

FTC/Jeepers vs. Zwirn: Opening Statement

This is in main part a ~~a relatively simple~~ breach of contract case. The dollars are large, the circumstances unusual, and the characters are colorful. But the issue to be decided is ~~plain~~-vanilla. The contractual language ~~is not complicated~~ is clear, and the legal principles are ~~the stuff you learn the first week of law school in contracts class~~ solid

Under the terms of the 2005 Letter Agreement between FTC/Jeepers and the Zwirn Fund, FTC was entitled to withdraw its "Capital Account" on March 31, 2007, so long as it gave notice before December 1, 2006. Notice was given to withdraw \$80 million. But the money was not paid. As a result, the Fund owes FTC a minimum of \$80 million plus prejudgment interest, which is recoverable as a matter of right. This claim is the heart of the case. [this needs to be beefed up if we decide to continue asking for the \$133m]

My guess is that the Hearing evidence, however, will not have much to do with this claim. ~~And, I urge Your Honor not to lose focus on what really matters.~~ The parties will debate hotly what exactly

happened in November 2006 before FTC made its demand. This is a classic swearing match. But it has no relevance to the contract claim. ~~Even-if~~ Jeffrey Epstein clearly never spoke to Dan Zwirn and Glenn Dubin before making the \$80 million demand, however that in and of itself will not , be required to carry the day, FTC's claim for breach of contract ~~would-be~~ is valid. Indeed, ~~even-if~~ Dan Zwirn ~~explicitly~~ told Jeffrey Epstein himself he did not have the right to make a withdrawal (which didn't happen), FTC's claim for breach of contract would still be valid. Mr. Zwirn can't change the plain meaning of the language used.

Similarly, questions about ~~what~~ Dan Zwirn's credibility ~~knew~~ and when did he know it regarding the accounting improprieties are irrelevant to the contract question.

~~As-a-result~~ If I may ,, I am going to ~~start-begin~~ by focusing ~~exclusively~~ on the contract argument. Our position on the language of the contract is straightforward, and I ~~think-believe fully~~ explained in our Pre-Hearing Brief.

DEMO 1 [2005 Letter Agreement]. Under the 2005 Letter Agreement signed on January 11, 2005, FTC was given the right to

withdraw~~al~~ its “Capital Account” at the quarter ending “two years after the Company initially purchases this Interest,” which was the January 1, 2005 interest.

DEMO 2 [Definition of Capital Account.] The LPA clearly says that there is 1 “Capital Account” per limited partner. “Each Limited Partner” has a capital account.

The Fund acknowledges that Delaware enforces the parole evidence rule. Unless the contract is ambiguous, a court applies the plain meaning of the language. Extrinsic evidence is entirely irrelevant.

The Fund claims ~~is~~ that each investment “created a separate ‘Capital Account.’” But this is not supported by the language of the agreement. The language is that there is a Capital Account for “each Limited Partner.” If the Fund’s view were correct, then the definition of “Capital Account” would say, “A ‘Capital Account’ shall be maintained for each investment.” But those aren’t the word~~s~~ used.

The Fund seems to suggest that FTC became a limited partner multiple times, and thus FTC was 5 limited partners. Again, the contract language precludes this dodge. **DEMO 3** [Limited Partner Definition].

The term “Limited Partner is defined as “those persons who have executed this Agreement and whose names and addresses” are set forth on the books and records. There is only one 1 name and address for FTC on the books and records, and thus only 1 FTC as a Limited Partner.

The Fund attempts to create an ambiguity in the Agreement by pointing to the use of the plural “Interests” in the LPA. To begin with, even if the use of the plural “interests” in the LPA were ambiguous, which it is not, this would not create an ambiguity in the relevant contract here: The 2005 Agreement. Regardless, the Fund’s argument is incorrect as a matter of law.~~simply wrong.~~

DEMO 4 [Section 9.1 of First Amended LPA]. The LPA as it existed in January 2005 said that withdrawals “of a Limited Partner’s Capital Account” may be made at the quarter end two years “after the Limited Partner initially purchases Interests.”

