

**JAMS ARBITRATION
NEW YORK, NEW YORK**

IN THE MATTER OF

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

v.

JEEPERS, INC.,
Respondent

and

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

v.

■■■■. ZWIRN SPECIAL OPPORTUNITIES
FUND, ■■■■. k/n/a FORTRESS VALUE
RECOVERY FUND I LLC,
Counter-Respondent

and

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

Reference No. 1425006537

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

**THIRD-PARTY RESPONDENTS'
PRE-HEARING BRIEF**

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Third-Party Respondents Daniel Zwirn, [REDACTED], Zwirn Partners, LLC, [REDACTED], Zwirn & Co., [REDACTED], (“DBZ”), DBZ GP, LLC, and Zwirn Holdings, LLC (together, the “Zwirn Respondents”) submit this pre-hearing brief in opposition to the claims by Third-Party Claimants Financial Trust Company, Inc. and Jeepers, Inc. (together, “FTC”).

Preliminary Statement

At no time did Daniel Zwirn promise Jeffrey Epstein that FTC could immediately withdraw \$80 million of its investments in DBZ’s Fund. Mr. Epstein’s claim that Mr. Zwirn made such a promise is a newly invented assertion, unmentioned by anyone from FTC during the three-and-half years after the \$80 million withdrawal demand was made.

The Fund documents and DBZ’s practices show that FTC was only entitled to redeem its investments based on two-year rolling lock-ups that applied to each investment that FTC made. The proof will show that Mr. Zwirn in good faith believed that FTC was not entitled to an immediate \$80 million withdrawal and that requiring FTC to comply with its redemption schedule was in the best interests of the Fund and its investors. The evidence will further demonstrate that Mr. Zwirn made timely disclosures to FTC that were in no way misleading. Furthermore, an exculpation clause in the limited partnership agreement precludes any liability against Mr. Zwirn (or the other Zwirn Respondents) to FTC absent willful misfeasance, bad faith, or gross negligence. There is simply no proof of such conduct here.

For these reasons, Your Honor should dismiss all causes of action against the Zwirn Respondents and enter an award for them.

Statement of Facts

A. Mr. Zwirn's Personal Background

Daniel Zwirn was born in Pittsburgh in 1971. He graduated from the University of Pennsylvania in 1993. After working in the financial industry, he received an [REDACTED] from Harvard Business School in 1998. During and after business school, Mr. Zwirn worked at Davidson Kempner Partners. In 2000, Michael Dell's investment firm hired Mr. Zwirn to start and serve as the portfolio manager of its Special Opportunities Group. In 2001, Glenn Dubin, the co-founder of Highbridge Capital Management ("Highbridge"), recruited Mr. Zwirn to serve as a managing director and the senior portfolio manager of the Special Opportunities Group at Highbridge.

B. DBZ Background

In 2002, Mr. Zwirn, Mr. Dubin, and Henry Swieca (Mr. [REDACTED] business partner) established Highbridge/Zwirn Capital Management, LLC ("Highbridge/Zwirn") as a separate management company to carry out Mr. Zwirn's investment strategy. In 2004, Highbridge/Zwirn was spun off from Highbridge and renamed [REDACTED]. Zwirn & Co., [REDACTED] ("DBZ"). DBZ managed investments for two primary funds—an onshore fund (the "Fund") and an offshore fund—as well as other funds and individual managed accounts, including an account it managed for Highbridge. DBZ's assets under management grew from \$900 million in 2004 to over \$5 billion in 2006. The funds had over 150 investors. Third-Party Respondent [REDACTED]. Zwirn Partners, LLC was the Fund's General Partner.¹

¹ Third-Party Respondent DBZ GP LLC was DBZ's General Partner. Third-Party Respondent Zwirn Holdings LLC was a member of DBZ GP LLC and [REDACTED]. Zwirn Partners, LLC. Under Delaware law, , Zwirn Holdings LLC cannot be held liable solely on the basis of its membership in the limited liability companies. 6 Del. C. § 18-303; *see also Thomas v. Hobbs*, 2005 WL 1653947, at *2 (Del. Super. Apr. 27, 2005). Neither DBZ, nor DBZ GP LLC, nor Zwirn Holdings LLC had any contractual relationship with FTC.

1. DBZ's Investment Strategy

DBZ's principal investment strategy was to provide capital to businesses all over the world that had limited access to financing. From its inception, Mr. Zwirn frequently referred to DBZ as a "global chaser of illiquidity," and DBZ made more than 1,000 illiquid investments—totaling over \$10 billion—for the funds and accounts that it managed. A smaller part of DBZ's investments involved liquid credit and equity strategies.

DBZ optimized returns by making efficient use of a large variety of sources to finance attractive investments that it had identified.²

2. Mr. Zwirn's Role at DBZ

Mr. Zwirn served as the Chief Investment Officer at DBZ, and spent the vast majority of his time on DBZ's investment decisions. He personally approved each of the illiquid investments that DBZ made, after reviewing memos and exhibits and meeting with front-office professionals to discuss available opportunities. Mr. Zwirn met regularly with DBZ's Chief Financial Officer, Perry Gruss, and other members of the treasury group to discuss the financing of potential investments. Mr. Zwirn adjusted the size and timing of investments based on the funding that the treasury group informed him was available.

Mr. Zwirn also served as the managing partner of DBZ, and as a member of DBZ's management committee. He delegated management of the back office and day-to-day operations to other senior officers who were experienced in those areas, including Mr. Gruss.

² The financing sources included cash on the funds' balance sheets; interest and principal received from existing loans; proceeds from sales of assets; various forms of asset-based non-recourse financing; recourse financing at the fund level; prime broker leverage; repo financing; and new inflows of money from investors.

3. Mr. [REDACTED] Involvement with DBZ

Glenn Dubin was a part-owner of DBZ. He initially held a 50% ownership interest in DBZ (through a holding company controlled by Messrs. Dubin and Swieca). His interest in DBZ declined over time. Mr. Dubin acted as a senior advisor to DBZ, and Mr. Zwirn consulted with him on numerous issues. Mr. Dubin introduced a number of large investors to DBZ and persuaded them to invest in DBZ's funds. In addition, Mr. [REDACTED] company, Highbridge, invested over \$500 million in a managed account with DBZ. Due to his involvement with DBZ as owner, senior advisor, recruiter of investors, and investor, Mr. Dubin was very familiar with DBZ and its investment strategy.

4. DBZ's Lock-Ups

DBZ sought to ensure that the Fund's assets and liabilities were properly matched. Because DBZ's investment strategy centered on making illiquid investments, it needed investors to commit their money to the Fund for substantial periods of time. DBZ could not effectively deploy investor funds in illiquid investments if investors were able to withdraw their money quickly. And DBZ could not effectively manage its portfolio of illiquid investments unless redemption dates for investor subscriptions were distributed over time and were based on the dates of each particular subscription.

