JAMS ARBITRATION

IN THE MATTER OF	§	
	§	
FORTRESS VRF I LLC and FORTRESS VALUE RECOVERY FUND I LLC, Claimants	§	
	§	
v.	§	
	§	
JEEPERS, INC., Respondent	§	Case No. 1425006537
	§	
and	§	
	§	
FINANCIAL TRUST COMPANY, INC. and JEEPERS, INC., Counterclaimants and Third-Party Claimants	§	
	§	
v.	§	
	§	Arbitrator: Hon. Anthony J. Carpinello
D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, L.P. k/n/a FORTRESS VALUE RECOVERY FUND I LLC, Counter-Respondent	§	
	§	
and	§	
	§	
D.B. ZWIRN PARTNERS, LLC, D.B. ZWIRN & CO., L.P., DBZ GP, LLC, ZWIRN HOLDINGS, LLC, DANIEL ZWIRN, and Third-Party Respondents	§	

FINANCIAL TRUST COMPANY, INC.'S AND JEEPER INC.'S
PRE-HEARING BRIEF

Counter- and Third-Party Claimants Jeepers, Inc. and Financial Trust Company, Inc. (collectively "FTC") submit the following Pre-Hearing Brief in Support of its claims against D.B. Zwirn Special Opportunities Fund, L.P. k/n/a Fortress Value Recovery Fund I LLC ("Fund"), D.B. Zwirn Partners, LLC, D.B. Zwirn & Co., L.P., DBZ GP, LLC, Zwirn Holdings, LLC, and Daniel Zwirn.

INTRODUCTION

FTC invested $80 million the D.B. Zwirn Special Opportunities Fund, L.P. ("Fund"). From 2002 until 2006, the Fund performed well, and FTC's investment grew in value to $133 million. However, at the first sign of trouble in late 2006, FTC decided to get out. FTC suspected something ominous before other investors. Although FTC initially demanded payment of its entire $133 million, the Fund and its agents convinced FTC to settle for a return of somewhat more than half of its capital account - $80 million. A few months later, once FTC realized the Fund was back-tracking on its word, FTC again demanded the entire $133 million.

FTC's intuition proved correct, as the Fund began a spiral downward from which it has never recovered. Despite FTC's prescient decision to get out, its money has been held prisoner in breach of the Fund's contractual obligations. To support its position, the Fund has concocted a fabricated interpretation of the relevant contract that has zero support in the actual language.

Worse, the Fund and its agents have engaged in various acts of deception in order to frustrate FTC's effort to exercise its contractual rights. The Fund and its agents delayed disclosing material information, withheld material information, and made false promises. These acts constitute breaches of fiduciary duty and fraud.

As a result, FTC respectfully requests an award of $133 million plus applicable interest.

FACTUAL BACKGROUND

1. Zwirn Launches a Fund with the Help of Financial Trust Company, Inc.

In April 2002, Highbridge Capital Management ("Highbridge"), one of the leaders in the hedge fund management business, launched a new fund run by Daniel Zwirn. The fund was called Highbridge/Zwirn Special Opportunities Fund, L.P. (the "Fund"). Dan Zwirn was in his early 30's and had been working for Highbridge. Glenn Dubin, who ran and owned Highbridge was impressed with Zwirn and decided to help Zwirn start a fund.

To get the Fund started, Dubin approached his longtime friend and client, Jeffrey Epstein, about making an initial investment in the Fund. In April 2002, Epstein invested $10 million in the Fund through an entity owned and controlled by Epstein called Financial Trust Company, Inc. ("FTC"). FTC followed-up its initial investment with another $10 million investment in August 2002 and a $30 million investment in November 2002. As of the end of 2002, FTC owned over 73% of the Fund.

As the Fund grew and succeeded, FTC continued investing. In June 2003, FTC made another $10 million investment. And, in January 2005, FTC made its last investment of $20 million. In total, FTC invested $80 million in the Fund.

Epstein made the decision to invest—both the initial decision and all subsequent decisions—exclusively based on the advice and direction of Dubin. Epstein did not study the Fund's investment strategy nor did he talk to or meet with Zwirn other than to have one brief in person meeting after FTC invested. Dubin was his only point of contact at the Fund and only source of information about the Fund.

Originally, the Fund's General Partner was an entity called Highbridge/Zwirn Partners, LLC. The General Partner was owned by D.B. Zwirn & Co., LLC., which in turn was owned by Highbridge and Zwirn personally. The Fund also had a Trading Manager called Highbridge/Zwirn Capital Management, LLC, which also was owned by Highbridge and Zwirn. In addition to its ownership interest in the Fund's management entities, Highbridge opened a managed account ("Highbridge Managed Account") that was managed by Zwirn in parallel with the Fund.

In late 2004, JP Morgan Chase bought Highbridge, initially purchasing a less than total interest with plans to acquire the entire business. JP Morgan did not acquire Highbridge's ownership of the Fund's management company. So, Highbridge's ownership in the General

Partner was moved to an entity called Dubin & Swieca Asset Management ("DSAM"), which was owned by Dubin and his partner.

On October 1, 2004, the "Highbridge" name was dropped from the Fund's name and the name of the General Partner. The Fund's name was changed to D.B. Zwirn Special Opportunities Fund, L.P.; the General Partner's name was changed to D.B. Zwirn Partners, LLC; and the Manager's name was changed to D.B. Zwirn & Co., L.P. (Technically, the General Partner was a distinct legal entity from the Manager, which was called D.B. Zwirn & Co., L.P. In practice, there was no relevant difference between two, so this brief will refer to both by the term "General Partner" or "Management Company.")

2. FTC's Withdrawal Rights.

When FTC made its final investment in the Fund on January 1, 2005, as FTC was one of the largest and the initial investor, FTC and the General Partner entered into a side letter that governed FTC's withdrawal rights. The letter agreement was signed on January 11, 2005 ("2005 Letter Agreement") and provided:

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

The Limited Partnership Agreement provided that each limited partner had a single "Capital Account." Specifically, the Agreement defined a "Capital Account" by providing that "[a] 'Capital Account' shall be maintained for each Partner," and that such account shall constitute the Partner's "Initial Capital Contribution" plus adjustments for performance of the Fund and increased by any "Additional Capital Contribution." Thus, the 2005 Letter Agreement clearly

applied to all of FTC's investments in the Fund, which were held in FTC's single "Capital Account." Under the 2005 Letter Agreement, FTC could withdraw its Capital Account on March 31, 2007 (the quarter ending after the two-year anniversary of the January 1, 2005 investment). FTC would have to give 120-days notice—i.e., notice by December 1, 2006.

Significantly, the Fund drafted the 2005 Letter Agreement and Limited Partnership Agreement. FTC did not negotiate over the language or have any input in the words selected by the Fund.

3. The Zwirn Fund's Hidden Problems.

Between its inception and 2005, the Fund reported strong returns. Unbeknownst to investors, however, Zwirn's management was experiencing serious problems. To begin with, Zwirn constantly pushed the Fund's liquidity to the edge, creating a constant need to find cash to fund approved investments. Until 2005, Zwirn had found it necessary to rely in part on Highbridge to loan it money or add capital when the Fund became short of liquidity. Once JP Morgan purchased Highbridge, however, the outside cash flow stopped. As a result, the General Partner began improperly using money entrusted to management by investors in vehicles other than the Fund, including the Fund's offshore sister fund, called D.B. Zwirn Special Opportunities, Ltd. ("Offshore Fund"), and the Highbridge Managed Account to meet its demands. These so-called "Interfund Transfers" eventually amounted to hundreds of millions of dollars in undocumented, no interest loans.

Just as he ran the Fund on the edge, Zwirn ran the Management Company with very little liquidity. As a result, the Management Company was short cash to pay expenses. The Management Company was designed to generate significant income from a 27% management fee and 20% incentive fee. The management fee was predictable and earned every month but payable only at each quarter end. The incentive fee was earned only at year end if there were

profits. Zwirn, however, wanted to avoid paying current income taxes on the incentive portion, which in some years was very large, so he deferred the incentive fees payable by the Offshore Fund (keeping the money out of the United States). This scheme left the Management Company perpetually short of cash. To make up for the cash crunch, the Management Company began paying itself the management fees from the Onshore Fund, Offshore Fund, and two other funds before the fees were actually payable. This practice was designed to provide desperately-needed cash, and continued until March 2006. Moreover, in September 2005, when a subsidiary of the Management Company bought an expensive private jet for Zwirn's private use, investor money was improperly borrowed to fund the purchase.

4. The Fund's Knowledge of the Improprieties.

While Zwirn personally claims to have had no knowledge of the improprieties, the law firm hired to investigate concluded that Perry Gruss personally oversaw and approved of these transactions. Mr. Gruss was both an officer (Chief Financial Officer) and part owner of the Management Company. Additionally, the law firm concluded that another officer of the Management Company, Harold Kahn, was at a minimum "willfully blind" to this misconduct.

In the Spring of 2006, two other high ranking officers of the Management Company learned of the prepayment of management fees and the airplane funding issues. The Management Company's General Counsel, David Proshan, and Chief Compliance Officer, Lawrence Cutler, apparently learned from an accounting staff member of the issues. They immediately informed Dan Zwirn, yet Zwirn maintains that they did not tell him any details. Zwirn claims that he did not learn any of the details until June 2006, at which point the Management Company's outside counsel, Schulte, Roth & Zabel "SRZ", was called in to conduct an investigation.

In early September 2006, SRZ presented the results of its investigation into the prepayment of management fees and the airplane financing.

Zwirn claims that at this point in time, no one other than Gruss and his immediate subordinates knew about the Interfund Transfers.

In September 2006, Zwirn and the other members of management decided to fire Gruss. Realizing what was about to occur, Gruss quit.

5. The Fund Begins Disclosing to Investors.

Even though the Management Company was aware of the above issues for almost six months, no one told the investors in the Fund.

Finally in mid-October 2006, the Management Company began contacting investors to disclose that Gruss was no longer employed. According to the prepared script, Zwirn intended to make no disclosure of any details other than that Gruss had been replaced.

According to Zwirn, at about the time he was making the first round of investor calls, a low-level accountant came forward to reveal the Interfund Transfers, which had been going on for over a year and a half. At this point, it was clear that Zwirn could not keep the lid on the problems brewing at the Fund.

In late October 2006, Zwirn made yet another series of calls to investors. According the prepared script, Zwirn was supposed to inform investors of exactly why Gruss had been fired (*i.e.,* the prepayment of management fees and airplane financing) and to reveal that yet another, more serious problem had been uncovered, the Interfund Transfers. The script fails to explain that Zwirn and his co-officers learned about the prepayment of management fees and the airplane financing during the Spring of 2006. Worse, the script makes no mention of the role played by Harold Kahn, who was never formally disciplined or fired.

With one exception, investors largely accepted Zwirn's explanation and assurances.

6. Epstein Demands His Money Back.

Jeffrey Epstein smelled something foul. While the witnesses' memories of events disagree about many details, everyone appears to agree that Epstein was agitated from the first moment he was contacted about the Fund's problems. Indeed, Epstein demanded to speak (and did speak) to a partner at SRZ to get an explanation as to why the initial disclosure about Gruss's departure was misleading.

The parties disagree about whether Epstein actually began demanding his money back at this point.