DEMO 5 [Quote from Pg. 29 of Brief].

The Fund says that the use of the plural “contemplates multiple subscriptions, each of which will trigger its own withdrawal schedule.”

That's the entirety of their argument to provide a reasonable alternative interpretation of this language. The first part of this sentence is true. The use of the plural "Interest" contemplates multiple subscriptions. [Actually the LPA doesn't refer to subscriptions at all. It suggests that the only way a LP can get an additional Interest is by making an additional cap contribution.] By the way, multiple subscriptions by a single—not plural—Limited Partner. The second part of this argument "each of which will trigger its own withdrawal schedule" is just an assertion; the Fund provides no reasoning for this assertion. By definition, an interpretation unsupported by any reasoning can't be a reasonable alternative.

But it is worse for the Fund. Their proffered interpretation is downright-unreasonable. To begin with, the thing being withdrawn is not the "Interests" plural but the "Capital Account," which is singular. Worse for the Fund, the use of the plural "Interests" is the explicit recognition that the singular "Capital Account" can includes multiple "Interests." In other words, instead of helping the Fund's cause, the use of the plural "Interests" utterly-guts their argument.

Second, the notion that the plural “Interests” indicates there would be multiple withdrawal dates is completely undercut by the word “initially.” The language says the withdrawal date runs from the anniversary of the “initial” purchase of the plural Interest. In other words, this language specifies a particular purchase—the initial purchase—that the withdrawal date runs off.

The Fund claims that we are trying to ~~would~~ re-write the language to say the withdrawal date runs from when a limited partner “initially purchased its first Interest.” That’s not re-writing anything; it is just another way of saying the same thing as the language used. The phrase “initially purchases Interests” (plural) means the first Interest among a pool of Interests.

There is ~~simply~~ no way to interpret this language other than as calling for a date upon which you can withdraw a single Capital Account even one containing multiple Interests.

We ~~adamantly~~ believe this is the end of analysis. Delaware law takes a strict view towards interpreting contracts. Absent an ambiguity, one cannot look at extrinsic evidence; the words on the page are the

beginning and the end of the matter. That's one of the reasons business routinely select it to govern contracts. Application of this rule in the context of hedge fund investments is particularly important. ~~Practically every hedge fund subscription document contains a very strong clause requiring the investor to disclaim reliance on anything outside the written documents and anything the Fund's management may have said about the terms of the investments; the Zwirn Fund was no exception. Since~~ investors are stuck with the plain meaning of the words, it would be highly unfair to permit the Fund to use evidence outside the documents to change the meaning.

Even if Your Honor wades into the extrinsic evidence, it does not help the Fund. At the outset, since the Fund drafted the documents at issue, Delaware courts will construe the extrinsic evidence against the Fund. So, the Fund has an uphill battle even on the extrinsic evidence front.

The Fund's extrinsic evidence has nothing to do with FTC or any information that would have come to FTC's attention. The Fund focuses exclusively on what management thought or other third-parties thought.

I want to focus on the evidence that sheds light on what FTC should have reasonably believed the contract meant.

While there is no evidence that the parties had any discussions on the specific topic of how multiple investments would be treated for purposes of calculating lock-ups, Your Honor will see that the Fund repeatedly and consistently over the years ~~told~~ sent in writing, confirmation that describing that FTC s sole ~~that it's~~ "Capital Account" was the entire value of all of its Interests. This is critical because the Fund now wants to claim FTC should have understood each investment was in its own Capital Account.

The Fund's Pre-hearing brief anticipates this problem for its argument and claims that FTC had one capital account for tax purposes. Well, it is true that the K-1's provided to FTC over the years for tax purposes showed a single capital account, but that's not the evidence we are relying on. Instead, you will see that whenever we asked a question about the size of our Capital Account (and we asked a lot to the frustration of the Fund), we were always given a single number. There

is simply zero evidence that the Fund ever conveyed to us its understanding that FTC in fact had 5 different capital accounts.