DBZ initially established a two-year rolling lock-up for investments in the Fund. An investment could be withdrawn only on a quarter-end withdrawal date falling two years after the investment was made, with 120 days' prior written notice. If the funds were not withdrawn on that date, they would be subject to another two-year lock-up. If the funds were not withdrawn on the next withdrawal date two years later, they would be subject to another two-year lock-up, and so on. The two-year period was later extended to three years for investments made on or after

January 1, 2005, with an exception made for Mr. Epstein (discussed below). The Fund also offered a one-year plus liquidity option. Under that option, investors would not receive an immediate payment, but could elect to stop participating in new investments at the end of the year, and would receive payments over time as their existing investments matured. This was compatible with DBZ's investment strategy because it did not require any premature exits from illiquid investments. In addition, the Fund's general partner had the authority to suspend withdrawals or to redeem investors in kind rather than in cash.

Under the Fund's lock-up policy, investors signed separate subscription agreements for each investment; and separate investments each had separate lock-ups and withdrawal dates. For the Fund's purposes, including for incentive fees and withdrawal dates, each investment by an investor was tracked separately.³ For tax purposes, each limited partner had a single account and received one K-1 reflecting the year's net gains/losses.

DBZ never considered adopting a lock-up policy where multiple investments could be withdrawn on a single date based on the first investment. Such a lock-up scheme would have been incompatible with DBZ's illiquid investment strategy. First, it would have created tranches of investor money locked up for less—potentially far less—than two years.⁴ Second, it would have created “lumpiness,” with large potential redemptions falling on single dates rather than

³ DBZ earned an incentive fee of 20% of net profits in each investment tranche. DBZ used a “high water mark” concept, whereby an investor would not have to pay incentive fees for recoupment of losses from prior periods. But there was a separate high water mark for each tranche, and losses in one tranche did not cancel out gains in other tranches—DBZ earned incentive fees on any gains in those other tranches. To calculate these incentive fees properly, an investor's tranches had to be tracked separately and could not be netted together into one account.

⁴ For example, suppose an investor invested \$5 million in the Fund on January 1, 2004. That investment could be withdrawn at the end of the first quarter two years later, on March 31, 2006. Suppose the investor invested an additional \$50 million in the Fund on October 1, 2005. If the investor could withdraw all of its funds on the withdrawal date for the first investment, then the second investment would be locked up for only 6 months.

spread over multiple dates, making it potentially more difficult for DBZ to manage the Fund's illiquid investments.

Internally, DBZ treated each investment tranche as having a separate withdrawal date. DBZ's accounting and investor-relations departments maintained redemption schedules recording separate withdrawal dates for separate investments. Mr. Zwirn in good faith believed that separate investment tranches had separate withdrawal dates, and told investors that their investments could only be redeemed on that schedule. Investors frequently chose different lock-ups for different investment tranches (for example, opting for a two-year rolling lock-up for one investment, and the one-year plus liquidity option for another).

No investor other than FTC ever claimed that it was entitled to withdraw multiple investments on a single withdrawal date. On certain occasions, investors requested to withdraw particular investment tranches before their scheduled withdrawal dates, but were able to do so only on accommodation from DBZ. DBZ granted permission in several instances where the redemptions involved relatively small amounts of money and would not be disruptive to the Fund or against the interests of the other investors.

C. Mr. Epstein's Relationship with Mr. Dubin

Mr. Epstein and Mr. Dubin have a close personal and financial relationship. Mr. Epstein is a friend of Mr. Dubin, a close friend of Mr. [REDACTED] wife, and the godfather to their children. He speaks to them and sees them regularly.

Mr. Epstein invested approximately \$300 million in Highbridge and made other investments based on Mr. [REDACTED] recommendations. In 2004, Mr. Epstein brought Highbridge to the attention of Jes Staley, then the CEO of [REDACTED] Morgan Asset Management, and helped

facilitate [REDACTED] Morgan's purchase of Highbridge. The deal made Mr. Dubin a billionaire. Mr. Dubin paid Mr. Epstein a \$20 million finder's fee for facilitating the transaction.

D. FTC's Investments in the Fund

In 2002, Mr. Epstein followed Mr. [REDACTED] recommendation to invest in the Fund. Mr. Dubin served as Mr. Epstein's principal contact for matters relating to DBZ. Despite episodic contacts, Mr. Zwirn did not have a direct relationship with Mr. Epstein.

Mr. Epstein invested in the Fund through his company, Financial Trust Company, Inc. FTC made five investments in the Fund: \$10 million on May 1, 2002; \$10 million on September 1, 2002; \$30 million on December 1, 2002; \$10 million on June 1, 2003; and \$20 million on January 1, 2005. Mr. Epstein signed separate subscription agreements for each of FTC's separate investments.

FTC's first four investments were subject to the two-year rolling lock-ups that applied to all investors. In November 2004, DBZ informed investors that any new investments made on or after January 1, 2005 would be subject to a three-year lock-up. In December 2004, Mr. Epstein decided to invest \$20 million in the Fund, but insisted that his new investment be subject to a two-year lock-up. Mr. Zwirn agreed to that request.

In January 2005, DBZ and FTC entered into a letter agreement (the "2005 Side Letter") to effectuate Mr. Epstein's request. The sole purpose of the 2005 Side Letter was to set a two-year—rather than three-year—lockup for the \$20 million that FTC invested in January 2005. It was not intended to have any effect on the withdrawal dates of FTC's prior investments.⁵

⁵ None of the parties ever discussed or intended to *extend* the lock-ups of FTC's prior investments—which FTC apparently now claims the 2005 Side Letter did. *See* Fortress Claimants' Pre-Hearing Brief at 15, 42.

E. Accounting Improprieties at DBZ

From July 2002 until October 4, 2006, Mr. Gruss was DBZ's CFO. During his tenure as CFO, Mr. Gruss engaged in a variety of accounting and financial improprieties at DBZ. At his direction, the accounting department collected management fees early (after the month when they had been earned but before they were payable at the end of the quarter), temporarily used investor money for the purchase of an airplane for Mr. Zwirn's business travel, and made improper interfund transfers from the offshore fund and managed accounts to make payments and investments on behalf of the onshore fund. As a result of this misconduct, the SEC has charged Mr. Gruss with fraud.

Neither Mr. Gruss nor other members of the accounting department ever told Mr. Zwirn about the improprieties. In fact, they actively concealed the misconduct from Mr. Zwirn, including by altering and omitting information from reports that Mr. Zwirn reviewed. In its complaint against Mr. Gruss, the SEC explicitly alleges that Mr. Gruss did not tell DBZ's senior management about his misconduct. In contrast to the action the SEC took against Mr. Gruss, Mr. Zwirn (personally) and DBZ received letters from the SEC informing them, in effect, that the investigation had been terminated as to them.

