness interview notes) (quoting *Madanes v. Madanes*, 199 ██████████, 135, 150 (██████████, 2001)). Further, FTC cannot obtain the information from other sources because it will not be permitted to depose these witnesses in this arbitration. See e.g., *U.S. v. Davis*, 131 ██████████, 391, 395-96 (██████████, 1990) (unavailability of witness for deposition renders interview notes producible and noting more broadly, “where a witness gives a statement to one party but then refuses to give it to the another, courts have held that, despite the invocation of the work product privilege, the party should be able to discover the statement given to the adversary”); see also *Federal Election ██████████ v. Christian Coalition*, 178 ██████████, 456, 466 (██████████, Va. 1998) (affirming magistrate’s ruling that plaintiff was unable to obtain information without undue hardship in light of the limitation on depositions in the litigation combined with the potential that deponents might not be able to recall sufficient detail regarding events that took place five years ago). Finally, because of fading memories and the non-adversarial nature of the interviews, it would be impossible to recreate a substantial equivalent of the near-contemporaneous notes even if depositions were possible. See *In re Grand Jury Subpoena*, 510 F.3d at 189 (in a similar context, finding that there was a “substantial need” to obtain work-product recordings of fact witnesses because, in part, “the recordings are a unique memorialization of

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<sup>1</sup> As explained in *In re Grand Jury Subpoena*, the Zwirn Entities should submit the notes to Your Honor for *in camera* review in order to claim work-product protection; failing to do so, there is certainly no argument that these are anything more than fact work product. See *id.*

the conversations between [relevant fact witnesses] that is not subject to fading memories or contradiction.”); *see also Southern Ry. Co. v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962) (good cause to produce work product statements taken soon after the occurrence); Advisory Committee Note to Rule 26(b)(3) (noting that privilege may be overcome when the document records a “fresh and contemporaneous account” as compared to a deposition “a substantial time thereafter”).

### III. Tax and Fairness Opinions

As your Honor is aware, one of the most glaring examples of the Fund’s mismanagement was the undisclosed practice of causing illicit interfund transfers to occur between various funds to cover up the severe, undisclosed liquidity crisis that befell the Fund. These interfund transfers have been the focus of several SEC investigations and a recent SEC complaint against Perry Gruss. See Exhibit A. FTC has requested all tax and fairness opinions that assess the tax consequences to the Fund of the interfund transfers and the resulting post-hoc interfund notes. Defendants refuse to produce these opinions on the grounds that such opinions would be irrelevant and they have not been able to locate any such opinion anyway. Neither argument has any merit.

As explained in the attached letter, the Zwirn Entities hired Clifford Chance to issue a tax opinion on the interfund note. See Exhibit B. The opinion clearly exists. It is also clearly relevant. When Daniel Zwirn disclosed the interfund transfer issue to investors, he failed to disclose that the interfund transfers functioned as loans that placed the Fund in severe danger of losing its domestic tax status. The Clifford Chance opinion discussing the tax consequences of the transfers is therefore highly relevant to the Fund’s mismanagement and the Zwirn Entities’ disclosure failures – unless, of course, the Zwirn Entities concede that any failure to disclose facts relating to the tax consequences of the interfund transfers is material.

The Zwirn Entities have not claimed that this opinion is subject to work product privilege, so we presume they have waived any such argument. In any event, such an assertion would fail for three independent reasons. First, to the extent any such opinions were produced to the SEC without court order, any privilege has been waived. *See Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170 (2d Cir. 2003) (holding that any attorney-client privilege was lost when party voluntarily authorized to send the documents to the SEC); *In re Steinhardt Partners, LP*, 9 F.3d 230, 235 (2d Cir. 1993) (party waived any work product protection by submitting the memorandum to the SEC without court order). Second, the Zwirn Entities admit that they provided this opinion to an outside auditor. See Exhibit B. Because sharing this information with the outside auditor was not “necessary for the client to obtain informed legal advice,” the Zwirn Entities waived any privilege by sharing it with that third party. *Green v. Beer*, 2010 WL 3422723 \*3

(██████████ 2010) (affirming magistrate ruling that work product provided to financial analysts waived the privilege); *In re Application Pursuant to 28 U.S.C. § 1782*, 249 ██████████ 96, 101-02 (██████████ 2008) (finding no privilege for communications between “intermediary” and counsel that helped counsel clarify factual issues but were not necessary to the provision of legal services). Third, for reasons similar to those discussed above, the opinion should be produced because it bears on a central issue in the litigation and cannot be obtained through any other means. Finally, if the tax opinion was prepared in the ordinary course of business, it is not work product.

For the forgoing reasons, FTC respectfully requests that Your Honor compel production of these documents.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen D. Susman" with a stylized flourish at the end.

Stephen D. Susman

cc: William O'Brien (counsel for ██████████ Zwirn Partners, LLC, ██████████ Zwirn & Co., ██████████, DBZ GP, LLC, and Zwirn Holdings, LLC)  
Allan Arffa (counsel for Fortress VRF I LLC and Fortress Value Recovery Fund I LLC)  
John Siffert (counsel for Daniel Zwirn)