The Fund claims that FTC should have known it had 5 separate capital accounts because it filled out 5 separate subscription agreements. The Fund claims that each such subscription constituted an “Initial Capital Contribution” and not an “Additional Capital Contribution.” Of course, there is nothing in the documents that says this. To the contrary, the LPA defines "Initial Capital Contribution" as "with respect to any Partner, the amount of capital contribute by such Partner in accordance with Section 4.7, 5.1 or 5.2." Section 4.7 is the \$50 put in by the Initial Limited Partner, defined as Dan Zwirn. Section 5.1 is the contribution by the General Partner. Section 5.2 is the \$2mil minimum initial capital contribution a person must pay upon execution of the LPA. There is no provision in the LPA for multiple Initial Capital Contributions by a limited partner. The Fund has just decided after-the-fact to characterize these transactions in a self-serving way. (WHY ARE THEY DOING THIS < SHOULD WE GIVE HI A FEEL) In fact, the act that puts the lie to the Fund’s argument is that in late 2006 when FTC assigned its

interests to Jeepers, the Fund demanded that Jeepers fill out a new subscription agreement. According to the Fund's Pre-Hearing brief, Jeepers should have been asked to fill out 5 separate subscription agreements since it was allegedly getting 5 separate Interests in 5 separate capital accounts. Of course, that didn't happen; the Fund asked Jeepers to fill out 1 agreement.

The Fund also argues that if you accept FTC's interpretation, the 2005 Letter Agreement makes no commercial sense. As of January 2005, the quarter ending on the next two-year anniversary of FTC's initial April 2002 investment would have been June 30, 2006. The 2005 Letter Agreement had the effect of extending FTC's withdrawal date from June 2006 to March 2007. The Fund says FTC would never have agreed to that. Why., FTC was making a new decision at that point with respect its Entire now 80 million dollars investment. Two points in response. First, since FTC was ~~getting a concession~~ agreeing to add to its position (and ~~receiveing an~~ exemption from the three-year, rolling lock-up) it is not illogical at all to assume a new period. ~~or unreasonable that FTC had to give up something.~~ Second, at the time, January 2005,

there was zero reason why FTC would have thought the extra 9 months would make any material difference. FTC was being told of significant multi year positive returns ~~—FTC was happy with the Fund;~~ indeed, FTC was increasing its investment by \$20 million. This was hardly ~~some a~~ dramatic concession ~~. such that it would be nonsensical to believe FTC would have accepted it, much less even noticed it at the time.~~

The Fund points to the 2005 Offering Memorandum to show that FTC should have known each investment was subject to a distinct lock-up. The 2005 Offering Memorandum contains a paragraph that says each investment will be subject to a three-year lock-up, and that a “separate capital account” will be created for each investment. As noted in our brief, this Offering Memorandum was issued in May 2005—after all of FTC’s investments were made. The point of updating the Offering Memorandum in May 2005 was to memorialize a change in the way lock-ups were handled, a change that was not retroactive and didn’t apply to FTC. Frankly, there is no reason why FTC would have paid much attention to this language since it was not then contemplating any new investment in the funds.

DEMO 6 [Sec. 9.1 from 2nd Amended LPA—redline version]

In fact, let's look at the amended LPA that was issued in conjunction with the new Offering Memorandum in May 2005. This is a redline version. The new language comes after the "provided however." Now, this language clearly conveys the notion that each Interest (or investment) has its own lock-up; it specifies a singular date running from the third-anniversary of "the date on which the Interest was purchased." Nothing about the date when you "initially purchased Interests." Moreover, note that it says you can withdraw the "portion" of your capital account attributable to the Interest. Obviously, whoever wrote this understood that a capital account could include numerous Interests even though the Fund now claims that was impossible.