F. DBZ's Discovery of Accounting Improprieties and Response

In Spring 2006, Lawrence Cutler, DBZ's Chief Compliance Officer, and David Proshan, DBZ's General Counsel, informed Mr. Zwirn of a potential accounting irregularity relating to DBZ's management fees. They may have also mentioned a potential issue relating to use of investor funds in the airplane purchase. They told Mr. Zwirn that they wanted to spend more time looking into the issues.

By June 2006, Messrs. Cutler and Proshan reported back to Mr. Zwirn. They recommended that DBZ retain Schulte Roth & Zabel LLP (“Schulte”) to investigate the management-fee and airplane issues, determine what had occurred, and provide legal advice on potential disclosure and employment issues. Mr. Zwirn followed their recommendation. He also informed Mr. Dubin that DBZ had retained Schulte to investigate the accounting issues. At the time, Mr. Zwirn did not know how the problems had occurred or who was responsible. He did not think that Mr. Gruss had been responsible.

Schulte conducted a three-month investigation, and reported its findings to Mr. Zwirn and DBZ’s other partners—including Mr. Dubin—in mid-September 2006. Schulte found that Mr. Gruss had caused DBZ to take management fees from the funds earlier than permitted (before they were payable at the end of the quarter), and that Mr. Gruss had approved the use of investor money to pay for airplane-related expenses. Schulte further found that DBZ had repaid the money used for the airplane within 45 days, but that interest—which totaled approximately \$36,000—had not been paid.

After learning of Schulte’s findings and recommendations, DBZ’s senior management decided to terminate Mr. Gruss’s employment at the firm. Mr. Dubin actively participated in the decision. Mr. Zwirn believed that, from an employment perspective, Mr. Gruss’s conduct was unacceptable—even though the two issues involved relatively small amounts of money.⁶

⁶ Your Honor may hear testimony from an SEC deposition that Mr. Zwirn considered the misconduct to be “qualitatively material” and “completely unacceptable.” Mr. Zwirn was referring to the employment-related considerations of whether DBZ should separate from Mr. Gruss. FTC will try to make it appear that Mr. Zwirn was characterizing disclosure obligations of DBZ. The question of whether Mr. Gruss’s misconduct warranted his separation from the firm was entirely distinct from the rules governing what DBZ should tell investors about the misconduct. DBZ consulted with Schulte on what should be disclosed to investors, and Mr. Zwirn followed disclosure scripts that had been approved by Schulte in the calls he made to investors.

Mr. Gruss resigned on the verge of being fired in early October 2006. David Lee was appointed to replace him as DBZ's Acting CFO. Mr. Zwirn informed investors of Mr. Gruss's separation from DBZ in mid-October 2006, using a script approved by Schulte which Mr. Dubin reviewed. As set forth in Schulte's talking points for a presentation to the SEC (that was produced to FTC in accordance with Your Honor's ruling), DBZ consulted with Schulte and determined that it need not disclose the substance of the management fee or airplane issues. Schulte's SEC talking points confirm that the two issues were determined to be both quantitatively immaterial, because they involved small amounts of money relative to the funds' assets under management, and qualitatively immaterial, because the misconduct was not for Mr. Gruss's personal benefit, did not affect the fund assets, did not overstate the Fund's value, and because the responsible person, Mr. Gruss, had been removed.

After Mr. Gruss's departure, Mr. Zwirn and DBZ for the first time became aware of a possible impropriety relating to interfund transfers of substantial amounts of money. As described in Schulte's talking points for the SEC presentation, DBZ consulted with Schulte and determined that, as a result of the newly discovered impropriety, disclosure to investors of all the accounting issues that had been discovered was now warranted. In late October 2006, Mr. Zwirn informed investors of the substance of both the newly discovered and earlier discovered accounting issues at DBZ, following a second script approved by Schulte. Mr. Dubin again participated in the process of determining what should be disclosed to investors, reviewed the script, and even received his own script to use if he was contacted by investors about the issues.

Because of the newly discovered issues, DBZ retained Gibson Dunn to conduct a full investigation into any accounting improprieties at DBZ, and Mr. Zwirn delegated authority over

the investigation to Messrs. Lee and Cutler. DBZ retained Fried Frank to represent it before the SEC, and self-reported the accounting improprieties to the SEC in late October 2006.

G. DBZ's Disclosures to FTC in Fall 2006

During the first round of investor calls in mid-October, Mr. Zwirn disclosed Mr. Gruss's departure to Mr. Epstein, following the script for the calls that had been prepared with Schulte. Elise Hubsher, the head of DBZ's Investor Relations department, sat in on the call. Mr. Epstein pressed Mr. Zwirn to go "off script," but Mr. Zwirn stuck to the script. Mr. Zwirn believed it was essential that all investors receive the same information.

During the second round of investor calls in late October 2006, Mr. Zwirn disclosed all the accounting improprieties that had been discovered at DBZ to Mr. Epstein, following the script that had been prepared for the second round of calls. Ms. Hubsher again sat in on the call. Mr. Epstein pressed Mr. Zwirn on why he had not disclosed the information during the prior call. As set forth in the script, Mr. Zwirn explained that DBZ had previously determined, in consultation with its advisors, that the initial two issues were immaterial; however, in light of the additional impropriety that had been discovered, DBZ had determined that additional disclosure on the substance of all the issues was appropriate. Mr. Epstein demanded to speak to Schulte, and Mr. Zwirn facilitated the call.

Mr. Epstein spoke to Harry Davis of Schulte, but was not satisfied with the conversation. Mr. Epstein also had questions about the value of FTC's investments in the Fund. Mr. Epstein will be the only witness to testify that he demanded to withdraw all of FTC's investments during these conversations; in fact, he did not.

H. FTC's Liquidation Demand

On November 13, 2006, Harry Beller, an accountant at FTC, called Mr. Zwirn. They discussed when FTC's investments could be redeemed. Mr. Zwirn explained that FTC's investments were subject to two-year rolling lock-ups. Mr. Zwirn then informed Mr. Dubin by email that he had spoken to Mr. Beller about "the facts of lock-ups."

Mr. Zwirn and Mr. Lee, then DBZ's Acting CFO, obtained and reviewed redemption schedules from DBZ's Investor Relations department, which showed separate withdrawal dates for FTC's separate investment tranches. Mr. Zwirn forwarded the redemption schedule to Mr. Dubin that day.

Late in the day on November 13, 2006, FTC sent a fax demanding that DBZ immediately liquidate \$80 million of FTC's interest in the Fund, and wire the proceeds to FTC. This is the first that Mr. Zwirn, Mr. Lee, or anyone at DBZ recalls they heard of a demand for withdrawal by Mr. Epstein.