In contrast, Epstein and Dubin both will testify that Epstein repeatedly demanded to withdraw from the Fund. At that point in time, FTC's investment in the Fund was valued at about $133 million. In response, Dubin and Zwirn discussed how to change Epstein's mind. Zwirn feared that news of Epstein's withdrawal could spark a panic among investors, especially given that Epstein was the oldest and still one of the largest investors.

The discussions between Dubin and Zwirn culminated in a plan to convince Epstein to reduce his demand. Dubin initially asked Epstein to refrain from pushing his demand for a total withdrawal. Dubin relayed Zwirn's concerns about Epstein causing a run-on-the-bank and explained that if Epstein was adamant about withdrawing, Zwirn would prefer that Epstein withdraw half of his capital account. Epstein responded that he would agree to withdraw $80 million, which was the amount of Epstein's original invested capital. This conversation was followed up a three-way call involving Dubin, Epstein, and Zwirn. During this call, Zwirn confirmed what Dubin had told Epstein. The call ended with Zwirn and Epstein agreeing that FTC would make a reduced demand of $80 million withdrawal and that the Fund would honor such a demand.

On the night of November 13, 2006, FTC sent the following memorandum to Dan Zwirn:

As per our conversation, I hereby instruct you to immediately liquidated in the amount of EIGHTY MILLION DOLLARS of Financial Trust Company's interest in D.B. Zwirn Special Opportunities Fund, L.P., and wire the proceeds of EIGHTY MILLION DOLLARS ($80,000,000) to:

Bank Name: Citibank, New York City
ABA #: [redacted]
For Credit To: Bear Stearns & Co.
Account #: [redacted]
F/B/O/: Financial Trust Company
Account #: [redacted]

Please call Harry Beller at [redacted] with the Fed. reference number or if you have any questions.

Exhibit 5 (JE 2000-01) (emphasis added).[1]

According to Zwirn, the first time he heard that Epstein wanted any money back was when he received a written demand for $80 million on November 13, 2006. Zwirn will testify the request came out-of-the-blue.

7. Zwirn's Response to FTC's Demand.

The day after receiving FTC's demand, Zwirn contacted Epstein to set up a meeting where Zwirn would attempt to demonstrate that the problems at the Fund had not impacted the underlying investments. Epstein cancelled the meeting.

Zwirn claims that Epstein subsequently agreed to retract his withdrawal demand. This is simply false. There is zero evidence to support Zwirn's claim. As noted above, Epstein made the investment through an entity called Financial Trust Company, Inc., which is located in the United States Virgin Islands. The Fund was reporting New York State source income to FTC. For tax reasons, FTC preferred not to have New York source income. To solve this problem, FTC proposed transferring its investment in the Fund to a wholly-owned subsidiary of FTC, called Jeepers, whose sole purpose was to hold the investment. Under the Fund's Limited

[1] Exhibits 5, 45, and 117 are attached to this Brief.

Partnership Agreement, any assignment required prior consent of the General Partner. According to Zwirn, Epstein agreed that if Zwirn would agree to the assignment to Jeepers, Epstein would drop the withdrawal demand.

During December 2006, Zwirn did consent in writing to an assignment of FTC's interest to Jeepers. The assignment was made effective retroactive to January 1, 2006. The Assignment Agreement, which Zwirn signed, says nothing about FTC agreeing to retract its pending withdrawal demand. To the contrary, Zwirn attempted to insert language into the document that would grant the Fund a broad release of any claims, including pending claims. Epstein specifically objected to this language, which was removed from the executed version. Moreover, the Fund asked Jeepers to execute a new Subscription Agreement. The form Subscription Agreement contained language requiring the investor to acknowledge and agree to the standard lock-up provisions of the Limited Partnership Agreement. Because FTC had a pending withdrawal demand, Epstein inserted in hand-writing language to the effect that the standard withdrawal rules did not apply to FTC and thus would not apply to Jeepers.

8. Epstein Learns that the Fund Disputes the $80 Million Demand.

In February 2007, Epstein's in-house bookkeeper, Harry Beller, was instructed by the Fund to direct all future communications to the then-President of the Management Company, David Lee. Sensing something was amiss, Epstein instructed Beller to get an update on the status of the $80 million redemption.

On February 14, 2007, Beller called Lee about the withdrawal demand and was told that the Fund had no intention of honoring it. Lee explained that FTC/Jeepers's withdrawal rights were governed by a rolling schedule of redemption dates (based on the two-year or three-year anniversary of each, separate capital contribution) and that FTC/Jeepers had no right to withdraw $80 million in November 2006.

Epstein responded immediately by demanding in writing a complete withdrawal of his interest in the Fund. FTC's complete withdrawal demand was given to the Fund on February 14, 2007. Exhibit 45.

9. The Fund Formally Responds to FTC's Demand.

Although FTC made its partial withdrawal demand on November 13, 2006 and complete withdrawal demand on February 14, 2007, the Fund waited until March 27, 2007 to respond in writing. The Fund sent FTC a letter written by SRZ, who drafted the Limited Partnership Agreement. Conspicuously, SRZ's letter does not dispute that FTC had a right under the 2005 Letter Agreement to withdraw its entire Capital Account nor did SRZ claim that the 2005 Letter Agreement only applied to the $20 million investment made on January 1, 2005—both of which are arguments now advocated by the Fund.

Instead, SRZ begins by stating that the February 14, 2007 demand for a complete withdrawal failed to comply with the 120-day notice requirement. With respect to November 13, 2006 demand, SRZ claimed that the 2005 Letter Agreement only authorized complete withdrawals, not partial withdrawals. According to SRZ, the 2005 Letter Agreement only authorized complete withdrawals because it contained an introductory clause saying the agreement was made "[i]n accordance with Section 9.1" of the Limited Partnership Agreement, and Section 9.1 addressed "complete" withdrawals—as opposed to Section 9.2 which addressed "partial" withdrawals. Since FTC asked for $80 million on November 13, 2006 (not $133 million which was the value of FTC's entire Capital Account at the time), SRZ claimed the demand was invalid:

> Mr. Epstein previously sought withdrawal of a portion of his interest in the Fund by letter dated November 13, 2006. That letter did not constitute valid notice, because Mr. Epstein had no right at that time to partial withdrawal from the Fund. The 2005 letter Agreement did not provide Mr. Epstein with any such right as of March 31, 2007, because partial withdrawals are governed by Section 9.2 of the

Limited Partnership Agreement, which was not covered by the 2005 Letter Agreement.

Exhibit 117.

LEGAL ARGUMENT

FTC's primary claim is a straightforward breach of contract claim based on FTC's demand to withdrawal $80 million. The Fund's failure to honor this demand breached the 2005 Letter Agreement. The Fund has two defenses to FTC's contract claim. First, the Fund claims the 2005 Letter Agreement only applied to a single investment or "tranche" (the January 1, 2005 investment), and that FTC's remaining investments were subject to distinct lock-ups. This is the "Tranche-by-Tranche" defense. As outlined below, the "Tranche-by-Tranche" defense is demonstrably wrong as a matter of contract interpretation. The Fund's second defense is that the 2005 Letter Agreement only authorized "complete" withdrawals, and the $80 million demand was a "partial" withdrawal demand. This is the "Complete, Not Partial" defense. The "Complete, Not Partial" defense is also flawed as a matter of contract interpretation, but even it if were valid, it would make no difference. Because FTC made the decision to seek a partial withdrawal instead of a complete withdrawal (which FTC originally wanted) based on the conduct of the Fund and its agents, the Fund is estopped from using the "Complete, Not Partial" defense. Alternatively, the Fund entered into an oral agreement with FTC, which it must honor.

Second, FTC claims that the Fund is liable for $133 million, which was the full value of FTC's Capital Account as of March 31, 2007. This claim presumes that the 2005 Letter Agreement permitted FTC to withdraw its entire Capital Account as of March 31, 2007. On February 14, 2007, FTC made a formal demand to withdrawal its account. The Fund rejected this demand because it failed to comply with the 120-day notice requirement. However, the Fund is equitably estopped from asserting the notice requirement as a defense. The Fund's agent engaged in misconduct which caused FTC to fail to comply with the notice requirement. Even if

equitable estoppel did not apply, the Fund would be liable in tort because this misconduct (non-disclosure and misleading disclosure) constitutes fraud and breach of fiduciary duty. As a result of this misconduct, FTC was misled into making a demand for $80 million instead of $133 million. The misconduct underlying this claim is two-fold: (1) the Fund failed to inform FTC that it would not honor the $80 million demand or the basis for such refusal; and (2) the Fund failed to adequately describe the scope of the underlying accounting problems, including for example that the misconduct was not confined to Perry Gruss. Had FTC known any of these facts, FTC would have demanded to withdraw $133 million in the Fall of 2006.

FTC's third claim is based on the dubious assumption that the Fund's "Tranche-by-Tranche" defense is valid. In other words, even if the Fund were right about FTC's contract rights, the Fund would be still liable to FTC. To begin with, even under the Fund's view, FTC had the right to withdraw a total of $45 million on March 31, 2007 and June 30, 2007. FTC's November 13, 2006 withdrawal demand provided sufficient notice, so the Fund has zero defense for the failure to pay this amount.

Moreover, under the Fund's view, FTC had a right to withdraw all its investments had it started the process earlier in 2006. Specifically, the Fund claims FTC could have withdrawn on the following dates: June 30, 2006, September 31, 2006, December 31, 2006, March 31, 2007, and June 30, 2007. As a result, had Epstein learned of the Gruss-related issues earlier in 2006, FTC could have (and would have) withdrawn its money in accordance with the Fund's tortured view of FTC's redemption rights. The evidence will show that Zwirn and the Fund knew about these accounting problems well before October 2006. The failure to reveal the information sooner was a clear breach of fiduciary duty that harmed FTC by preventing it from exercising its withdrawal rights.

I. The Fund Breached the 2005 Letter Agreement By Not Paying FTC $80 Million.

The Fund's failure to pay FTC $80 million on March 31, 2007 was a clear breach of the 2005 Letter Agreement. Under that Agreement, FTC had the right to withdraw its Capital Account on March 31, 2007 provided FTC gave 120-days notice. FTC's November 13, 2006 demand met the notice requirement. The Fund's argument is that the 2005 Letter Agreement only authorized a withdrawal of the $20 million investment made January 1, 2005. This argument is unsupported by the plain language of the Agreement. The Fund's claim that the 2005 Letter Agreement applies only to complete withdrawals is also not supported by the language of the Agreement. However, this point is irrelevant. Even if the 2005 Letter Agreement were construed to cover only complete withdrawals, the Fund would be estopped from asserting this limitation because (1) the Fund induced FTC to reduce the demand from a complete to a partial and (2) the General Partner breached its fiduciary duty to FTC by not correcting FTC's alleged error before it was too late for FTC to correct it. At a result, the Fund is liable to honor the demand.

A. The 2005 Letter Agreement Unambiguously Applies to FTC's Entire Capital Account.

Under the plain language of the 2005 Letter Agreement, FTC had the right to withdraw its "Capital Account" (not a particular tranche or investment) so long as FTC gave notice before December 1, 2006. FTC complied with the notice requirement—no particular form of notice is specified anywhere in the 2005 Letter Agreement or in the Fund's Limited Partnership Agreement. In any event, Delaware law, which governs, merely requires that a party "substantially comply" with a notice requirement. *E.g., Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *10 (Del. Ch.) ("When confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision.