Most importantly, no one went back and changed the language applying to two-year lock-ups to make the withdrawal date run off the purchase of each Interest or to authorize withdrawal of only that portion of a capital account relating to the investment. And, you can't say that was just because no one paid attention to cleaning up the two-year language. You will see that as originally written, the language suggested

that the lock-up only rolled to the next two-year anniversary, as opposed to rolling for “each” two-year anniversary. The SRZ lawyers caught this and fixed it.

DEMO 7 [SRZ Presentation]. The extrinsic evidence will show that SRZ drafted eds a lot of hedge fund documents. We will show you evidence that SRZ clearly understood that there were at least two ways to calculate a lock-up period. This comes directly from the SRZ website:

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.

We will show you plenty of examples where SRZ knew exactly how to express the “each capital contribution” or tranche-by-tranche concept in clear language. But they didn’t do it in the Zwirn Fund—at least not until the three-year lock-up was introduced. And, they didn’t go back and change the two-year lock-up rules. There are two only inferences you can make from this: (1) the SRZ lawyers were unbelievably incompetent; or (2) the SRZ lawyers knew that under the original lock-up terms, the date began “on the date of the investor’s admission to the

fund” and that changing the rules midstream would be unacceptable. I am going to get to the fact that the Fund’s management believed in the tranche-by-tranche approach, but this wouldn’t be the first time that lay management thought (or wanted) some legal right but the lawyers knew that’s not what the contract said.

The Fund suggests that any sophisticated hedge fund investor should know that lock-ups are always done on a tranche-by-tranche basis. That’s clearly false, as the SRZ presentation that I just showed you proves. It is also false based on FTC’s actual experience. You will see evidence that FTC invested in a number of hedge funds. Their practices are all over the map. As far as FTC’s experience was concerned, there was no accepted industry practice.

Now, I want to talk some about the Fund’s extrinsic evidence. It fits into three categories: (1) evidence that the Fund’s management genuinely believed in the tranche-by-tranche approach; (2) evidence that other investors understood that too; and (3) arguments that only a tranche-by-tranche approach makes sense.

The one area where the Fund's extrinsic evidence is clear is that the Fund's management believed in this tranche-by-tranche approach. We don't dispute this. But so what? FTC believed the opposite. One of ~~the first lessons we all learned in first year~~basic tenets of contracts is that one party's subjective belief about a contract's meaning ~~is utterly irrelevant~~does not trump the written word.

In any event, just because the management may have believed in a tranche-by-tranche ~~doesn't mean~~ it is not ~~was~~ a reasonable belief based on the contract language. It certainly didn't come from the contract language. The Fund will tell you that a tranche-by-tranche approach makes the lock-up stronger. While the Fund wildly exaggerates the impact (more on that later), it is generally true that the tranche-by-tranche locks-up more money longer. It is thus not shocking that management, which earned fees off the capital, adopted the most self-serving interpretation.

Moreover, the evidence will show that this management team was careless—indeed reckless--about administrative matters. That is what killed this Fund. And, it wasn't confined to Perry Gruss. Dan Zwirn's

claimed ignorance of what Mr. Gruss did may have saved Zwirn from being charged by the SEC, but that same ignorance certainly makes him guilty of ~~massive incompetence as a manager~~ as a manager, like his Harold Kahn of willful blindness. Management's opinion that the lock-up was tranche-by-tranche is yet ~~another example of Management's incompetence and inexperience. Management obvi~~ attempts to draw self serving ously leaped to a conclusions without ~~actually reviewing true~~ consideration of the relevant documents ~~very carefully~~.

The Fund claims that ~~every~~ other investors understood that the lock-up was tranche-by-tranche. Assume that were true, so what? The contract at issue is the 2005 Letter Agreement between FTC and the Fund. The other investors were not parties to that agreement. FTC was the largest investor and the only one with a side letter agreement that reflected its unique status.