According to Mr. Epstein, he had previously demanded the return of all of his investments, worth approximately \$130 million (including capital appreciation). Mr. Epstein claims that he sent the November 13 fax only after Mr. Dubin played the role of intermediary between Mr. Epstein and Mr. Zwirn. According to Mr. Epstein, he and Mr. Dubin directly negotiated FTC's withdrawal during a phone conversation (without Mr. Zwirn). Mr. Epstein claims that Mr. Dubin asked Mr. Epstein to reduce his complete withdrawal by half, and Mr. Epstein agreed to reduce it to \$80 million, provided that Highbridge was leaving its money with DBZ. Mr. Epstein claims that Mr. Dubin separately persuaded Mr. Zwirn to agree to the \$80

million.⁷ According to Mr. Epstein, Mr. Zwirn later joined a three-way call with him and Mr. Dubin to thank Mr. Epstein for reducing his demand to \$80 million.⁸

The evidence will show that Mr. Zwirn never agreed to let Mr. Epstein withdraw \$80 million. Mr. Zwirn had no reason to make the claimed promise, and he never did. He understood that each separate FTC investment tranche had its own withdrawal date, and that withdrawals required 120 days' prior notice. Mr. Zwirn believed that permitting any investor to make an immediate, substantial withdrawal in advance of the scheduled withdrawal dates would undercut the Fund's illiquid investment strategy and would be against the interests of the Fund's other investors. Mr. Zwirn also understood that DBZ had the authority to suspend redemptions or redeem in kind, so the Fund could never be forced to pay FTC \$80 million—or \$130 million—in cash against DBZ's will.

Mr. Epstein's claim of a three-way call before the November 13 fax, during which Mr. Zwirn promised that FTC could immediately withdraw \$80 million, makes no sense. There is no plausible reason why Mr. Zwirn would have discussed lock-ups with Mr. Beller and Mr. Dubin if he had already agreed to redeem \$80 million. Nor is there any plausible reason why Mr. Zwirn would have promised to immediately redeem \$80 million to FTC shortly after reviewing a redemption schedule clearly showing that FTC was not entitled to withdraw \$80 million.

Contrary to promising to honor a withdrawal demand for \$80 million, Mr. Zwirn and Mr. Lee determined that the liquidation demand was not valid because FTC was not entitled to

⁷ Mr. Epstein attempts to explain away the November 13 conversation that Mr. Zwirn had with Mr. Beller and the redemption schedule that Mr. Zwirn sent to Mr. Dubin by saying that those discussions pertained to when the remaining \$50 million could be redeemed. This version of events makes no sense. The redemption schedule applied to all of FTC's investment tranches and totaled \$130 million, not \$50 million. Mr. Epstein submitted an errata sheet purporting to correct his testimony, asserting that the conversation between Mr. Zwirn and Mr. Beller occurred in February 2007 instead of November 2006.

⁸ This version of events differs from Mr. [REDACTED] affidavit, which recites that the agreement came in a direct negotiation between Mr. Zwirn and Mr. Epstein on a three-way call.

immediately redeem \$80 million under its redemption schedule. Furthermore, the liquidation demand failed to specify which investment tranches FTC intended to withdraw and failed to comply with the 120-day advance notice provision. After the fax was received, Mr. Lee spoke to Mr. Beller and told him that FTC's investments were subject to lock-ups, that there was a schedule of when the investment tranches could be redeemed, and that FTC had no right to receive an immediate liquidated cash interest. In that conversation, Mr. Beller made no mention of any promise by Mr. Zwirn to honor the \$80 million demand.

The next day, Mr. Zwirn spoke with Mr. Epstein. Mr. Epstein did not mention any promise by Mr. Zwirn to pay FTC \$80 million, insist on the immediate payment of \$80 million, confirm that DBZ was wiring the money, or ask when it would be wired. Instead, Mr. Epstein requested more information and attention from DBZ about his investments.

Mr. Zwirn and Mr. Epstein scheduled a meeting on November 21, 2006, that was to include Mr. Dubin, Mr. Cutler, Mr. Lee, Fried Frank, and Deloitte & Touche. The main purpose of the meeting was to give Mr. Epstein comfort about the value of FTC's investments in the Fund. Mr. Epstein cancelled the meeting, but had a phone conversation with Mr. Zwirn that morning. They discussed a New York-sourced income issue relating to Mr. Epstein's investment. They also discussed possible future calls and meetings for Mr. Epstein involving Deloitte & Touche and DBZ employees. Mr. Epstein did not mention the \$80 million immediate liquidation demand or any promise by Mr. Zwirn to honor it. He did not seek to confirm that DBZ was wiring the money or ask when it would be wired. Mr. Zwirn recounted the conversation to Mr. Dubin the same day.

Subsequently, Mr. Dubin told Mr. Zwirn that Mr. Epstein's demands—which Mr. Zwirn understood to include Mr. Epstein's demand for immediate withdrawal—would go away if DBZ

assisted Mr. Epstein with a New York-sourced income issue by helping FTC transfer its interests in the Fund to Jeepers, Inc. (“Jeepers”). After speaking with Mr. Dubin, Mr. Zwirn told Mr. Lee that Mr. Epstein would drop the demand for immediate payment if DBZ helped FTC transfer its interests in the Fund to Jeepers. Ms. Hubsher recalls learning of this arrangement shortly after the November 13 fax.

The proposed assignment required DBZ’s consent, which DBZ provided. DBZ also devoted time, effort, and resources (including legal fees) to implementing the assignment. On December 15, 2006, Mr. Epstein pushed Mr. Dubin to get Mr. Zwirn to “wrap up” the assignment. DBZ completed the assignment by the end of December 2006.

On January 8, 2007, Mr. Epstein signed a new subscription agreement on behalf of Jeepers for his entire investment, including the \$80 million he had previously demanded to withdraw, in connection with the transfer of FTC’s interests to Jeepers. Mr. Epstein did not mention the \$80 million demand, ask why it had not been paid, or ask when it would be wired. At that time, Mr. Zwirn and Mr. Lee understood that Mr. Epstein had abandoned his invalid demand for immediate liquidation, particularly in light of DBZ’s consent and assistance with the assignment.

I. FTC’s February 2007 and February 2008 Notices of Withdrawal

By early 2007, Mr. Dubin had become disenchanted with Mr. Zwirn and moved to terminate DBZ’s management of the Highbridge account. As if by coincidence, Mr. Epstein revived his attempts to withdraw his investments from the Fund around the same time.

In late January 2007, after months of silence about the liquidation demand, Mr. Beller called Mr. Lee, asked why the \$80 million had not been paid, and demanded immediate payment. Mr. Lee told him that FTC had dropped the demand when DBZ had transferred its

interests to Jeepers. Mr. Lee explained again that FTC's investments were subject to a schedule of lock-ups. Mr. Beller professed ignorance of the abandonment of the \$80 million demand and said he would check with Mr. Epstein. Neither Mr. Epstein nor Mr. Beller called or wrote back to say that Mr. Zwirn had agreed to the \$80 million withdrawal demand and they were entitled to have the benefit of that promise.

In February 2007, Mr. Zwirn participated in one or two four-way calls with Mr. Epstein, Mr. Dubin, and Mr. [REDACTED] wife. The purpose of the call was to soothe Mr. Epstein, in light of his demands. Neither Mr. Epstein, nor Mr. Dubin, nor Ms. Dubin mentioned anything about a promise by Mr. Zwirn to pay FTC \$80 million.

