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May 5, 2011

BY EMAIL AND BY HAND

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

VRF I LLC v. *Jeepers, Inc.*, JAMS Ref. No. 1425006537

Dear Judge Carpinello:

On behalf of Claimants VRF I LLC (the "New Fund Manager") and Fortress Value Recovery Fund I LLC (the "Fund") (together, "Claimants"), we write to respond to the letter to you from Respondents Financial Trust Company, Inc. and Jeepers, Inc. (together, "FTC"), dated April 21, 2011, requesting an order overcoming the applicable attorney-client and work product privileges and compelling the production of documents relating to (1) internal investigations relating to the Fund and the Fund's prior manager (along with its affiliates, the "Zwirn Manager") conducted by the law firms Schulte Roth & Zabel LLP ("Schulte") and Gibson, Dunn & Crutcher LLP ("Gibson Dunn"); and (2) a tax opinion Clifford Chance LLP ("Clifford Chance") provided to the Zwirn Manager, with respect to a fund formed under the laws of the Cayman Islands (the "Offshore Fund") that the Zwirn Manager also formerly managed.

FTC's requests do not withstand scrutiny and should be denied in full. As to the request for the internal investigation materials, Claimants have a strong interest in protecting whatever privileges exist with respect to those materials and see no sound basis for finding any waiver of the privileges that clearly apply. As to the tax opinion, FTC completely mischaracterizes the opinion, which (i) addressed whether *the Offshore Fund* was engaged in a U.S. trade or business; (ii) did not address the U.S. tax status of the Fund; and (iii) was not provided until December 2007, long after Mr. Zwirn informed FTC and other investors of the matters FTC complains about. As a result, the privileged tax opinion is totally irrelevant here.

1. Background: FTC's Counter- and Cross-Claims

By way of background, it is useful first to review FTC's counter- and cross-claims in this matter.

Contract Claim. FTC claims that the Fund breached its contractual obligations to FTC by refusing to honor an $80 million withdrawal request that FTC submitted to the Fund in November 2006. The Fund (then under the management of the Zwirn Manager) found that the request was untimely because each of FTC's five investments in the Fund (3 in 2002; 1 in 2003; 1 in 2005) was subject to its own rolling two-year "lockup" (plus 120 days' advance notice); as a result, none of the three 2002 investments (nor $80 million) was then available for FTC to withdraw. (See chart attached as Exhibit A.) FTC's November 2006 notice was hence defective; in addition, discovery here indicates that FTC dropped the November 2006 request immediately after it was made.

Breach of Fiduciary Duty Claim. FTC has also asserted a claim for breach of fiduciary duty against the Zwirn Manager and Daniel Zwirn (though not against Claimants).

The theory of this claim appears to be that Mr. Zwirn knew of various accounting improprieties at the Fund (the early payment of management fees to the Zwirn Manager that were earned but not yet due; the use of Fund assets to buy an airplane for Mr. Zwirn; and the borrowing of money by the Fund from the Offshore Fund also managed by the Zwirn Manager) in the Spring of 2006. According to FTC, Mr. Zwirn failed to disclose these matters to FTC (and other Fund investors) until the end of October 2006, thereby causing FTC (and other investors) not to exercise their withdrawal rights at an earlier point.

Mr. Zwirn and the Zwirn Manager strongly deny they did anything wrong. They believe these matters were properly handled and disclosed after they came to light.

Fraud Claim. Finally, FTC has asserted a fraud claim against the Zwirn Manager, Mr. Zwirn and the Fund. According to its pleading, FTC alleges that Mr. Zwirn and the Fund "made false statements and omitted material information" when Mr. Zwirn purportedly convinced FTC to reduce its November 2006 withdrawal request to $80 million. Yet, as FTC acknowledges, Mr. Zwirn disclosed the specific nature of the financial improprieties to investors by the end of October 2006, so it is unclear how any alleged "fraud" could have occurred in November.

2. The Purported Fraud Claim Provides No Basis for FTC's Requests

Perhaps for this reason, FTC refers in its letter only to (and bases its request for the documents at issue solely on) its breach of fiduciary duty claim, even though its fraud claim appears to be based on allegations similar to its breach of fiduciary duty claim. To the extent FTC attempts to change its position on this, the Claimants wish to point out two matters:

First, as noted above, given the disclosures Mr. Zwirn concededly gave by the end of October 2006, there can be no basis for this claim, and it thus furnishes no basis for FTC's requests.

Second, as far as the Fund is concerned, it is important to keep in mind that, if valid (and Claimants certainly do not believe it is), the fraud claim would exist for *all Fund investors*.