In any event, the evidence supporting the Fund's assertion about what other investors understood about their withdrawal rights is ~~very~~ weak. at best To begin with, it is important to note that most investors were not subject to the two-year lock-up at issue. The majority of

investors elected a one-year liquidity option that permitted withdrawals every December 31, and another big chunk of investors were subject to the three-year lock-up, which as noted above was unambiguously tranche-by-tranche. So, the only investors whose understanding matters is the two-year investors.

The evidence—we will be that very few two-year investors ever sought to redeem—certainly until it was too late. And, that of those that sought to redeem, the amounts were relatively small. This issue of whether you can redeem a single investment or the entire capital account only matters if an investor wants to pull out more than the value of a single investment. Before the Fund started to experience its problems, very few (if any) two-year investors who made multiple investments ever asked for an amount of money that equaled the value of even a single of their investments. Obviously, if you didn't want more than a single investment back, you wouldn't care to fight over the tranche-by-tranche vs. single capital account issue; it was not relevant. FTC really raised the issue.

The Fund's Pre-Hearing Brief cites one piece of evidence that investors understood the Fund's position that is telling. The Fund cites an internal email where a prospective investor, named EnTrust, asked a woman named, Allison Alamansky, who Fund's Business Development (*i.e.*, dealing with investors), if they invested on Sept 1 and Oct 1 would both investments be subject to the same lock-up. Ms. Alamansky responded by saying she didn't know the answer and would ask Dan Zwirn, who responds "each piece has its own lock-up. no combo." Of course, this exchange shows that the tranche-by-tranche approach wouldn't be obvious to a reasonable investor. The Fund's own director of business development didn't know the answer to this question. The Fund can't enforce an contract interpretation merely because that's the way Dan Zwirn wanted the contract to read. And, of course, EnTrust did not invest.

The Fund's industry practice evidence is especially weak. To begin with, as we noted in our Pre-Hearing brief notes, industry practice only matters if [it](#) is almost universal in practice. No one will testify that the tranche-by-tranche method is universal in practice in the hedge fund

industry. You will see examples of hedge fund documents that clearly do not use a tranche-by-tranche method. As noted above, the Fund's own lawyers (SRZ) says that there are two methods that are "typical," only one of which is the tranche-by-tranche.

The Fund posits the following hypothetical posed by the FTC interpretation. An investor invests \$10 million on May 1, 2002, and \$30 million a year and a half later. The Fund argues that the manager would not be able to invest the \$30 million because it could be withdrawn in a mere 6 months. Staying in the world of the hypothetical for a second, this problem would only exist during the first lock-up period. Once you got past the 2-year anniversary of the initial investment, everything would be locked-up for two years. But, of course, this is a false hypothetical. The Zwirn Fund had hundreds of investors with one and half billion of invested capital. As noted above, over half these investors had a one-year lock-up. And, it should have had adequate liquidity to meet even fairly substantial redemption demands. There is no reason why Zwirn would be so scared that an investor might want \$30 million back after a mere 6 months that he would have to leave \$30 million in

cash for 6-months—especially when you have an investor who by definition must be pretty happy with the Fund because they just quadrupled their investment.

The Fund argues that it is common for hedge funds to track separate investments to calculate the highwater mark. This is another so what? There is no connection between the highwater mark and redemption rights. In fact, You Honor will see examples of hedge funds that combine investments for redemption purposes but not for purposes of calculating the highwater mark. There is simply no industry standard.

The Fund suggests that it tracked investments separately to calculate the highwater mark. To begin with, you will see evidence of the Zwirn Fund tracking a highwater mark based on the gross value of an investor's entire capital account—all investments—not on a tranche-by-tranche basis. Moreover, any calculation of the highwater mark was academic for the Zwirn Fund given's the Fund's unusual trajectory. The highwater mark only matters when a fund losses money, and then subsequently makes money. The manager has to recover the past losses before it can earn fees. Here, the Zwirn Fund had many years where it

experiences no losses followed by an endless series of losing years. The highwater mark has played no role.