Mr. Beller had various conversations with junior staff at DBZ in January and early February 2007 relating to the value of FTC's investments. The junior staff had given Mr. Beller preliminary estimates that needed to be adjusted due to tax withholding resulting from the transfer of FTC's interests to Jeepers. On February 12, 2007, a junior DBZ staff member requested that Mr. Beller speak directly to Mr. Lee about matters relating to FTC's account. Mr. Beller reported this request to Mr. Epstein—that he speak directly with Mr. Lee, then the President of DBZ—as “very suspicious.” But Mr. Beller again made no mention of the supposed promise by Mr. Zwirn to allow FTC to withdraw \$80 million. Nor did Mr. Epstein make any reference to it.

On February 14, 2007, Mr. Zwirn again forwarded FTC's redemption schedule to Mr. Dubin, who forwarded it to Mr. Epstein. It would have made no sense for Mr. Zwirn to forward the redemption schedule to Mr. Dubin if he already had promised to allow Mr. Epstein to withdraw \$80 million. Mr. Dubin did not tell Mr. Zwirn that he must comply with a promise he had made to Mr. Epstein to allow FTC to withdraw \$80 million.

Mr. Epstein wrote an email to Mr. Dubin, stating: “[T]his is why I want out. The email to which he [Mr. Zwirn] refers [a November 13, 2006 email from Mr. Zwirn to Mr. Dubin attaching FTC’s redemption schedule and showing the total value of its investments] was sent months ago, there were many conflicting conversations since then, after yesterday, when I was promised to get a firm answer, we heard nothing except the e-mail received only this morning copied to you.” Mr. Epstein did not mention anything about a promise by Mr. Zwirn in November 2006 to immediately pay FTC \$80 million. Mr. Dubin responded to Mr. Epstein that “you should put in a redemption and move on. You need to feel comfortable with who’s managing your money.” Mr. Dubin did not mention the \$80 million demand or any promise by Mr. Zwirn to honor it.

Later that day, Mr. Lee sent an updated version of FTC’s redemption schedule to Mr. Epstein, Mr. Beller, and Mr. Dubin, which reflected the growth in each of FTC’s investments over time. Mr. Zwirn discussed the schedule with Mr. Beller. Mr. Beller did not mention anything about a promise by Mr. Zwirn to allow FTC to withdraw \$80 million.

Later on February 14, 2007, FTC submitted a letter demanding complete withdrawal of all its investments in the Fund. The letter claimed that DBZ’s position on withdrawal rights was inconsistent with the 2005 Side Letter and that DBZ had failed to resolve discrepancies relating to the value of FTC’s investments. The letter explicitly referred to FTC’s November 13, 2006 demand for \$80 million, but did not mention anything about a promise by Mr. Zwirn to honor it. DBZ forwarded the letter to Schulte.

Marc Elovitz from Schulte sent a letter in response to FTC on March 27, 2007. The letter stated that FTC’s withdrawal requests were invalid and set forth the schedule of eligible withdrawal dates for FTC’s investments. FTC did not respond to the letter by claiming that Mr. Zwirn had promised to honor FTC’s demand for \$80 million.

FTC subsequently submitted a request for complete withdrawal on February 13, 2008. This letter also failed to mention anything about a promise by Mr. Zwirn to allow FTC to withdraw \$80 million.

J. The 2009 Agreement

In 2009, Mr. Epstein and DBZ engaged in lengthy settlement discussions before reaching an agreement in which the Fund would have the option of paying Mr. Epstein \$45 million by the end of 2010, and if it did, Mr. Epstein would release any claim he had against the Fund or Mr. Zwirn. The settlement agreement makes no mention—in the “whereas” clauses or anywhere else—of any alleged promise by Mr. Zwirn to honor FTC’s \$80 million demand.

The first time DBZ and Mr. Zwirn learned of Mr. Epstein’s newly minted claim of such a promise was shortly before this arbitration began.

Argument

I.

The Zwirn Respondents Cannot Be Liable For Breach Of Contract

The Zwirn Respondents are not liable for alleged breaches of the limited partnership agreement (the “2005 LPA”), the 2005 Side Letter, and the alleged oral promise made on November 13, 2006.⁹

The Zwirn Respondents adopt the arguments set forth in the Fortress Claimants’ Pre-Hearing Brief, demonstrating that FTC’s withdrawal requests were not valid and the Fund did not breach the 2005 LPA or the 2005 Side Letter. The Fortress Claimants’ brief correctly presents DBZ’s understanding of the Fund documents. It accurately reflects the practices of DBZ and the Fund, and their treatment of all investors. Furthermore, as far as DBZ is aware, the

⁹ FTC’s Claim ¶ 62.

understanding of the Fund documents set forth in the Fortress Claimants' brief was shared by every investor in the Fund—except for FTC.

With respect to the alleged November 13, 2006 oral contract, FTC will be unable to satisfy its burden of proving that such an oral contract ever was made. Mr. Zwirn never promised Mr. Epstein that the Fund would honor an \$80 million withdrawal demand. In addition, any so-called November 13 oral contract is not enforceable because FTC dropped its \$80 withdrawal demand when DBZ assisted with and consented to the assignment of FTC's interests to Jeepers.

Moreover, the Zwirn Respondents cannot be liable for the alleged breaches of contract for two additional reasons.

First, the 2005 LPA, 2005 Side Letter, and the alleged oral promise are all contracts between FTC and the Fund.¹⁰ Only the Fund or, secondarily, its General Partner (██████████, Zwirn Partners, LLC) could be liable for breaches of these contracts—which FTC appears to acknowledge in its pleading.¹¹

Second, an exculpation clause in the 2005 LPA precludes recovery from any of the Zwirn Respondents. Section 4.3(a) of the 2005 LPA provides:

The General Partner, the Manager, their Affiliates and respective employees, members, partners, directors, officers and agents will not be liable to any Limited Partner or the Partnership for mistakes of judgment or for action or inaction . . . reasonably believed to be in the best interests of the Partnership or for any act or omission performed or failed to be performed by them, or for any losses, claims, costs, damages, or liabilities arising therefrom, in the absence of willful misfeasance, bad faith or gross negligence . . .¹²

¹⁰ FTC's Claim ¶ 62 ("FTC had three contracts with the Fund.").

¹¹ See FTC's Claim ¶ 64 ("As the general partner of the Fund, Zwirn is liable for the breach.").

¹² Delaware law applies in this arbitration. 2005 LPA §§ 15.2, 15.8. Delaware partnership law seeks "to give maximum effect to the principle of freedom of contract." Del. C. § 17-1101(c). Partnership

Bad faith “implies the conscious doing of a wrong because of dishonest purpose or moral obliquity” and “contemplates a state of mind affirmatively operating with furtive design or ill will.” *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, LP*, 624 A.2d 1199, 1208 n.16 (Del. 1993) (quoting Black’s Law Dictionary 337 (5th ed. 1983)).