The requirement of substantial compliance is an attempt to avoid 'harsh results' . . . where the purposes of these [notice] requirements has been met.").[2]

If a contract is unambiguous, Delaware law gives effect to the plain meaning of the words used without further inquiry. As this Court is well aware, a contract is not ambiguous merely because the parties disagree about the meaning; a contract is only ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del.1992).

The 2005 Letter Agreement provides that FTC "shall be permitted to withdraw its Capital Account" as of the quarter ending two years after January 1, 2005. "Capital Account" is a defined term so there is no plausible claim of ambiguity. The 2005 Letter Agreement expressly incorporates the defined terms from the Fund's Amended and Restated Limited Partnership Agreement dated May 1, 2003, which it turn defined a "Capital Account" in Section 6.1:

> 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 the immediately preceding Fiscal Period in according with the provisions of this Article VI increased by the amount of any Additional Capital Contribution made by the Partner as of the first day of the Fiscal Period.

This definition makes clear that there is a single "Capital Account" for each investor: "A 'Capital Account' shall be maintained for each Partner." The "Capital Account" includes an aggregation of all investments made by that investor. As a result, when the 2005 Letter Agreement provided

[2] The Agreement was entered into pursuant to the terms of the Fund's Limited Partnership Agreement, which contained a Delaware choice-of-law clause, and the arbitration clause governing this dispute requires application of Delaware law.

that FTC could withdraw its "Capital Account," there is only one reasonable interpretation of that language. FTC could withdraw any and all of its money.

The Fund may attempt to argue that each of FTC's investments was placed in a separate "Capital Account" because FTC completed a separate Subscription Agreement for each investment. Accordingly, the Fund may argue that each subsequent investment after the first was not an "Additional Capital Contribution" but rather a new "Initial Capital Contribution." This argument ignores the language of the LPA. Section 5.2 of the LPA defines a partner's "Initial Capital Contribution" as a contribution of not less than $5 million (subject to waiver by the General Partner) that results in admission to the partnership. Section 5.3 simply says the General Partner may accept an "Additional Capital Contribution" from a "Limited Partner"—*i.e.*, an entity that has already been admitted to the partnership. The definition has nothing to do with the type of paperwork completed when making the contribution. As a result, the Fund's own internal documents repeatedly characterized FTC's first investment as its "subscription" and each subsequent investment as an "additional contribution." Moreover, the Fund always gave FTC a single number that when it regularly provided in writing the value of FTC's "Capital Account"; the single number represented the total of all of FTC's investments plus all appreciation.

B. There Is No Basis for Adopting a So-Called Tranche-By-Tranche Approach.

The Fund contends the 2005 Letter Agreement only permitted FTC to withdraw its $20 million investment made on January 1, 2005. The Fund does not and cannot offer a reasonable interpretation of the actual language in the 2005 Letter Agreement to support this result. That ends the matter under Delaware law.

FTC anticipates that the Fund's argument to support its interpretation of the contractual language will hinge entirely on extrinsic evidence, *e.g.* the practice of other funds. To date, the

Fund has not provided an explanation for its position that is based on an interpretation of the contractual language itself. Under Delaware, this is not permissible. As a result, FTC is filing current with this Pre-Hearing Brief a Motion in Limine to Exclude All Extrinsic Evidence, and any discussion of extrinsic evidence in this Brief is without prejudice and included herein to avoid forcing Your Honor to have to read both an extensive Pre-Hearing Brief and Motion in Limine.

Extrinsic evidence is irrelevant and should be excluded in this case for three reasons. First, the terms at issue are unambiguous, and Delaware courts do not allow the introduction of extrinsic evidence to interpret unambiguous terms. Second, if Your Honor finds the terms to be ambiguous, extrinsic evidence is still irrelevant because the Fund drafted the terms, and Delaware courts strictly apply the principle of *contra proferentem* and construe ambiguous terms against the drafter without permitting any consideration of extrinsic evidence. Third, the specific types of extrinsic evidence FTC anticipates the Fund will rely on do not meet Delaware's standards for relevant, probative extrinsic evidence.

1. Delaware Does Not Permit Extrinsic Evidence Where Terms Are Unambiguous.

The first reason that extrinsic evidence is irrelevant relates to the parol evidence rule. Delaware law strictly applies the parol evidence rule so that extrinsic evidence may not be used to create an ambiguity in a contract. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del.1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").[3] In Delaware the threshold question of whether a contract provision is ambiguous or

[3] The Delaware Supreme Court in *Eagle Industries* disapproved and limited its previous holding in *Klair v. Reese*, 531 A.2d 219 (Del. 1987), in which it suggested that extrinsic evidence should be considered even when the contract was unambiguous. *See Eagle Indus., Inc.*, 702 A.2d at 1232 n.7.

unambiguous is answered without resort to extrinsic evidence,[4] and if a contract provision is found to be unambiguous, extrinsic evidence—course of performance,[5] usage of trade,[6] and so on—is simply excluded. *See, e.g.*, *Halliburton Co. v. Highlands Ins. Group, Inc.*, 811 A.2d 277, 279–80 (Del. 2002) ("We agree with [the trial court] that the documents are not ambiguous. Accordingly extrinsic evidence was properly excluded."); *Pellaton v. Bank of New York*, 592 A.2d 473, 478–79 (Del. 1991) (reversing trial court's contract interpretation because it impermissibly used extrinsic evidence to interpret unambiguous contract, "if the instrument is clear and unambiguous on its face, neither this Court nor the trial court may consider parol evidence to interpret it or search for the parties' intentions.") (internal quotation marks and citations omitted).

2. Delaware Strictly Applies *Contra Proferentem* And Excludes Extrinsic Evidence Where Ambiguous Terms Were Drafted By Only One Party.

Here, however, even if the terms in question are ambiguous, consideration of extrinsic evidence would be inappropriate. The Delaware Supreme Court has held that the principle of *contra proferentem* requires the exclusion of extrinsic evidence and construction of the ambiguous terms against the drafter in cases where ambiguous terms are drafted by only one party—as is the case with the 2005 Letter Agreement and the 2003 Limited Partnership Agreement. *See SI Management L.P. v. Wininger*, 707 A.2d 37 (Del. 1998). The ambiguous terms in situations where this rule applies are construed against the drafter. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 399 (Del. 1996).

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[4] *See, e.g.*, *E.I. Du Pont De Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 60 (Del. Sup. Ct. 1995) ("My obligation is to determine whether the term 'sudden' is ambiguous in the context of the specific pollution exclusions at issue *without relying on extrinsic evidence*.") (emphasis in original).

[5] *See, e.g.*, Del. Civil Pattern Jury Instructions § 19.15 (2000) ("[T]to determine the parties' intent *when there are ambiguous terms*, the jury will look to the construction given to the parties as shown through their conduct during the period after the contract allegedly became effective and before the institution of this lawsuit.") (emphasis added).

[6] *See, e.g.*, *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 468 n.86 (Del. Ch. 2008) ("Nor can parol evidence such as industry usage be used to create ambiguity.").

SI Management L.P. itself had closely analogous facts to this case—a dispute between a Limited Partner and a General Partner over the interpretation of ambiguous provisions in a document drafted by the General Partner. The Delaware Supreme Court held:

> [T]he articulation of contract terms . . . appears to have been entirely within the control of *one party*—the General Partner—that party bears full responsibility for the effect of those terms. Accordingly, extrinsic evidence is irrelevant to the intent of *all* parties at the time they entered into the agreement.

Id. at 44 (emphases in original).

In accordance with these principles, Delaware courts have construed ambiguous terms in documents drafted by only one party against the drafter, without permitting the introduction of extrinsic evidence. *See, e.g., SI Management L.P.*, 707 A.2d at 40–44 (requirements for meetings and amendments in limited partnership agreement); *Kaiser Aluminum Corp.*, 681 A.2d at 395–99 (conversion rights in certificate of designation creating preferred shares); *Stockman*, 2009 WL 2096213, at **5–8 (advancement of legal fees under partnership agreement); *In re Nantucket Island Assocs. Ltd. P'Ship Unitholders Litig.*, 810 A.2d 351, 361–68 (Del. Ch. 2002) (amendment of limited partnership agreement); *Greco v. Columbia/HCA Healthcare Corp.*, No. Civ. A. 16801, 1999 WL 1261446, at **12–13 (Del. Ch. Feb. 12, 1999) (payment of legal fees under limited partnership agreement.).

3. The Specific Extrinsic Evidence FTC Anticipates that Fund Will Cite Is Legally Irrelevant and Inadmissible.

There are additional reasons why the specific types of extrinsic evidence that the Fund will likely submit here are irrelevant and should be excluded. FTC anticipates that the Fund will rely on three types of extrinsic evidence: (1) the fact that people within the Management Company believed that each investment was subject to a distinct lock-up period; (2) the fact that other investors allegedly redeemed investments on an investment-by-investment basis; (3) the claim that many hedge funds adopt a "tranche-by-tranche" approach; and (4) the fact that

"tranche-by-tranche" language was added to a May 2005 Offering Memorandum. Even assuming there was a factual basis to support the existence of these types of extrinsic evidence (which there is not), this evidence would be legally irrelevant and inadmissible because it does not meet Delaware's standards for the types of extrinsic evidence that are entitled to weight.

a. Unexpressed Subjective Understanding Is Irrelevant.

The Fund apparently intends to present evidence that the General Partner and its employees believed that each investment made by a single investor was subject to a distinct lock-up. This evidence largely consists of internal redemption schedules that were prepared by Management Company personnel prior to the dispute with FTC. Even assuming there was crystal clear and overwhelming evidence of a sincere belief within the Management Company, this evidence would be irrelevant and inadmissible.

"It is the law of Delaware that subjective understandings of a party to a contract which are not communicated to the other party are of no effect. They are irrelevant to the interpretation of the contract and should not and will not be given any weight." *Supermex Trading Co., Ltd. v. Strategic Solutions Group, Inc.*, No. Civ. A. 16183, 1998 WL 229530, at *9 (Del. Ch. May 1, 1998). The rule against crediting one party's subjective understanding is consistent with the overarching principle that contract interpretation is a search for a meaning *shared* between the parties rather than a meaning held by one party alone. *See United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007) ("[T]he private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning because the meaning of a properly formed contract must be shared or common.").

There is no shortage of Delaware cases applying this rule. Delaware courts give no weight at all to a party's subjective, unexpressed understandings of a contract term's meaning, even when the evidence is uncontradicted that the party did in fact hold that understanding. *See,*

e.g., *United Rentals, Inc.*, 937 A.2d at 836–40 (Del. Ch. 2007) (party's understanding that contract preserved a right to specific performance); *Supermex Trading Co.*, 1998 WL 229530, at **8–9 (party's understanding that contract gave the party the right to redeem a debenture for stock); *SBC Interactive, Inc. v. Corporate Media Partners*, No. Civ. A. 15987, 1997 WL 810008, at *4 n.13 ((Del. Ch. 1997) (party's understanding that a withdrawal under a contract provision would be nonarbitrable); *Bell Atlantic Meridian Sys. v. Octel Commc'ns Corp.*, No. Civ. A. 14348, 1995 WL 707916, at **6–11 (Del. Ch. Nov. 28, 1995) (party's understanding that "new systems" in a contract entitled it to certain successor products).

b. The Understanding and Conduct of Other Investors Is Irrelevant.