In sum, the contract is not ambiguous. FTC properly exercised its contractual rights in making the \$80 million demand. Even in the unlikely event Your Honor concluded the agreement was ambiguous, the relevant extrinsic evidence supports the conclusion that the most reasonable interpretation of the contract is that for two-year investments, the lock-up was keyed off the single capital account even if the investor made multiple investments.

Alleged Withdrawal of \$80 Million Request

The Fund claims that FTC agreed to rescind the \$80 million request in return for the Fund agreeing to an assignment of its interest to Jeepers. This claim is truly made up out of thin air. There is no written evidence that FTC ever struck such a deal. To the contrary, the assignment documents make clear that FTC was not waiving or releasing anything even though the Fund tried to slip that into the documents.

Worse, as our Pre-Hearing Brief notes, the Fund had its lawyer SRZ write a letter on March 27, 2007 rejecting both FTC's \$80 million demand and the \$133 million demand. The Fund took months to prepare this response. Yet, in rejecting the \$80 million demand, SRZ does not make the simple point: You agreed to rescind this.

The Fund's story further makes no sense. The assignment was purely administrative; the Fund didn't give anything up by agreeing to it nor frankly did FTC get all that much out of it. There is no reason why FTC would have thought Zwirn might refuse this, and would have had to make a concession like giving up its \$80 million, to get this done.

FTC's \$133 Million Claim

Assuming we are right about the contract, the Fund does not ~~simply only~~ owe FTC the \$80 million that it requested in November 2006. ~~Instead,~~WE maintain that the Fund owes FTC the full \$133 million that FTC requested in February 2007—three months later. While it is true that FTC's complete withdrawal demand did not meet the 120-day notice requirement, the Fund is estopped from asserting this requirement.

The evidence will be that what directly provoked the February 2007 demand was one thing: Jeffrey Epstein learned on February 14 that the Fund intended to dishonor the reduced 133 million dollar demand ie \$80 million demand. His immediate response was to demand the balance ie the full \$133 million. Obviously, had JE learned back in November 2006—at anytime prior to December 1, when the 120-notice period expired—that the Fund would not honor his \$80 million demand, he would have done exactly what he did on February 14: demand \$133 million and essentially go to war with the Fund.

The Fund's response is that we told JE in November that we would not honor the \$80 million and did nothing to make him think otherwise.

This dispute turns on what happened during the first two weeks of November 2006, and in particular on November 13, 2006—the day that culminated with FTC sending in its redemption demand around 6:40PM.

The Parties' Pre-Hearing Briefs lay out each side's respective version of events. But I want to make a few observations. FTC's \$80 million didn't come out-of-the-blue. The text of the memo makes it crystal clear it was the product of some conversation between Mr. Epstein and Dan Zwirn. The demand begins with the words "as per our conversation"

This phrase "as per our conversation . . ." is telling. The Fund claims that FTC recently fabricated the story that there was a conversation between JE, DZ, and GD prior to the \$80 million request. Admittedly, this doesn't say what was discussed, as the Fund notes, but it is pretty powerful contemporaneous evidence that some conversation occurred and "as per" whatever was discussed, FTC demanded \$80 million.

According to the Fund, the only discussion had on November 13 was Mr. Zwirn telling Mr. Epstein's bookkeeper that FTC had no right to withdraw. Assume that's true, then how can you explain the fact that FTC demanded \$80 million that night? Mr. Epstein was making a futile gesture? It just doesn't make any sense.

The \$80 million number also doesn't make any sense. One thing that everyone can agree upon when it comes to Jeffrey Epstein is that he ~~does not like to be pushed around~~ remembers numbers . ~~If you tell him he can't have \$100, he will demand \$200.~~ The idea that he reacted to being told he had a right to take out nothing by submitting a request for only part of his investment is totally out-of-character and in contrast to other instances of fund withdrawals when bad information surfaced . Clearly, this was a compromise figure. Indeed, when he is clearly and unambiguously told on February 14, 2007 that the Fund claimed he had no right to withdraw, he waited two days to respond—presumably because he had his lawyers write a much more formal demand this time—~~by re-~~ re- demanding all his money.