FTC cannot satisfy its burden of proving that Mr. Zwirn or any of the Zwirn Respondents acted with a dishonest motive when the Fund rejected FTC’s withdrawal demands. The Zwirn Respondents will offer evidence to the contrary: they acted in good faith when refusing to allow Mr. Epstein to withdraw \$80 million based on the November 13, 2006 fax because they believed that FTC’s investments were locked up on a tranche-by-tranche basis, each on its own cycle, and that FTC’s demand for immediate payment of \$80 million was therefore not valid. Further, the General Partner believed that acceding to Mr. Epstein’s demand was against the interests of the Fund and its other investors. The General Partner also believed in good faith that FTC’s February 14, 2007 demand for a withdrawal on March 31, 2007 was untimely. Because FTC cannot establish that the General Partner (or its affiliates) acted in bad faith in not honoring FTC’s withdrawal demands, Section 4.3(a) of the 2005 LPA precludes recovery against the Zwirn Respondents for breach of contract.

agreements may, for example, restrict or eliminate the duties a general partner owes to other partners or the partnership. *Id.* § 17-1101(d). Moreover, the partnership agreement may “limit[] or eliminat[e] any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person ...,” except in the case of “bad faith violation[s] of the implied contractual covenant of good faith and fair dealing.” *Id.* § 17-1101(f).

See Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1017 (Del. Ch. 2010) (limited partnership agreement eliminated all fiduciary duties and limited the general partner’s duties to those specifically provided for in the agreement); *Anglo Amer. Sec. Fund, LLC v. S.R. Global Int’l Fund, LLC*, 2006 WL 1494360, at *4 (Del. Ch. May 24, 2006) (limited partnership agreement exculpated general partner for negligent misrepresentation).

II. The Zwirn Respondents Cannot Be Liable For Promissory Estoppel

For the same reasons, FTC may not recover from any of the Zwirn Respondents under a promissory estoppel claim.¹³ First, Mr. Zwirn never promised Mr. Epstein that the Fund would honor an \$80 million withdrawal demand. Second, it would not be equitable to enforce the alleged promise when FTC obtained DBZ's assistance and consent with the assignment of its interests in the Fund in exchange for dropping its \$80 million demand. Third, the exculpation clause of the 2005 LPA precludes any recovery by FTC from the Zwirn Respondents under a theory of promissory estoppel.

The doctrine of promissory estoppel does not apply in these circumstances, in any event. Promissory estoppel addresses situations where there is no consideration, yet equity entitles the claimant to relief because there has been some other detrimental reliance. *See Beck & Panico Builders, Inc. v. Straitman*, 2009 WL 5177160, at *6 (Nov. 23, 2009). In this case, however, FTC's alleged detrimental reliance for purposes of promissory estoppel is the same as the consideration alleged for its breach of contract claim: both are based on FTC refraining from a complete withdrawal of its investments.

Under any analysis of FTC's withdrawal rights, promissory estoppel may not lie here. If Your Honor determines that FTC's separate investment tranches had separate withdrawal dates (as the Fortress Claimants and the Zwirn Respondents contend), then FTC had no right to a complete withdrawal of its investments. Refraining from exercising a non-existent right does not amount to detrimental reliance, and promissory estoppel would not apply.

¹³ To establish promissory estoppel, a plaintiff must show, "by clear and convincing evidence," that "(1) the defendant made a promise; (2) the promise was made with the reasonable expectation of inducing action or forbearance by the plaintiff; (3) the plaintiff reasonably relied on the promise to her detriment; and (4) the Court can only avoid injustice by finding that the promise is binding." *Beck & Panico Builders, Inc. v. Straitman*, 2009 WL 5177160, at *6 (Del. Super. Nov. 23, 2009).

On the other hand, if Your Honor determines that FTC had a right to withdraw all of its investments at the end of the first quarter of 2007 (as FTC contends), then FTC's alleged forbearance of a complete withdrawal would amount to consideration. Delaware case law makes clear that promissory estoppel is not available where there is a contract. "Because promissory estoppel substitutes the plaintiff's detrimental reliance for consideration to salvage an otherwise unenforceable promise, it will not apply where the alleged promise was bargained for as part of a contract." *Id.* (citing *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000)). In this scenario, the applicable claim would be breach of contract, not promissory estoppel.

In no instance does FTC have a promissory estoppel claim.

III. The Zwirn Respondents Did Not Defraud FTC

FTC cannot prove any of its three theories of fraud because Mr. Zwirn did not make misrepresentations as to: (A) the Fund's intent to pay FTC \$80 million, (B) the nature and scope of the accounting irregularities, and (C) his participation in the accounting irregularities.¹⁴

A. Mr. Zwirn Never Made the Alleged Oral Promise

Mr. Zwirn never promised Mr. Epstein that the Fund would honor Mr. Epstein's \$80 million demand. From November 13, 2006 until shortly before this arbitration, neither Mr. Epstein nor anyone else from FTC ever asserted that Mr. Zwirn was obligated to honor FTC's \$80 million withdrawal demand because Mr. Zwirn had promised Mr. Epstein that the Fund would do so. The proof will show that for nearly three-and-a-half years FTC never asserted that Mr. Zwirn had made such a promise, despite numerous discussions on the very topic of FTC's right to withdraw \$80 million and the position of the Zwirn Respondents that FTC's redemption

¹⁴ FTC's Claim ¶ 71.

rights were governed by separate two-year rolling lock-ups for each tranche of FTC's investments.

The only credible evidence will be that Mr. Zwirn never made the alleged promise. First, Mr. Zwirn will testify that he did not. Second, the proof will show that it makes no sense for Mr. Zwirn to have made such a promise. Mr. Zwirn did not believe that Mr. Epstein had any contractual right to an immediate \$80 million withdrawal, and he believed that it was against the interests of the Fund and the other investors to permit Mr. Epstein to withdraw \$80 million immediately, as the November 13, 2006 fax demanded. Third, the proof will show that Mr. Zwirn held a good faith belief that DBZ's illiquid investment strategy required rolling lock-ups based on the date when each investment was made. Fourth, other DBZ employees will confirm that they were not aware of any promise to allow FTC to withdraw \$80 million. Indeed, Mr. Zwirn and other DBZ employees will testify that they first learned that Mr. Epstein wanted to withdraw \$80 million when they received the November 13, 2006 fax.