The Fund also will attempt to claim that other investors in the Fund believed that each of their investments was subject to a distinct lock-up and that some requested withdrawals consistent with that understanding. There are two huge problems with this evidence.

First, not a single investor in the Fund other than FTC is on the witness list. Any evidence about what other investors thought would be inadmissible hearsay.

Second, the conduct of other investors in requesting withdrawals is irrelevant. Before addressing the legal flaw in such evidence, FTC notes that prior to the Fall of 2006, there were very few requests for withdrawals from the Fund, presumably because the Fund had experienced positive performance and had not revealed any of its problems yet. In fact, FTC believes there may be a single example of an investor who asked to withdraw an amount equal to an entire "tranche"; in other words, there was a single example of an investor who conceivably might have considered whether it could ask for more than a tranche or was limited by some tranche-by-tranche restriction – every other withdrawal request was for relatively small amounts.

Even if compelling evidence of other investors acting consistent with the Fund's proffered interpretation existed, such evidence would be inadmissible and irrelevant. Obviously,

the conduct of third parties is entirely irrelevant to interpreting a bilateral contract between FTC and the Fund. Presumably, the Fund might contend this sort of evidence constitutes "course of performance" evidence. Such a contention would be very wrong.

Delaware courts have relied on the Restatement (Second) of Contracts when considering evidence submitted to establish a course of performance.[7] The Restatement's definition of course of performance requires: "repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other." Restatement (Second) of Contracts § 202(4) (1981) (emphasis added). A course of performance shows the meaning that *both* parties put on the contract by their repeated actions—"the parties' own practical interpretation of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it." 11 Richard Lord, *Williston on Contracts* § 32:14 (4th ed. 1999). As the Restatement makes clear, a course of performance must thus be both *repeated* (the agreement must have an opportunity for "repeated occasions for performance" by either party (Restatement (Second) of Contracts § 202(4) (1981)) and *mutual* (the other party must "accept[] . . . or acquiesce[] in" the performance "without objection") (*Id.*). These two elements—repetition and mutuality—are necessary for evidence to truly be a "course of performance" and therefore entitled to great weight: repetition, so that it's clear that a party has truly admitted by conduct that the contract should be interpreted in a certain way,[8] and mutuality, so that it's clear that both parties share the understanding of the contract's interpretation.

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[7] *See, e.g., Personnel Decisions, Inc. v. Business Planning Sys., Inc.*, No. 3213-VCS, 2008 WL 1932404 at *5 n. 21 (Del. Ch. May 5, 2008) (quoting Restatement (Second) of Contracts section on course of performance evidence); *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 398 n.71 (Del. Ch. 2008) (same).

[8] *See* 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.13, at 332 (3rd ed. 2004) ("Perhaps the most satisfactory explanation [for why course of performance evidence is relevant to the parties' intent at the time of contracting] is that [course of performance evidence] operates as an admission. If that is so, presumably the reason for requiring more than one occasion of conduct is to justify a court in inferring an admission from the conduct.").

Delaware cases recognizing evidence establishing a course of performance similarly require both repetition and mutuality. *See, e.g., Personnel Decisions, Inc. v. Business Planning Sys., Inc.*, No. 3213-VCS, 2008 WL 1932404 at *5 (Del. Ch. May 5, 2008) (course of performance establishing parties' agreement to arbitrate under the Delaware Uniform Arbitration Act established by "[n]early five years" of conduct between parties, including "exchang[ing] multiple correspondence to each other" assuming statute's applicability); *Wakefern Food Corp. v. Chestnut Hill Plaza Holdings Corp.*, No. Civ. A. 18040, 2001 WL 515069, at *8 (Del. Ch. May 4, 2001) (course of performance established when one party knew of "at least seven months" of other party's conduct allegedly in breach of contract before objecting); *Bd. Of Educ. Of the Appoquinimink School Dist. v. Appoquinimink Education Ass'n*, No. Civ. A. 16812, 1999 WL 826492, at **8–9 (Del. Ch. Oct. 6, 1999) (course of performance regarding arbitrability of disputes over disability benefits established when both parties conducted three levels of arbitration of grievance); *Izquierdo v. Sills*, No. Civ. A. 15505-NC, 2006 WL 318631, at *2 (Del. Ch. Jan. 30, 2006) (rejecting purported course of performance evidence of "four instances" of conduct that did not show any consistent pattern because it was not a "regular and discernable" course of conduct).

c. No Industry Custom and Usage Exists.

The Fund has submitted the expert report of a lawyer who has drafted hedge fund documents before and opines that he commonly sees funds employ a tranche-by-tranche approach. Conspicuously, the Fund's expert does not opine that this is a uniform practice. Such a claim would be entirely false, as evidenced by the expert report submitted by FTC. Presumably, the Fund intends to claim that its expert's understanding constitutes a custom and usage in the trade. The Fund, however, cannot satisfy the exacting standard required to establish a trade usage.

Delaware courts have stated that the common law of custom and usage is codified in Delaware's enactment of the UCC,[9] which states: "A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." 6 Del. C. § 1-303(c). Trade usage can be established in two ways: (1) by evidence that the other party actually knows of the alleged usage, or (2) by evidence that the alleged usage is "so general and notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it." 12 Richard Lord, *Williston on Contracts* § 34:15 (4th ed. 1999). There is no evidence FTC knew of an alleged "tranche-by-tranche" usage, and the Fund cannot establish that the "tranche-by-tranche" approach is "so general, notorious, and universal and well established" that knowledge can be presumed. *See id.* ("[O]ne who seeks either to define language or to attach a term to a contract by means of usage must demonstrate that the usage was actually known by the party to be affected by it, or that it is so general, notorious, universal and well established that knowledge of it will be presumed.").

There is zero evidence FTC knew of some industry practice to calculate redemption periods based on a tranche-by-tranche basis. To the contrary, FTC has provided the governing documents for its various hedge fund investments. The picture that emerges is mixed: Some clearly employ a "tranche-by-tranche" approach advocated by the Fund; others clearly use a "single capital account" approach; and some employ both. Worse, when the other hedge funds FTC invested in seek to employ a "tranche-by-tranche" approach, their documents say so

[9] *See Freudenberg Spunweb Co. v. Fibervisions L.P.*, No. 04C-03-073-FSS, 2006 WL 1064173, at *18 (Del. Super. Ct. Mar. 27, 2006) ("The Delaware Uniform Commercial Code codifies the common law doctrine of 'custom and usage in the trade' . . . .")

expressly.[10] Obviously, if there were some accepted custom to use a "tranche-by-tranche," this specific language would be unnecessary.

There is no evidence that the tranche-by-tranche approach is "general, notorious, and universal and well established." As noted by a continuing legal education paper that two of the firm's partners authored and posted on its website, SRZ (the author of the Fund's documents) has opined that the "single capital account" and "tranche-by-tranche" approaches are both "typical":

> A **typical** lock-up applies for a specified period beginning on the date of the investor's admission to the fund **or** the date of each capital contribution made by an investor to the fund.

Managing Liquidity, Stephanie R. Breslow & Kelli L Moll (January 18 2007) (emphasis added). There simply is no uniform practice. The proffered testimony of the Fund's expert witness, Henry Bregstein, is that in "my experience," funds "routinely" use a tranche-by-tranche approach. Bregstein Report, at 6. That opinion does not establish that the practice is so "general, notorious, and universal" that any reasonable hedge fund investor should be aware of the practice.

d. The 2005 Offering Memorandum Is Improper Extrinsic Evidence.

FTC anticipates the Fund also will point to revisions made to the Confidential Offering Memorandum in May 2005. As noted above, the Fund announced that a three-year lock-up would apply to all investments made after January 1, 2005. In connection with this change, the

[10] For example, the Prentice Capital Limited Partnership Agreement expressly states that each investment is put in its own "Capital Account": "A capital account (the 'Capital Account') shall be established on the books of the Partnership for each Capital Contribution made by each Partner." As a result, the Offering Memorandum explains: "Each capital contribution of a Limited Partner will be credited to a separate capital account (each, as 'Capital Account'). Each capital contribution by a Limited Partner (and any appreciation or depreciation thereof) will be subject to a new Lock-Up Period (as defined below) and to the application of other provisions relating to withdrawals." Similarly, the Bear Stearns Asset Backed Fund's Limited Partnership Agreement states: "For purposes of this Sec. 4.02, each additional contribution by a Limited Partner made pursuant to Sec. 3.02(b) shall be placed in a separate Capital Account for purposes of determining the applicable Lock-up Period." Schulte Roth and Zabel, the same firm that drafted the Zwirn documents, drafted both sets of these documents.

Fund issued a new Offering Memorandum, albeit five months later. The new Offering Memorandum describes the applicable lock-up using the following language:

> A Limited Partner may, upon at least 120 days' prior written notice to the General Partner, withdraw part or all of its Capital Account as of the last business day of the calendar quarter ending at least three years after the date on which the Interest was purchased and as of each third anniversary of that date thereafter . . . 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).

May 2005 Offering Memorandum.

This evidence is inadmissible. To begin with, the document was created in May 2005 five months after the 2005 Letter Agreement was entered into in January 2005. This is classic extrinsic evidence that should be excluded. As the Delaware Supreme Court has stated, "backward-looking evidence gathered after the time of contracting is not usually helpful." *Eagle Indus.*, 702 A.2d at 1233 n.11 (emphasis added); *See, e.g., Agranoff v. Miller*, No. Civ. A 16795, 1999 WL 219650, *17 (Del. Ch. Apr. 12, 1999) (applying the *Eagle Industries* bar on "backward-looking evidence" to exclude evidence of certain shareholders' actions after contract was executed because "none of these dealings bear on what the parties to the [contract] intended at the time they executed it"). Second, this language is not probative of the intended meaning of the 2005 Letter Agreement because it applies to investments subject to the three-year lock-up—*i.e.*, not FTC's investment. Worse, the Fund's use of this language five months after the 2005 Letter Agreement illustrates painfully that the Fund knew how to invoke a "Tranche-by-Tranche" method of calculating lock-ups; yet, it failed to use such language when crafting the 2005 Letter Agreement.

C. The 2005 Letter Agreement Is Not Limited to "Complete" Withdrawals.

The Fund claims that even if the 2005 Letter Agreement applied to withdrawals of any and all of FTC's investments, it only authorized a "complete" withdrawal of all of the

investments, not a partial withdrawal. To support this argument, the Fund does not cite any express language of limitation in the 2005 Letter Agreement. The 2005 Letter Agreement says that FTC "shall be permitted to withdraw its Capital Account." A withdrawal of $80 million by FTC would constitute a withdrawal of FTC's "Capital Account"; it could not be described any other way. There is no language that suggests the "withdraw" may only be complete.

The Fund's argument is based on the fact that the introductory clause of the Agreement says: "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. . . ." Section 9.1 specifically authorizes "complete withdrawals of a Limited Partner's Capital Account." Section 9.2 addresses "partial withdrawals." In other words, the Fund argues that this recital language proves that the parties' intended the 2005 Letter Agreement to authorize only "complete" withdrawals. In short, the Fund tacitly concedes the 2005 Letter Agreement is ambiguous on this point, but that the introductory clause can help resolve the ambiguity.