Thus, each investor would be entitled to its pro rata share of the remaining assets of the Fund, in which case FTC should not be allowed to divert other investors' assets to itself.

As Your Honor may recall, the Fund has been in dissolution since early 2008 and the Fund currently has limited proceeds to distribute to its investors through its liquidation process. Any recovery by FTC here would take funds away from other investors and provide them to FTC. In the Fund's view, this should not be permitted where any alleged wrongdoing would have been wrongful as to *all investors*, not just to Mr. Epstein/FTC. Thus, FTC should not be allowed to obtain other investors' assets by virtue of claims – such as the purported fraud claim – that apply equally to all investors.

3. FTC Is Incorrect as to the Withdrawal Dates

It is further worth noting, in considering FTC's requests, that, as FTC's letter tacitly concedes, the documents at issue are not even relevant to FTC's breach of fiduciary duty claim – if FTC's own theory about the Fund's lock-ups is accepted. FTC apparently takes the position that FTC was eligible to redeem *all* of its investments on a two-year cycle, triggered off the date of its final investment on January 1, 2005. If so, FTC did not have to notify the Fund of its withdrawal request until November 30, 2006 – long *after* Mr. Zwirn's disclosures to investors.

Accordingly, FTC's requests only seek information relevant to its breach of fiduciary duty claim if Mr. Zwirn's and the Zwirn Manager's (and Claimants') view of the redemption rights is correct. Even then, FTC overstates the relevance of the information. Specifically, FTC claims that, had it known, in the "Spring of 2006," of the accounting improprieties at the Fund, it could have withdrawn *all* of its "2002 investments." (Letter at 2.) That is incorrect.

In fact, as the chart attached as Exhibit A makes clear, under the Fund's (and Claimants') view as to the withdrawal dates, to withdraw the three investments FTC made in May, September and December 2002, FTC had to make its redemption requests by the beginning of March, June or September 2006, respectively. Yet, even FTC concedes that Mr. Zwirn had no idea of any improprieties as of March 2, 2006. It is also unclear whether FTC is contending that Mr. Zwirn knew enough by the June deadline to advise investors. Although, theoretically, FTC might have been able to withdraw its third investment by August 31, 2006, as today's letter from the Zwirn Manager and Mr. Zwirn explains, it does not appear that Schulte first reported the results of its investigation to Mr. Zwirn until mid-September 2006, at which point the "window had shut" for withdrawal of *all* of FTC's 2002 investments.

I.

FTC'S REQUESTS SHOULD BE DENIED

In any event, we now turn to the specifics of FTC's requests, neither of which Claimants believe should be granted.

A. Documents Relating to the Internal Investigations Remain Privileged

Because the internal investigations at issue took place in 2006 and 2007, before the New Fund Manager became the Managing Member of the Fund, Claimants have no independent knowledge as to the internal investigations. Nor do Claimants possess the documents that FTC seeks, though they may be in the possession of (or accessible to) the Zwirn Manager and/or Mr. Zwirn.

As the current Fund and its current Managing Member, however, Claimants continue to control the Fund's (and, to the extent relevant, the New Fund Manager's) privileges. They strongly wish to prevent any invasion of any privileges that the Fund may have. They are therefore entitled to assert that any privileges that apply to the documents created by the Fund's legal counsel during the internal investigations in 2006 and 2007 continue to exist and should not be waived.

Nor, for the reasons set forth by the Zwirn Manager and Mr. Zwirn in their submission today, does the Fund believe any waiver has occurred. As Claimants understand it, the Zwirn Manager and Mr. Zwirn merely assert, in their defense to the breach of fiduciary duty claim, that the disclosures Mr. Zwirn made to investors in both mid and late October 2006 were made in consultation with, and pursuant to "scripts" approved by, counsel. This mere assertion does not appear to waive any privilege. (Nor apparently did the SEC take the position that such a waiver had occurred.) We also understand that, for this very reason, the "scripts" Mr. Zwirn used in speaking with investors were deemed not to be privileged and have been produced.

Claimants therefore support the arguments expressed by the Zwirn Manager and Mr. Zwirn to the effect that no waiver of any privilege has occurred as to the internal investigation materials FTC now seeks.

B. The Offshore Fund Tax Opinion Is Not Relevant in This Arbitration

Finally, FTC requests "all tax and fairness opinions that asses [sic] the tax consequences to the Fund of the interfund transfers" (presumably, those between the Offshore Fund and the Fund) on the ground that Mr. Zwirn "failed to disclose that the interfund transfers functioned as loans that placed the Fund in severe danger of losing its domestic tax status." (Letter at 4.) FTC claims that the privileges as to these materials have been waived because the Fund produced them to the SEC and shared them with an outside auditor. FTC is wrong in many ways, and its request should be denied.