FTC cannot establish that Delaware law permits a fraud claim based on a broken contractual promise. Most decisions that have addressed the issue hold that a plaintiff cannot so "bootstrap" a breach of contract claim into a fraud claim, even if the defendant did not intend to honor the promise when it was made. In *Microstrategy Inc. v. Acacia Research Corp.*, the Delaware Court of Chancery stated:

Delaware law holds that a plaintiff cannot bootstrap a claim for breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations . . . couching an alleged failure to comply with the contract at issue as a failure to disclose an intention to take certain actions arguably inconsistent with that contract is exactly the type of bootstrapping this Court will not entertain.¹⁵

¹⁵ 2010 WL 5550455, at *17 (Del. Ch. Dec. 30, 2010) (internal quotations omitted). See also *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010) (same); *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004) (same); *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. Dec. 21, 1998) (same); but see

Even those decisions permitting such claims acknowledge that Delaware courts “look[] with particular disfavor at allegations of fraud when the underlying utterances take the form of unfulfilled promises of future performance.” *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *9 (Del. Ch. Dec. 23, 2008). Since breaking a promise is not proof of having lied in making it, FTC would have to adduce additional “facts which support a reasonable inference that [the promisor] had no intention to fulfill the alleged promises at the time they were made.” *Id.* at *10.

B. The Disclosures Were Not Fraudulent

FTC will not satisfy its burden of proving that Mr. Zwirn misled Mr. Epstein about the accounting issues during their conversations in October 2006. Mr. Epstein claims that he received inadequate information during the first call in mid-October 2006. Less than three weeks later, however, during the second round of investor calls in late October 2006, Mr. Zwirn disclosed all the accounting issues that had come to light at that time. FTC’s theory of fraud based on inadequate disclosures fails for the following reasons.

First, the proof will show that Mr. Zwirn’s disclosures to Mr. Epstein were truthful, not misleading, and were made in good faith after a proper process of investigation and consultation. The Zwirn Respondents had retained Schulte, in part, to give disclosure advice. DBZ consulted with Schulte on disclosure, developed scripts about what to disclose to investors, and Mr. Zwirn followed those scripts in his calls with investors.

Second, FTC cannot establish any detrimental reliance from the alleged omissions (during the first October call), a required element of fraud under Delaware law. *See*

Winner Acceptance Corp. v. Return on Capital Corp., 2008 WL 5352063, at *10 (Del. Ch. Dec. 23, 2008).

Microstrategy, 2010 WL 5550455, at *12; *Wilmington Sav. Fund Soc., F.S.B. v. Anderson*, 2009 WL 597268, at *3 (Del. Super. Mar. 9, 2009). FTC was not prejudiced by any delay in disclosure. It was not until mid-September 2006 that Mr. Zwirn learned the results of Schulte's investigation into two of the improprieties. And any delay in disclosure from mid-September to late October had no effect on FTC's ability to withdraw its investments.

Though parts of the LPA are heavily disputed by the parties, two things are abundantly clear: the LPA set withdrawal dates at the end of the quarter and required 120 days' prior written notice. To withdraw any eligible funds at the end of the fourth quarter of 2006, investors needed to provide notice by August 31, 2006. Mr. Zwirn first learned of the results of the Schulte investigation in mid-September 2006. By then, the notice deadline for fourth-quarter withdrawals already had passed. Even if Mr. Zwirn had disclosed the two issues to investors on the very same day that he learned of Schulte's findings, it was already too late for any investor to provide timely notice of a withdrawal of eligible funds at the end of the fourth quarter (or any prior quarter). In other words, any failure to disclose immediately in mid-September 2006 did not affect withdrawals at the end of the fourth quarter of 2006 (or any prior quarter) because those redemptions were already unavailable by mid-September 2006.

Mr. Zwirn then disclosed to investors in late October 2006 all of the accounting issues that had been discovered at DBZ. Any delay from mid-September to late October 2006 did not prevent any investors from withdrawing eligible funds at the next withdrawal date, at the end of the first quarter of 2007. After the late October 2006 disclosure, investors—including Mr. Epstein—still had until November 30, 2006 to give the required notice to withdraw any eligible funds at the end of the first quarter of 2007 (or any subsequent quarter). Thus, any delay in disclosure from mid-September 2006 to late October 2006 was of no consequence.

This conclusion holds regardless of whether there were separate quarter-end withdrawal dates for FTC's separate investment tranches (Fortress's and Third-Party Respondents' interpretation)¹⁶ or whether there was a single quarter-end withdrawal date for all of FTC's separate investments (FTC's interpretation).¹⁷

C. Mr. Zwirn Did Not Participate In The Financial Irregularities

FTC cannot establish that the Zwirn Respondents made fraudulent misrepresentations about Mr. Zwirn's participation in or awareness of the accounting misconduct. There is no evidence that Mr. Zwirn participated in the misconduct or knew about the misconduct when it occurred. Schulte and Gibson Dunn spent many months investigating the underlying facts and the SEC spent years doing so. All of them concluded that there is no evidence to support the position that Mr. Zwirn participated in or was aware of the misconduct. FTC can offer no proof other than insinuation and conjecture, and cannot sustain its burden of proving such fraud.

**IV.
The Zwirn Respondents Did Not Breach Any Fiduciary Duties**

FTC will not prove that the Zwirn Respondents breached their fiduciary duties by failing to make "timely, full and accurate disclosure about the Fund's internal issues and FTC's

¹⁶ Under this interpretation, FTC's first three investments were eligible for withdrawal at the end of the second, third, and fourth quarters of 2006. By mid-September, it was too late to timely withdraw any of these investments. FTC's fourth and fifth investments were eligible for withdrawal at the end of the first and second quarters of 2007. After DBZ's disclosure in late October 2006, FTC still had time to put in a notice of withdrawal for these investments.

¹⁷ FTC claims that it was entitled to withdraw all of its five investments at the end of the first quarter of 2007, with notice by November 30, 2006. Under this interpretation, when FTC learned of the accounting improprieties in late October 2006, it still had time to put in a notice of withdrawal for all of its investments.

withdrawal rights and by failing to inform FTC about the Fund's internal issues when Zwirn first learned of them.”¹⁸

FTC cannot establish that Mr. Zwirn acted with “willful misfeasance, bad faith or gross negligence,” which the LPA requires for any recovery from the Zwirn Respondents.¹⁹ 2005 LPA § 4.3(a). In any event, FTC will be unable to sustain any of its three theories of breach of fiduciary duty: that the Zwirn Respondents (A) failed to disclose in Spring 2006 the two accounting irregularities that were first reported at that time, (B) failed to make sufficient disclosures in the first October 2006 phone call, and (C) failed to explain FTC's withdrawal rights to FTC. None of these theories has any merit.

A. Mr. Zwirn Was Not Required To Make Disclosures in Spring 2006

Fiduciaries have “no distinctive state law duty to disclose material developments with respect to the company's business. There are good business reasons to permit the company to treat material information confidentially.”²⁰ *Raskin v. Birmingham Steel Corp.*, 1990 WL 193326, at *5 (Del. Ch. Dec. 4, 1990); *see also Metro [REDACTED] Corp. BVI v. Adv. Mobilecom Techs., Inc.*, 854 A.2d 121, 153 (Del. Ch. 2004). In other words, mere possession of material information does not by itself give rise to a duty to disclose. Thus, Mr. Zwirn did not have a

¹⁸ FTC's Claim ¶ 76.