Conspicuously, the recital does not say that the Agreement is made exclusively under Section 9.1; it merely says that the Agreement is in "accordance" with Section 9.1. Section 9.1 contained a sentence that said, "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." All the introductory language did was acknowledge that the General Partner was invoking its power to alter the standard withdrawal rules. Thus, the Agreement is in "accordance" with Section 9.1; nothing more can be inferred from this introductory clause.

If Your Honor believes the 2005 Letter Agreement is ambiguous as to whether it authorizes complete or partial withdrawals, this ambiguity is easily resolved. To begin with, the Fund can provide zero explanation for why the parties would have intended to limit FTC to a complete withdrawal. Obviously, it makes no sense why FTC would want to limit its options to

only a complete withdrawal. Similarly, it makes no sense why the Fund would want to encourage FTC to abandon the Fund entirely if FTC ever wanted some money back; yet, that would be precisely the effect of depriving FTC of the contractual right to seek a partial withdrawal. "Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. As such, a party to a contract has made an implied covenant to interpret and to act reasonably upon contractual language that is on its face reasonable." *Chamison v. Healthrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).

Moreover, the evidence will be that the General Partner drafted the language of the 2005 Letter Agreement and that FTC did not change a word of the proposed language. As noted above, Delaware strictly enforces the rule of *contra proferentem*. *See supra*, at ___. Application of this principal makes particular sense where it is clear that the Fund knew how to distinguish between "complete" and "partial" withdrawals. *E.g., Penn Mutual Life Ins. Co. v. Oglesby,* II, 695 A.2d 1146, 1149-50 (Del. 1997). Sections 9.1 and 9.2 of the LPA expressly use the adjectives "complete" and "partial" to modify "withdrawal" when only a particular type of withdrawal is intended. Conspicuously, the 2005 Letter Agreement uses neither adjective. Moreover, the LPA repeatedly uses the word "withdrawal" without modification when referring to both complete and partial withdrawals, just as the 2005 Letter Agreement. *E.g.,* LPA §§ 9.3; 9.4; 9.8.

D. Even if the 2005 Letter Agreement Authorized Only A Complete Withdrawal, the Fund Must Honor FTC's $80 Million Demand.

Even if Your Honor construed the 2005 Letter Agreement to authorize only a complete withdrawal, the Fund would be legally obligated to honor FTC's $80 million demand. In short, the fight about whether the 2005 Letter Agreement applies to complete or partial withdrawals is academic. The result is same regardless for three reasons: (1) the Fund would be bound by the doctrine of promissory estoppel to honor the $80 million demand; (2) the Fund would be

equitably estopped from asserting its right to permit only a complete withdrawal; and (3) alternatively, the Fund would be bound a new formed agreement between it and FTC to permit a partial withdrawal. Under any of these three contract or quasi-contract doctrines, the Fund would be liable for the $80 million.

Worse for the Fund, if the 2005 Letter Agreement authorized only a complete withdrawal, then FTC has a tort claim against the General Partner and the Fund, which is liable for the torts committed by its agent, for breach of fiduciary duty or an outright fraud. The General Partner's decision to wait to inform FTC of the "Complete, not Partial" position until March 27, 2007, at which point FTC could not fix the problem, was a breach of fiduciary duty at a minimum. The damages for this claim exceed $80 million. FTC's tort theories are addressed in Section II. B. *See infra*, at 33-39.

1. Promissory Estoppel Requires that the Fund Honor the $80 Million Demand.

Even assuming arguendo that FTC did not have a contractual right to a partial withdrawal under the 2005 Letter Agreement, promissory estoppel requires that the Fund honor FTC's $80 million demand. "To succeed on a claim for promissory estoppel, the promisee must prove that the promisor made a promise with the intent to induce action or forbearance, that promisee actually relied on the promise, and that promisee suffered an injury as a result." *Continental Insurance Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1233 (Del. Ch. 2000). Here, FTC intended to make a complete withdrawal demand, but was convinced by the Fund's agents (Zwirn and Dubin) to reduce the demand to a partial withdrawal. Zwirn promised and assured FTC that the $80 million demand would be honored, knowing at the time that FTC would rely on this promise. Assuming the Fund is correct that FTC only had the contractual right to a complete withdrawal, then FTC suffered significant injury as a result of its reliance. But for FTC's

reliance on Zwirn, FTC would have demanded a complete withdrawal of the roughly $133 million in November 2006. All the elements of promissory estoppel are easily satisfied.

2. Equitable Estoppel Bars the Fund From Asserting that FTC Only Had the Right to a Complete Withdrawal.

Delaware law recognizes that there are situations where the conduct of one party to a contract equitably estopps that party from asserting a contractual right that it otherwise might have. "[A] party may be precluded by its own act or omission from asserting a right to which it *otherwise would have been entitled*." *Genencor International, Inc. v. Novo Nordisk*, 766 A.2d 8, 12 (Del. 2000) (emphasis in original). The underlying conduct can even be "unintentional" conduct. *Waggoner v. Laster*, 581 A. 2d 1127, 1136 (Del. 1990) (equitable estoppel arises "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." (emphasis added)). To prove an estoppel, FTC must show that (1) FTC "lacked knowledge and the means of knowledge of the truth of the facts in question"; (2) FTC relied on the conduct of the Fund and its agents; and (3) FTC "suffered a prejudicial change of position in consequence thereof." *Id.*

Here, the conduct of the Fund was its failure to inform FTC of the Fund's position that the 2005 Letter Agreement only authorized complete withdrawals until after it was too late for FTC to give the required 120-days notice. While silence alone can give rise to an estoppel, *American Family Mortgage Comp. v. Acierno*, 1994 WL 144591, at *5 (Del. Supr.) ("estoppel may be appropriate when a party, by silence, induced another to enter a transaction"), particularly where, as here, the General Partner had a fiduciary duty to speak up, and tell FTC that it believed that the 2005 Letter Agreement only permitted complete withdrawals.

FTC clearly lacked knowledge of the Fund's concealed view and lacked the means to uncover the truth given that FTC expressly discussed the withdrawal with the Fund's agents yet was not told of the "Complete, not Partial" position. FTC changed it position in reliance on the

Fund's failure to disclose (changing from a complete to partial demand) and was prejudiced by it because otherwise FTC would have made a timely complete demand. The Fund is estopped from invoking the "Complete, not Partial" defense.

3. Fund and FTC Created An Oral Agreement.

Even assuming the 2005 Letter Agreement only permitted "complete" withdrawals, the facts support the conclusion that the Fund and FTC formed a binding oral agreement to permit FTC to make a partial withdrawal. Under the Limited Partnership Agreement, the General Partner had broad authority to make new agreements or modifications to withdrawal rights. *See* LPA §§ 9.1 & 9.2.[11] Similarly, the 2005 Letter Agreement was subject to oral modification. *See 913 North Market Street Partnership v. Davis*, 723 A.2d 397, 397 (Del. 1998) ("The terms of a written contract, however, may be modified by subsequent oral agreement of the parties to forbear their rights under the agreement.").[12] Here, the oral modification, of course, is evidenced by Epstein's subsequent memorandum requesting the $80 million "as per our conversation."

The Fund's agents orally agreed to permit FTC to withdraw $80 million. FTC gave consideration in two forms. First, FTC did not demand a complete withdrawal (which apparently the Fund concedes it had the legal right to demand). Second, FTC did not provoke a fight with the Fund at time when the Fund was vulnerable. In the Fall of 2006, the evidence will show that Zwirn was uncertain about the scope of the Fund's accounting problems and nervous that investors (and even creditors) would abandon the Fund. As a result, he was desperate to avoid any fight with an investor, much less a large one like FTC, and thus agreed (albeit perhaps without any intention of honoring his agreement) to permit FTC to withdrawal of $80 million to

[11] The LPA does not contain a prohibition on oral modifications, so the General Partner is free to make oral agreements.

silence Epstein—at least until Zwirn could get a better grasp on the situation. Obviously, as events unfolded and Zwirn got a better sense of the situation, Zwirn had a change of heart and felt emboldened to dishonor FTC's demand. But Zwirn already had made a binding agreement with FTC, and the Fund was obligated to honor it.

II. The Fund Is Liable for $133 Million.

In the alternative to its claim for $80 million, FTC has a claim against the Fund for $133 million, which was the value of FTC's entire Capital Account as of March 31, 2007 when FTC had the right under the 2005 Letter Agreement to withdraw. FTC made a demand to withdraw the entire Capital Account on February 14, 2007—admittedly a failure to comply with the 120-day notice requirement. Under Delaware law, however, the Fund is equitably estopped from asserting the notice defense because its own conduct caused FTC to submit the request late. But for the Fund's conduct, FTC would have submitted the request timely. Even if equitable etoppel does not apply, the conduct of the Fund and its agents constitutes a breach of fiduciary duty and/or fraud that caused FTC to not make a timely demand for a complete withdrawal.

A. Equitable Estoppel Precludes the Fund from Asserting the 120-Day Notice Requirement.

The elements of estoppel are outlined above. *See* supra, at 30. It is clear that in the Fall of 2006, FTC did not know the Fund would claim the 2005 Letter Agreement only authorized complete withdrawals or that the Fund would claim the 2005 Letter Agreement applied to only the January 1, 2005 investment. FTC also did not know the full scope of the problems at the Fund, including that the problem was not simply confined to Perry Gruss.

FTC clearly relied on the Fund's failure to inform FTC of these facts in making the decision to postpone a complete withdrawal demand. To support equitable estoppel, "the defendants' conduct may be either an affirmative act or a failure to act when duty required." *Moore Business Forms, Inc. v. Cordant Holdings Company, Inc.*, 1995 WL 662685, at *9

(Del.Ch.). Here, the defendants owed a fiduciary duty to FTC and thus had an obligation to disclose. Moreover, FTC had discussions with the Fund's agents where they affirmatively mislead FTC. Whatever was said during their conversation, Zwirn knew that FTC was led to believe "as per our conversation" that it had a right to withdraw $80 million. Zwirn had an obligation to correct that misimpression. Clearly, FTC would have responded immediately by making a timely demand for $133 million. As well, FTC's decision to settle for a reduced withdrawal demand was premised on the understanding created by Zwirn that the Fund's problems were limited to Perry Gruss, and that the Fund was healthy despite the accounting issues. These facts were not true, yet FTC relied on these facts in making the decision to leave roughly $55 million in the Fund.

FTC clearly suffered a prejudicial change in position. Had FTC made a complete withdrawal request in November 2006 rather than a partial demand, FTC would have satisfied the 120-day notice requirement of the 2005 Letter Agreement. As a result, the Fund is estopped to assert the 120-day notice requirement.

B. The Fund Is Liable for a Complete Withdrawal Under Breach of Fiduciary Duty and Fraud Principles

Even if equitable estoppel does not apply, the Fund is liable to FTC for a complete withdrawal as damages for breach of fiduciary duty or fraud. FTC was clearly induced to not make a complete withdrawal request by the misstatements and omissions of the Fund's agents. Assuming FTC had a right to a complete withdrawal under the 2005 Letter Agreement, then the damage flowing from FTC's reliance is $133 million.