First, Claimants are aware of only *a single tax opinion* (from Clifford Chance, dated December 2007); Claimants are not aware of any other "tax and fairness opinions."

Second, FTC completely misunderstands the nature of that tax opinion. The tax opinion addressed whether *the Offshore Fund* was engaged in a U.S. trade or business (and hence would be subject to U.S. taxes) due to the interfund transfers, *not* whether the domestic Fund would somehow lose its "domestic tax status." It is undisputed that FTC invested in the Fund, which was formed under the laws of Delaware and hence was sometimes referred to as the "Onshore Fund." (Because its formal name was the "[redacted]. Zwirn Special Opportunities Fund [redacted]," it was also sometimes referred to as the "LP Fund.") It is further undisputed that FTC did *not* invest in the

Offshore Fund. (That fund, formally named the "[redacted] Zwirn Special Opportunities Fund *Ltd.*," was sometimes referred to as the "LTD Fund.")

As described in the letter from Fried Frank to the SEC dated April 10, 2008, attached as Exhibit B to FTC's letter, Clifford Chance issued an opinion "as to whether it is more likely or not that the transfers from the LTD Fund [the Offshore Fund] to the LP Fund [the Fund] . . . will cause the LTD Fund [the Offshore Fund] to be treated as engaged in a U.S. Federal or state and local trade or business activity." (Fried Frank Letter at 2.) Thus, the tax opinion does not address the "domestic tax status" of the Fund and is not relevant to any of the issues here.

Third, the tax opinion is also not relevant to any issues in this Arbitration because it was provided by Clifford Chance to the Fund in *December 2007* – long after Mr. Zwirn informed FTC and the other investors of the improprieties at the Fund. The opinion therefore has no bearing on what Mr. Zwirn knew and when he disclosed it. By the time the opinion was issued, FTC was already long aware of the issues at the Fund.

Finally, even if the tax opinion had any bearing on the issues at hand, Claimants again wish to assert all applicable privileges and prevent any waiver of such privileges. In that regard, it is important to note that the opinion was *not*, in fact, produced to the SEC. The opinion *was* provided to an outside auditor, but in no way did that limited disclosure waive any privileges.

As Fried, Frank, then representing the Zwirn Manager, appears to have pointed out to the SEC, the Zwirn Manager's provision of a privileged opinion to the Fund's outside auditors does not waive the privileges at issue. *See, e.g., Int'l Design Concepts, Inc.* v. *Saks Inc.*, 2006 U.S. Dist. Lexis 36695, at *6 ([redacted]. 2006 ("Here, allowing the outside auditor, retained by the client, to know the content of the attorney's confidential threat assessment does not, in this Court's view, destroy the protection. A confidential oral or written report by an attorney to the company's auditors of the results of his or her investigation permits the auditor to assess whether the financial statement of the company should receive a qualified or unqualified opinion."); *accord*, *Vacco* v. *Harrah's Operating Co.*, 2008 WL 4793719, at *6 ([redacted]. Oct. 29, 2008) (provision of litigation summaries to auditor did not waive work product protection); *Am. S.S. Owners Mut. Prot. & Indem. Assoc. Inc.* v. *Alcoa Steamship Co.*, 2006 WL 278131, at *1-2 ([redacted]. Feb. 2, 2006) (opinion letters provided to outside auditors were entitled to work production protection).

That result is further supported by the principle that providing privileged materials to a third party does not waive that protection unless the disclosure substantially increases the likelihood that the information will be provided to potential adversaries. *Merrill Lynch & Co.* v. *Allegheny Energy, Inc.*, 229 [redacted]. 441, 445-46 ([redacted]. Oct. 26, 2004). Here, the Fund provided the Clifford Chance opinion to PwC, the Offshore Fund's outside auditor, with the explicit understanding that PwC would not share the document with potential adversaries.

Significantly, the SEC does not appear to have challenged Fried, Frank's position, nor otherwise demanded the tax opinion after receiving Fried, Frank's letter.

In sum, the tax opinion is irrelevant to the issues in this Arbitration, nor have any applicable attorney-client and work product privileges been waived.

For the foregoing reasons, Claimants respectfully request that Your Honor deny FTC's requests in full.

Respectfully submitted,

Allan J. Arffa

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 [redacted]. Zwirn Partners, LLC; [redacted]. Zwirn & Co., [redacted]; DBZ GP, LLC; and Zwirn Holdings, LLC)