¹⁹ Section 4.3(a) also precludes liability for “for mistakes of judgment or any action or inaction . . . reasonably believed to be in the best interests of the Partnership.”

²⁰ Although the standards for nondisclosure liability under Delaware law “have been mostly articulated in the corporate context ...[these] standards often serve as the default rule in the alternative entity [e.g., limited partnerships] context unless they are preempted by valid contracting decisions.” *Metro*, 854 A.2d at 156 n.78. In *Metro*, the Chancery Court applied these principles to a dispute between members of a limited liability company. *Id.* When there are gaps in jurisprudence related to one type of alternative entity, Delaware courts will often look to the jurisprudence on other alternative entities to fill those gaps. *See, e.g., Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8 n.33 (Del. Ch. Apr. 20, 2009).

fiduciary duty to inform investors immediately when he heard of accounting irregularities (even if they had been material).

Moreover, even had there been an obligation to disclose, a failure to disclose material information does not breach fiduciary duties unless the fiduciary “*consciously and in bad faith* chooses to have the entity continue to withhold those facts.” *Metro*, 854 A.2d at 159 (emphasis added).

FTC cannot establish that Mr. Zwirn had an obligation to make disclosures in Spring 2006 before he had knowledge of what had occurred in the back office, or who was responsible. The proof will show that Mr. Zwirn did not act in bad faith and that he properly exercised his fiduciary duties upon hearing about potential accounting issues respecting the early payment of management fees and the use of Fund moneys to pay for part of the airplane purchase.

In Spring 2006, DBZ’s Chief Compliance Officer and General Counsel informed Mr. Zwirn of a potential issue involving the early management fees—and perhaps also raised a potential issue with the airplane purchase. Mr. Zwirn discharged his fiduciary duty by tasking the CCO and GC with following up on the issues; by following their subsequent recommendation in June to retain Schulte to investigate the issues and provide legal advice on potential disclosure and employment issues; and by waiting until Schulte completed its investigation and made its recommendations. Mr. Zwirn had no fiduciary duty to disclose the existence of potential accounting issues before he knew the nature and extent of the problems, much less how they had occurred and who was responsible.

Mr. Zwirn is fully entitled to the protections afforded by Section 4.3(a) of the 2005 LPA. That exculpation provision protects the Zwirn Respondents from liability for acts or omissions unless bad faith is established. Given the steps that Mr. Zwirn took, and how he responsibly

caused DBZ to investigate and respond to the accounting irregularities, the Zwirn Respondents acted responsibly throughout.²¹

B. The October Disclosures Were Consistent With Fiduciary Duties

FTC will be unable to satisfy its burden of proving that the Zwirn Respondents failed to comply with their legal duty by “knowingly disseminat[ing] false information,” or withholding material information “in bad faith.” *Metro*, 854 A.2d at 157-58, 159. Nor can FTC show that it relied on these disclosures. *Id.* at 158; *A.R. DeMarco Enters., Inc. v. Ocean Spray Cranberries, Inc.*, 2002 WL 31820970, at *4 n.10 (Del. Ch. Nov. 26, 2002).

By late October 2006, Mr. Zwirn had informed FTC of the very accounting issues that they claim they should have been told of. Any delay did not prejudice FTC’s ability to redeem its investments. Finally, the Zwirn Respondents are protected by the exculpation clause in the LPA.

C. DBZ Repeatedly Explained Withdrawal Rights To FTC

FTC’s claim that Mr. Zwirn kept FTC’s withdrawal rights a secret will fare no better at the hearing. The proof will establish that the Zwirn Respondents explained to Mr. Beller how the lock-ups worked on November 13, 2006. After FTC’s November 13, 2006 fax demanding an immediate \$80 million liquidation, Mr. Lee told Mr. Beller that FTC’s investments were subject to a schedule of lock-ups and that FTC had no right to receive an immediate liquidated cash interest. On November 13, 2006, Mr. Zwirn forwarded FTC’s redemption schedule to Mr. Dubin, which he expected Mr. Dubin to discuss with Mr. Epstein. Mr. Epstein’s email on

²¹ Even if FTC could prevail on the theory that Mr. Zwirn made a mistake in judgment in not making a disclosure in Spring 2006, the 2005 LPA specifically immunizes him from liability from claims by investors “for mistakes of judgment or for any action or inaction . . . reasonably believed to be in the best interests of the Partnership.” *Id.*

February 14, 2007 to Mr. Dubin indicates that Mr. Epstein had been made aware of this redemption schedule in November. Similarly, Mr. Lee will testify that in late January and February 2007, he again explained to Mr. Beller that FTC's investments were subject to lock-ups and provided FTC's redemption schedule to him. FTC will be unable to establish that there was a scheme to conceal FTC's withdrawal rights from Mr. Epstein, because none existed.

V.

The Zwirn Respondents Cannot Be Liable For Negligent Misrepresentation

FTC will not be able to establish that "when convincing FTC to reduce its withdrawal request in the Fall of 2006 . . . Zwirn was negligent in not discovering the true facts underlying its statements and in not revealing, timely or at all, the truth to FTC."²² Presumably, this claim of negligent misrepresentation is premised upon disclosures about the nature and scope of the accounting irregularity issues, rather than statements about Mr. Zwirn's own conduct and state of mind.

FTC will not be able to sustain its burden of proving that Mr. Zwirn's statements about the accounting irregularities were false or negligently made, for the reasons already discussed. In any event, Mr. Zwirn made the contested disclosures in good faith, after a proper process of investigation and consultation, and those disclosures cannot give rise to liability against the Zwirn Respondents. FTC cannot establish "willful malfeasance, gross negligence, or bad faith," which are necessary for FTC to recover on this negligent misrepresentation claim against Zwirn Respondents. 2005 LPA § 4.3(a).

²² FTC's Claim ¶ 79.

VI.

The Form of the Award Should Include Only the Total Amount Awarded, If Any

In the 2005 LPA, the parties agreed that “the arbitration award shall not include factual findings or conclusions of law.” 2005 LPA, § 15.2. The award should include only the total amount awarded, if any, against which party, without specifying any causes of action or reasons for the award.²³

Conclusion

For the reasons set forth above, an award should be entered for the Zwirn Respondents.

Dated: July 11, 2011
New York, New York

LANGLER SIFFERT & WOHL LLP

By:



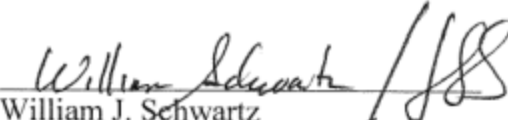
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²³ Though JAMS Rule 24(h) provides that an award shall “consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim,” application of that Rule in this instance would be a *de facto* conclusion of law prohibited by the 2005 LPA.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on all counsel of record by electronic mail, this 11th day of July, 2011.



Andrew S. Lee