1. Zwirn, Dubin and the General Partner Breached their Fiduciary Duty to Make Full and Complete Disclosure

The Limited Partnership Agreement states that "[t]he management, operation and control of the Partnership shall be vested exclusively in the General Partner." LPA § 3.1. "Necessarily,

this relationship of trust creates fiduciary duties in the general partner that run to the limited partners." *Madison Real Estate v. GENO One Fin. Place L.P.*, 2006 WL 456779 *3 (Del.Ch. 2006) (emphasizing that the partnership agreement "vest[ed] in the general partner sole and exclusive authority for the management of the partnership"). While the Limited Partnership Agreement refers to the general partner's "fiduciary duty" in Section 4.6, it makes no attempt to spell out what the fiduciary duty is. In such circumstances, the default statutory duties of due care and loyalty apply. *McGovern v. General Holding, Inc.*, 2006 WL 4782341, at *18 (Del.Ch. 2006) ("Under Delaware law, a general partner and its representative must manage the partnership in the best interests of the partnership and deal fairly with the limited partners" and traditional fiduciary duties apply absent contractual modification); *In re Boston Celtics, Ltd. P'ship S'holders Litig.,* 1999 WL 641902, at *4 (Del.Ch. Aug.6, 1999) ("It is well settled that, unless limited by the limited partnership agreement, the general partner of a Delaware limited partnership and the directors of a corporate General Partner who control the partnership, like the directors of a Delaware corporation, have the fiduciary duty to manage the partnership in the partnership's interests and the interests of the limited partners"). Furthermore, as representatives of the General Partner, and directors who controlled the General Partner, absent contractual modification, Zwirn and Dubin had a fiduciary duty to FTC as a limited partner. *McGovern*, 2006 WL 4782341, at *18; *In re Boston Celtics, Ltd.*, 1999 WL 641902, at *4.

In particular, "the Court of Chancery has stated that partnerships have a duty to disclose negative information about which investors might reasonably want to be aware." Edward P. Welch et al., Folk on the Delaware General Corporation Law § 17-403.5.4, at LP-IV-62 (5th ed. 2009 Supp.). In *Albert v. Alex. Brown Management Services, Inc.*, the Court determined that limited partners adequately pled a breach of fiduciary claim based on the general partner's failure to disclose material information. 2005 WL 2130607 (Del.Ch. 2005). The limited partners

alleged several non-disclosures, including that the defendants' failed to inform them of the Funds' liquidity issues, which were the focus of several management committee meetings. *Id.* at *1. *Id.* at *2. The Court determined that the non-disclosure claims were adequately pled because "the Managers failed to disclose the challenges facing the Funds and the meager steps they were taking to meet those challenges" and "had the plaintiffs known the truth, they could have asked for withdrawals." *Id.*[13]

Here, the General Partner, and its representatives, had a fiduciary duty to disclose negative information about which investors might reasonably want to be aware in determining whether to seek withdrawals. At a minimum, this duty was breached in the Fall of 2006 by the General Partner's failure to inform FTC of: the Fund's view and intent to claim that the 2005 Letter Agreement did not authorize the $80 million withdrawal; and the full scope of the problems at the Fund, including that the problem was not simply confined to Perry Gruss. FTC relied on these non-disclosures by not submitting a complete withdrawal request in November 2006, as it had originally demanded.

2. FTC Was Defrauded Out of Making A Complete Withdrawal Demand.

The conduct of the Fund's agents also constitute fraud. Zwirn, on behalf of the above entities, defrauded FTC by representing that the Fund had the present intent of honoring the $80 million request. Delaware Courts "will convert an unfulfilled promise of future performance into a fraud claim if particularized facts are alleged that collectively allow the inference that, at the

[13] The Court of Chancery recently held that unitholders in a limited partnership failed to state a colorable claim of breach of fiduciary duty of disclosure because the Limited Partnership Agreement expressly limited the relevant disclosure obligations of the general partner. *In re K-Sea Transp. Partners L.P.*, 2011 WL 2410395 at *9 (Del. Ch. June 10, 2011). In particular, plaintiffs alleged that defendants failed to disclose their conflict of interest and the true value of the shares in the context of a merge or consolidation. However, the LPA expressly proscribed what had to be disclosed in the context of a merger or consolidation and the procedures for handling conflicts of interest. *Id.* at *8. Because the defendants complied with these express procedures, plaintiffs failed to make a colorable claim of breach of fiduciary duty. *Id.* Accordingly, *In re K-Sea Transportation* simply reinforces the proposition that the default fiduciary duty of disclosure applies absent express modification that governs the required disclosures. Because no contractual provision modifies or governs the disclosures required in this case, the traditional fiduciary duties continue to apply.

time the promise was made, the speaker had no intention of performing. Indeed, '[s]tatements of intention ... which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent.'" *Id.* (quoting *Stevanov v. O'Connor*, 2009 WL 1059640, at *12 n. 66 (Del.Ch. Apr.21, 2009)). Here, Zwirn promised and assured FTC that the $80 million demand would be honored, knowing at the time that Zwirn had no intention of honoring FTC's withdrawal request. Assuming FTC had the contractual right to a complete withdrawal, FTC suffered significant injury as a result of its reliance. But for FTC's reliance on Zwirn and Dubin's false promise, FTC would have continued to demand a complete withdrawal of the roughly $133 million in its Capital Account in November 2006, just as FTC did three months later in February 2007 when FTC learned that the Fund had no intent to honor the $80 million demand. Furthermore, if FTC had known that it was going to face a war with the Fund over its withdrawal rights, there would be no point in giving up on $53 million by not even bothering to ask for that back too. All the elements of fraud are easily satisfied. The damages equal the value of a full redemption request, which is what FTC would have continued to demand had it not been defrauded.

Once Zwirn undertook to tell FTC about the problems at the Fund, Zwirn had a duty to make full disclosures regarding the Fund's problems, including the liquidity problems, the law firm's determination that the COO, Kahn, had been "willfully blind" to the misconduct, and the full scope of the recent discoveries regarding interfund transfers. Without these disclosures, FTC was left with the misleading impression that the problems at the Fund were as they were presented as "immaterial" not the truth of the severity of the actions. Zwirn failed to make these disclosures with the intent to convince FTC to reduce its demand, which it did to its detriment. In addition, Zwirn and Dubin had a duty to correct any misunderstanding that FTC may have had regarding the Fund's view of the lock-up periods. Whatever was said during the call, Zwirn and

Dubin knew that their statements led FTC to believe that, "as per [their] conversation," FTC had the right to withdraw $80 million. By failing to correct this misunderstanding caused by what was said during their conversation, Zwirn and Dubin fraudulently omitted information, which, if known, would have caused FTC to continue to demand his complete capital account.

The elements of fraudulent omission are easily satisfied. Under Delaware law, one is liable for fraud by remaining "silent in the face of a duty to speak." *Metro Comm'n Corp. BVI v. Advanced Mobilecomm Tech. Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004); *Stephenson v. Capano Dev't Co., Inc.*, 462 A.2d 1069 (Del. 1983) ("[O]ne is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading."). As discussed above, Zwirn, and the entities who he represented, had a fiduciary duty to disclose negative information to investors. In addition, it is black-letter law that Zwirn undertook a duty to speak by making partial disclosures: his duty was to make full disclosures necessary to correct his misleading partial disclosures. *E.g., Metro Comm'n*, 854 A.2d at 155 & n. 76 ("Once those defendants undertook to communicate . . . they were under a duty to disclose all facts within their knowledge necessary to prevent [their partial disclosures] from being misleading"). The measure of damages is the value of the complete withdrawal request, which is what FTC would have continued to demand absent these fraudulent omissions.

3. Fund Is Liable for the Torts Committed By Zwirn or Dubin.

The Fund (not just Zwirn personally) is liable for the above torts under Delaware law. Because the General Partner committed these torts, the Fund is on the hook for any damages.

a. General Partner Liable for Torts of its Agents and the Management Company and Their Knowledge is Attributable to the General Partner

To begin with, the Fund's General Partner is clearly liable. "Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed

to the principal." *Albert,* 2005 WL 2130607, at *11 (sustaining aiding and abetting breach of fiduciary duty claim against entity whose "employees, acting within the scope of their employment, had knowledge of the underlying factual allegations"). Accordingly, for purposes of the General Partner's fiduciary duty to disclose, the knowledge of its agents (including Zwirn) is attributable to the Management Company and General Partner, such that these entities were required to disclose facts known by its agents in the same manner as if these entities knew them. *See, e.g., Metro Comm'n*, 854 A.2d at 159 (holding that corporation could be held liable for breach of fiduciary duty because company, through agent, made statement that agent knew to be false and agent's "knowledge of [the misrepresented fact] was attributable to" the company); *id.* at 145-46 (allegation that company made misleading statements in light of the imputed knowledge of its agents knew sufficed to state common law fraud claims). Thus, the General Partner is liable for the torts of its agents. *See, e.g., Vichi v. Koninklijke Philips Electronics N.V.,* 2009 WL 4345724 *18 (Del. Ch. 2009) (entity can be held liable for fraud of its agents); *Knetzger v. Centre City Corporation*, 1999 WL 499460 (Del. Ch. 1999) (general partner breached its fiduciary duty because of self-interested acts of its CFO and operating head, even though principal of partnership was allegedly unaware of their acts).[14]

b. Fund Liable for Torts of General Partner

Under Delaware's Revised Uniform Partnership Act ("DRUPA"), the Fund is liable for the torts of the general partner committed in the ordinary course of business of the partnership.

[14] As stated previously, the General Partner and the Management Company are functionally the same entity. Zwirn and Dubin were principals and agents of both. Even if this were not true, the General Partner would be liable for their actions and responsible for their knowledge even if they were only agents of the Management Company. *See Davenport Group MG, L.P. v. Strategic Inv. Partners, Inc.* 685 A.2d 715 (Del.Ch. 1996) (holding that when general partner delegates powers to management company, general partner can be held liable for breach of fiduciary duty based on the conduct of the management company because general partner was entrusted the sole management authority over the fund and no provision in LPA precluded the general partner's liability for the management company's acts). Accordingly, the remainder of the discussion will refer to the General Partner's direct liability for the acts of agents of the Management Company and the General Partner, regardless of whether the agents were direct agents of the General Partner or the Management Company (or both).

"A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership." 6 Del.C. § 15-305 (a).[15] This provision is taken verbatim from the Revised Uniform Partnership Act ("RUPA"), the official comment to which notes that the section permits a partner or any other person to "sue the partnership on a tort or other theory during the term of the partnership." RUPA, Official Comment to Section 305(a). The Comment further explains that the partnership is liable for a general partner's conduct pursuant to "a partner's apparent, as well as actual, authority." *Id.* Thus, because the General Partner acted with the authority of the partnership under the express terms of the LPA, the Fund is liable for the General Partner's breach of fiduciary duty and fraud.

4. Exculpation Clause Does Not Apply

The exculpation clause in the Limited Partnership does not protect Zwirn, the General Partner or the Fund. Zwirn and the General Partner remain liable because their torts were not committed "in the absence of willful malfeasance, bad faith or gross negligence," which is an express carve out from the exculpation clause. LPA 4.3(a). As explained above, Zwirn intentionally defrauded FTC and intentionally refused to make full disclosures in order to induce FTC to reduce its withdrawal demand and keep FTC in the Fund. Zwirn's intent is imputed to the General Partner, such that Zwirn's intentional wrongdoing constitutes intentional wrongdoing by the General Partner. *See, e.g.*, *Metro Comm'n*, 854 A.2d at 159 (holding that corporation could be held liable for knowing breach of fiduciary duty based on agent's knowing misrepresentation); *KE Property Management Inc. v. 275 Madison Management Corp.*, 1993

[15] The DRUPA is made applicable to limited partnerships because no provision in Delaware's Revised Uniform Limited Partnership Act ("DRULPA) speaks to this issue. *See Hillman v. Hillman*, 910 A.2d 262, 276 & n.42 (Del.Ch. 2006) ("In the absence of an applicable provision, the DRULPA provides in § 17-1105 that 'the Delaware Uniform Partnership Law in effect on July 11, 1999 ... and the rules of law and equity ... shall govern.'").

WL 285900 *6 (Del. Ch. 1993) (applying New York law and holding "[w]here, as here, the agent acted intentionally to harm a third party (the Partnership) and the principal . . . had actual or imputed knowledge of the agent's actions . . . there is no reason not to impute the agent's intent to the principal").

The Fund is expressly not exculpated. While the LPA contains a provision limiting the liability of the General Partner in specified circumstances, it notably contains no provision limiting the liability of the Fund itself. This makes sense given Delaware statutory law governing partnerships. The official comment to RUPA explains that a phrase was deleted from a prior version of the Act – to wit, a phrase providing that the partnership was liable "to the same extent as the partner so acting or omitting to act" – in order "to prevent a partnership from asserting a partner's immunity from liability. This is consistent with the general agency rule that a principal is not entitled to its agent's immunities." RUPA, Official Comment to Section 305(a). Thus, even if the General Partner is exculpated under the LPA (which it is not), the Fund remains liable for the General Partner's tortious acts.

5. The Breach of Fiduciary Claim is Not Derivative.

The Fund has asserted that some of FTC's claims are derivative, not direct. This argument is flawed for numerous reasons.

The most obvious reason why FTC's claim are direct is that they are non-disclosure claims, where the injury alleged is that FTC lost its contractual right to withdraw. To be clear, FTC is not suing because the accounting misconduct occurred or because of any damage caused by the mismanagement. Instead, FTC is suing because the misconduct was not disclosed and had it been disclosed FTC would have withdrawn from the Fund. Delaware law is clear that this sort of claim is direct, not derivative. *E.g.*, *Albert v. Alex Brown Mgmt. Servs.*, No. Civ. A. 762-N, Civ. A. 763-N, 2005 WL 2130607, at 12 ("Generally, non-disclosure claims are direct claims.

Moreover, the partnerships were not harmed by the alleged disclosure violations. Any harm was to the unitholders, who either lost their opportunity to request a withdrawal from the Funds from the Managers, or to bring suit to force the Managers to redeem their interests."); *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143, 153 (Del. Ch. 2003) (holding non-disclosure claim where alleged harm was loss of hedge fund investor's opportunity to withdrawal because "the disclosure claim seems to implicate a contractual right of the limited partners that is not similarly a right of the Fund itself.").

The second serious flaw in this argument is that Delaware law dispenses with the derivative rules in the context of a limited partnership that is in liquidation, such as the Zwirn Fund. In *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *5-6 (Del. Ch.), Vice Chancellor Steele ruled that since the derivative requirements were designed to prevent interference in the on-going management of an entity, the direct/derivative distinction losses any meaning where the partnership is no longer functioning.

III. Even if the Fund Is Correct About the Tranche-By-Tranche Approach, the Fund Is Liable to FTC.

In the unlikely event Your Honor concludes that FTC's withdrawal dates were calculated on a Tranche-By-Tranche basis, the Fund is still liable to FTC as explained below.

A. The Fund Has No Excuse For Failing to Pay $45 Million to FTC in 2007

Even accepting the Fund's view of withdrawal rights, FTC had the right to withdraw two "tranches" worth a total of $45 million on March 31, 2007 and June 30, 2007, provided it gave 120-days notice. FTC's November 13, 2006 withdrawal demand provided sufficient notice for each of these withdrawal dates, so the Fund has no defense for the failure to pay the $45 million that was timely requested from these tranches. The fact that FTC's notice did not specify those tranches and asked for $80 million, not $45 million, is irrelevant. No particular form of notice is specified anywhere in the operative documents and FTC unambiguously expressed its intent to

take out all of its eligible funds up to $80 million. *See, e.g., Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *10 (Del. Ch.) (substantial compliance with notice provisions are sufficient).

B. Even Under the Tranche-By-Tranche Scheme, FTC Would Have Timely Withdrawn But For the Breach of Fiduciary Duty.

Accepting the Fund's view of the lock-ups, FTC could have and would have withdrawn all its money had it started the process earlier in 2006. Thus, the Fund's delay in disclosing the Gruss-related issues until October 2006 deprived FTC of a full exit. The following chart summarizes the Fund's view of FTC's redemption rights and the approximate values of FTC's investments on those redemption dates plus the date when the Fund made its belated disclosure:

Notice Date	Redemption Date	Approximate Value On Redemption Date	Investment Amount	FTC Initial Investment Date
3/2/06	6/30/06	$18 million (on 12/31/06)	$10,000,000	April 2002
6/2/06	9/30/06	$18 million (on 12/31/06)	$10,000,000	August 2002
9/2/06	12/31/06	$54 million	$30,000,000	December 2002
----------		October 2006 Disclosures		----------
12/1/06	3/31/07	$27 million	$20,000,000	January 2005
3/2/07	6/30/07	$18 million	$10,000,000	June 2003

As a result, had the Fund disclosed by September 1, 2006, FTC could have withdrawn $99 million from its capital account, even under the Fund's view, and disclosure by June 1, 2006 would have allowed FTC to withdraw an additional $18 million.

The primary defense to the lack of earlier disclosure is that Daniel Zwirn did not know about the facts until after September 1, 2006 when SRZ made its report. This is no defense.

1. Zwirn's Alleged Lack of Knowledge Is No Defense

The law firm hired to investigate the malfeasance concluded that Perry Gruss personally oversaw and approved the Interfund Transfers, the early payment of management fees and the use of investor money to buy an airplane for Zwirn's use. Mr. Gruss was the Chief Financial

Officer and part owner of the Management Company and a member of the General Partner. Additionally, the law firm concluded that the Chief Operating Officer of the Management Company, Harold Kahn, was at a minimum "willfully blind" to this misconduct. The Supreme Court recently reaffirmed that willful blindness, in a variety of contexts, is equivalent to knowledge and the same principle should apply here. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2068-69 (2011) (noting that "willful blindness" is used to prove knowledge in criminal contexts and importing same principle to civil patent context). As both Kahn and Gruss had day-to-day control over the financial operations of the Management Company, their knowledge, as agents, should be attributed to the General Partner.

It is no defense that Zwirn was allegedly unaware of Gruss's and Kahn's knowledge and acts. REST 3d AGEN § 5.03. Comment b.("An agent also has a duty, unless otherwise agreed, to use reasonable effort to transmit material facts to the principal or to coagents designated by the principal. A principal's right to control an agent enables the principal to consider whether and how best to monitor agents to ensure compliance with these duties. A principal may not rebut the imputation of an agent's notice of a fact by establishing that the agent kept silent."); *see also In re JP Morgan Chase Sec. Litig.*, 363 F.Supp.2d 595, 627 (S.D.N.Y. 2005) (imputing the knowledge of a Vice Chairman, a Vice President, and a Managing Director for the purposes of a 10-b5 misleading statement claim, even if the corporate officer responsible for the misleading statement had no knowledge that it was misleading); *In re American Intern. Group, Inc., Consol. Derivative Litigation*, 976 A.2d 872, 887 (Del.Ch. 2009) (holding that knowledge by mid-level AIG managers in fraudulent scheme is imputed to corporation for purposes of a pari delicto defense); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111133, at *2 (Del.Super.Feb.22, 1996) (holding that Dupont corporation received no insurance coverage for harms that low-level employees knew were foreseeable, even if the knowledge was not

communicated to superiors, because that knowledge is imputed to corporation and corporation's insurance didn't cover intentional harms). More broadly, the Management Company and the General Partner are liable for the tortious acts of Gruss and Kahn, who were managerial employees with control over the day-to-day operations of these entities. *See Knetzger v. Centre City Corporation*, 1999 WL 499460 (Del. Ch. 1999) (general partner breached its fiduciary duty because of self-interested acts of its CFO and operating head, even though principal of partnership was allegedly unaware of their acts); 118B Am.Jur.2d Corporations § 1444 ("Whether employees can be considered managerial employees so as to impute their actions to the corporation does not necessarily hinge on their level in the corporate hierarchy but depends on the degree of discretion the employee has in making decisions that will ultimately determine corporate policy.").

As both Kahn and Gruss had day-to-day control over the financial operations of the Management Company, their knowledge and acts should be attributed to the General Partner, regardless of what Zwirn knew.

In the Spring of 2006, two other high ranking officers of the Management Company learned of the prepayment of management fees and the airplane funding issues. The Management Company's General Counsel, David Proshan, and Chief Compliance Officer, Lawrence Cutler apparently learned about these issues from an accounting staff member. Zwirn was also told, but claims not to have learned more details in June. The Management Company, and the General Partner, were required to disclose this information when it was learned by these individuals.

While Zwirn claims not to have learned of the improprieties prior to June 2006, he was at least willfully blind about these improprieties as of 2005. The law firm hired to investigate determined that Kahn was willfully blind because he knew of the liquidity problems at the

Management Company and, at best, consciously turned a blind eye to the machinations that Gruss implemented to circumvent those liquidity problems, such as early withdrawal of management fees and using investor money to pay for the Management Company airplane. So too, Zwirn was willfully blind. First, like Kahn, he was on ample notice of the liquidity problems at the Fund and the Management Company, yet he continued to make investment and deferral decisions that forced the Management Company to resort to illicit means to overcome the dire liquidity problems. Second, Zwirn was put on notice of these improprieties in April and June. If he failed to learn the full extent of the wrongdoing until September – even though his colleagues knew earlier – he was willfully blind to the problems. In either event, his willful blindness, which is tantamount to knowledge, should be attributed to the Management Company and General Partner.

2. Exculpation Provision Does Not Protect Zwirn or General Partner

Neither Zwirn nor the General Partner is protected by the exculpation provision. For the same reasons explained above, Gruss's and Kahn's knowledge and intent is directly attributable to the General Partner. Nor can Zwirn or the General Partner invoke the reliance on counsel provision in the Limited Partnership Agreement because: (a) Gruss and Kahn's knowledge was attributed to the General Partner in 2005, at which point the General Partner had a duty to disclose to FTC, but counsel's advice on disclosure was not sought until much later; (b) there is no evidence that counsel's advice was sought on *when* to disclose the information.

IV. Prejudgment Interest

In a Delaware contract action, "prejudgment interest is awarded as a matter of right." *Citidel Holding Corporation v. Roven*, 603 A.2d 818, 826 (Del.1992). "[A] prevailing plaintiff in a contract case is entitled to prejudgment interest from the date payment was due under the contract." *Lewis v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1651960 *1 (Del. Super. 2007).

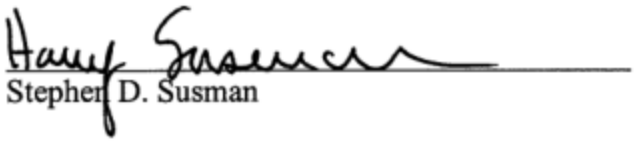
While the default rate is "the legal rate of five percent over the federal discount rate as of the time from which interest is due," *Smith v. Nu-West Indus.*, 2001 WL 50206 (Del. Ch. 2001) *aff'd for reasons set forth in decision by* 781 A.2d 695 (Del. Supr. 2001), Delaware Courts have the "discretion to select a rate of interest higher than the statutory rate" and "the lesser authority to award compounding" interest. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. Supr. 2002) (affirming award of compound interest and agreeing that the prior "rule or practice of awarding simple interest, in this day and age, has nothing to commend it"). Because the point of prejudgment interest is to make the injured party whole, courts look to how much the Plaintiff would have earned on the money had it been paid when owed, including by considering plaintiff's "financial sophistication." *Smith*, 2001 WL 50206 at *2 (awarding monthly compounding interest). Prejudgment interest is awarded under the same principles in breach of LPA fiduciary duties. *See Gotham Partners,* 817 A.2d at 173 (affirming prejudgment interest award for breach of fiduciary duty claim). The Federal Reserve Discount Rate in effect on March 31, 2007 was 6.25%. Thus, given that FTC is a highly sophisticated investor that routinely earns very high returns on its investments, FTC should be awarded, at a minimum, 11.25% interest, compounded monthly, beginning March 31, 2007, when the full redemption was due.

"In tort actions, including fraud and deceit, the general rule is that prejudgment interest is calculated from the date of the alleged wrong." *Tekstrom, Inc. v. Savla*, 2005 WL 3589401 (Del.Com.Pl. 2005) (citing *Stephenson v. Capano Development Co.,* 1985 WL 636429, at *3 (Del. Super. July 10, 1985)).

Dated: New York, New York
July 11, 2011

Respectfully submitted,

SUSMAN GODFREY L.L.P.



Stephen D. Susman

Seth Ard
654 Madison Avenue, 5th Floor
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[redacted]

Harry P. Susman
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
[redacted]

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

PROOF OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served by email this 11th day of July, 2011, on:

Brad S. Karp
Allan Arffa
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019

William O'Brien
Cooley LLP
The Grace Building
1114 Avenue of the Americas
New York, NY 10036

John S. Siffert
Lankler Siffert & Wohl LLP
500 Fifth Avenue, 33rd Floor
New York, NY 10110

Harry P. Susman

EXHIBIT 5

Financial Trust Company, Inc.

Memorandum

To: Dan Zwirn

From: Financial Trust Company, Inc
Jeffrey Epstein President

Date: November 13, 2006

Re: Account #: Financial Trust Company, Inc.
D.B. Zwirn Special Opportunities Fund, L.P.

****

As per our conversation, I hereby instruct you to immediately liquidate an interest in the amount of EIGHTY MILLION DOLLARS of Financial Trust Company's interest in D.B. Zwirn Special Opportunities Fund, L.P., and wire the proceeds of **EIGHTY MILLION DOLLARS ($80,000,000)** to:

Bank Name: Citibank, New York City
ABA # : [redacted]
For Credit To: Bear Stearns & Co.
Account #: [redacted]
F/B/O: Financial Trust Company
Account #: [redacted]

Please call Harry Beller at [redacted] with the Fed. reference number or if you have any questions.

JE002000

EXHIBIT 5

****
*** TX REPORT ***
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Financial Trust Company, Inc.

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From: Financial Trust Company, Inc
Jeffrey Epstein President

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D.B. Zwirn Special Opportunities Fund, L.P.

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Bank Name: Citibank, New York City
ABA # : [redacted]
For Credit To: Bear Stearns & Co.
Account #: [redacted]
F/B/O: Financial Trust Company
Account #: [redacted]

JE002001

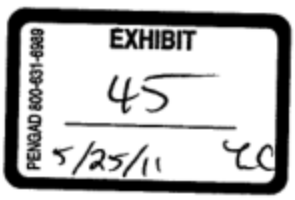
Please call Harry Beller a[redacted]with the Fed. reference number or if you have

EXHIBIT 45

From: Lee, David [redacted]
Sent: Thursday, February 15, 2007 12:10 PM
To: Sindell, Stuart [redacted]
Subject: FW: jeepers
Attach: SFX6DB.pdf

From: Lee, David
Sent: Wednesday, February 14, 2007 2:26 PM
To: Zwirn, Dan; Hubsher, Elise; Sindell, Stuart; Lebowitz, Seth; Cutler, Lawrence D.
Subject: FW: jeepers

From: ecopy
Sent: Wednesday, February 14, 2007 2:26 PM
To: Bursor, Alicia; Lee, David
Subject: jeepers



JEEPERS, INC.
6100 RED HOOK QUARTER
SUITE B-3
ST. THOMAS, USVI 00802

February 14, 2007

D.B. Zwirn Partners, LLC
General Partner
D.B. Zwirn Special Opportunities Fund, L.P.
745 Fifth Avenue, 18th Floor
New York, NY 10151
Attention: Mr. Daniel Zwirn
Managing Principal of D.B. Zwirn Partners, LLC

Re: Withdrawal of Capital Account of Jeepers, Inc.

Dear Mr. Zwirn:

Pursuant to the provisions of Section 9.1 of the Amended and Restated Limited Partnership of D.B. Zwirn Special Opportunities Fund, L.P. (the "Partnership") and the January 11, 2005 letter agreement from D.B. Zwirn Partners, LLC to Financial Trust Company, Inc., the assignor of its entire limited partnership interest in the Partnership to Jeepers, Inc., notice is hereby given that Jeepers, Inc., as assignee of the entire limited partnership interest of Financial Trust Company, Inc. in the Partnership and successor to all rights of Financial Trust Company, Inc. with respect to its limited partner interest in the Partnership (the "Limited Partner") , hereby withdraws its entire capital account, said withdrawal to be completed at the earliest possible date.

To this end, please note that a withdrawal request in the amount of $80 Million was already delivered to the Partnership on behalf of the Limited Partner on November 13, 2006. Pursuant to the provisions of the January 11, 2005 letter agreement, the Limited Partner is permitted to withdraw its capital account as of the last day of the calendar quarter ending at least two years after the date of purchase of the January 1, 2005 investment (i.e., March 31, 2007), upon not less than 120 days prior notice, which notice condition was satisfied with the November 13, 2006 notice. Consequently, a timely election for the withdrawal of $80 Million has already been given to the Partnership and demand is made that it be honored.

In addition, the General Partner has attempted to assign withdrawal rights to the Limited Partner which are other than as is provided in the January 11, 2005 letter agreement. This, combined with the failure of the General Partner to resolve certain discrepancies raised by the Limited Partner's representatives regarding year end values in

the Limited Partner's capital account, has compelled the Limited Partner to now demand withdrawal of the remainder of its capital account. The Limited Partner requests that the withdrawal of the balance of its capital account, in excess of the $80 Million previously demanded, be effectuated at the same time as the $80 Million withdrawal, so that the Limited Partner may withdraw from the Partnership as quickly as possible without further issue or incident.

Please confirm receipt of this notice and promptly provide me with your written response.

Sincerely,

Jeffrey E. Epstein
President

02/14/2007 1:40PM

EXHIBIT 117

****
*** TX REPORT ***
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TRANSMISSION OK

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RECIPIENT ADDRESS	[redacted]
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ST. TIME	03/27 11:50
TIME USE	00'26
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RESULT	OK

SCHULTE ROTH & ZABEL LLP

919 Third Avenue
New York, NY 10022
[redacted]
www.srz.com

2007 MAR 27 PM 12 48

FACSIMILE
PLEASE DISTRIBUTE TO ALL LISTED PERSONS

To	Company	Fax No.	Confirmation No.
Darren K. Indyke, Esq.	New York Strategy Group, LLC	[redacted]	[redacted]

FROM:	Marc E. Elovitz	DATE:	March 27, 2007
DIRECT DIAL:	[redacted]	Number of Pages:	3 (Including Cover Page)
Number of Cover Sheets:	1		
FILE NO.:	017962/0104		

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Darren K. Indyke, Esq.	New York Strategy Group, LLC	[redacted]	

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Marc E. Elovitz
[redacted]

E-mail
[redacted]

March 27, 2007

Darren K. Indyke, Esq.
New York Strategy Group, LLC
457 Madison Avenue
New York, New York 10022

Re: Jeepers, Inc. Redemption Request

Dear Mr. Indyke:

I write in response to the letter dated February 14, 2007 from your client, Jeffrey Epstein, to Daniel Zwirn regarding Jeepers, Inc.'s ("Jeepers") request for withdrawal of its capital account with D.B. Zwirn Special Opportunities Fund, L.P. (the "Fund").

As you are aware, Jeepers' withdrawal rights are governed by Article IX of the Second Amended and Restated Agreement of Limited Partnership, dated as of May 27, 2005 (the "Limited Partnership Agreement") and the January 11, 2005 letter agreement (the "2005 Letter Agreement") between D.B. Zwirn Partners, LLC and Financial Trust, which later assigned its limited partnership interest to Jeepers. Section 9.1 of the Limited Partnership Agreement governs complete withdrawals of investors' capital accounts and the 2005 Letter Agreement permitted Financial Trust to withdrawal under Section 9.1 as of March 31, 2007 (and as of the second anniversary of that date thereafter) on 120 days prior written notice. Because the February 14, 2007 Letter seeking complete withdrawal was not provided 120 days prior to March 31, 2007, it did not constitute valid notice.

Mr. Epstein previously sought withdrawal of a portion of his interest in the Fund by letter dated November 13, 2006. That letter did not constitute valid notice, because Mr. Epstein had no right at that time to partial withdrawal from the Fund. The 2005 Letter Agreement did not provide Mr. Epstein with any such right as of March 31, 2007, because partial withdrawals are governed by Section 9.2 of the Limited Partnership Agreement, which was not covered by the 2005 Letter Agreement.

Going forward, with the proper notice, Jeepers may withdraw from the Fund on the following schedule: (1) on June 30, 2008, Jeepers' April 1, 2002, investment may be redeemed; (2) on September 30, 2008, Jeepers' September 1, 2002, investment may be redeemed; (3) on December 31, 2008, Jeepers' December 1, 2002 investment may be redeemed; (4) on

March 31, 2009, Jeepers' January 1, 2005, investment may be redeemed; and (5) on June 30, 2009, Jeepers' June 1, 2003, investment may be redeemed. Even if Jeepers was entitled to complete withdrawal of its entire capital account on the two- year anniversary of its January 1, 2005, investment, Jeepers would not be entitled to complete withdrawal until March 31, 2009.

In his February Letter, Mr. Epstein also suggests that he is entitled to withdrawal of Jeepers' capital account by alluding to disagreements with respect to the 2005 Letter Agreement and as to year end values of Jeepers' capital account. In addition, I understand that you indicated to an attorney for the Fund that Mr. Epstein is entitled to withdrawal of Jeepers' capital account based on conversations between Mr. Epstein and Dan Zwirn. While we are happy to review with you the relevant agreements and the Jeepers' account details, there is no basis for withdrawal of Jeepers' capital account.

Please call me if you would like to discuss this matter or if you have any questions. Until we resolve the matter, please direct all communications through me or my partner Harry Davis as counsel to the Fund.

Sincerely,

Marc E. Elovitz