The big mystery in this case what exactly happened on November 13. Here's what we believe the evidence will show. Mr. Epstein was clearly agitating to get his money out. Mr. Beller is instructed to ~~contact~~ make a written demand on the Fund. ~~to make preparations for the withdrawal demand.~~ Dan Zwirn claims that in response, he talked to Beller and explained to him that FTC had no right to withdrawal. Mr. Beller says it didn't happen. Whether or not this conversation occurred, and whether or not Mr. Beller understood what Mr. Zwirn was saying—you will see that Mr. Beller is a ~~numbers person~~ the accountant and nothing more—it doesn't really matter.

Mr. Zwirn obviously tasked Mr. Dubin to talk to Mr. Epstein. The Fund is right that Mr. Dubin and Mr. Epstein have a close relationship; it is also not a relationship where legalisms have much meaning. Their relationship is the type where Mr. Dubin agreed to pay Mr. Epstein \$20 million as a finder's fee even though there was no contractual obligation in writing. It is extraordinarily unlikely that Mr. Dubin got on the phone and told Mr. Epstein that he had no legal right to withdrawal and walked him through some rolling redemption schedule for each investment.

Instead, Mr. Dubin to solve the problem the way he knew best: by striking a business compromise between Mr. Epstein and the Fund. At the same time Mr Epstein also withdrew money from a HIGHBRIDGE fund. Then, Dubin, Zwirn, and Epstein got on the phone to confirm the gentleman's understanding agreement that Epstein would withdraw \$80 million. Zwirn agreed. ~~Eighty million was not going to bankrupt the Fund, and Zwirn could try later to get Epstein to change his mind—~~ which is exactly why the next day, Zwirn tried to set up a meeting with Epstein to make a presentation about the Fund. To assure Epstein that the balance of his money ie 64 million was safe based on the NAVs

The Fund asks why on earth would Zwirn agree to this, especially after having taken the position that Epstein had no right to withdraw? The fund had determined that serious wrongdoing had occurred There would be an SEC investigation. The answer is that Zwirn was 37-years old at the time and in the midst of a ~~horrible~~ credibility crisis, where his business was about to be under investigation by the SEC. He was on the phone with two ~~billionaires, titans of the investment community, and~~ folks who had made his business possible. Mr. Dubin put him into

business and was his partner; Mr. Epstein was the initial, big investor who backed him at the start. Dan Zwirn ~~was to get prepared was for his investigation of wrongdoing, not about to get in between these two or make trouble by upsetting their deal.~~ So, Zwirn went along. He needed peace and the last thing he wanted was his largest investor running for the door. ~~may not have been happy about it—and he may have regretted it later—but he sat on his hands and~~
 agreed.

The day after Mr. Epstein sends in the demand, Mr. Zwirn attempts to set up a meeting to make a presentation about the NAV of the Fund. It would be the first substantive meeting they've ever had. Obviously, Mr. Zwirn hopes to ~~talk Mr. Epstein off the ledge~~ reassure. Mr. Epstein ~~doesn't want to re-litigate the issue, so he cancels. That's it.~~ that leaving more than 50 million dollars in the fund was the right decision for him,

During December, the lawyers work out the transfer from FTC to Jeppers. As I mentioned earlier, this is purely an administrative matter, nothing substantive. However, when the Fund attempts to insert release

language into the documents, FTC objects, and the offending language is removed.

It is not until February 14, 2007, that Mr. Epstein clearly learns of the Fund's contrary position. He asks Mr. Beller to follow-up on the \$80 million. Mr. Beller is told that the Fund is not going to honor it, and is sent a schedule that shows the Fund's position. Mr. Dubin and Mr. Beller both forward the schedule to Mr. Epstein, who now sees in clear writing the Fund's tranche-by-tranche position. He immediately responds by again demanding all his money ~~back in outrage~~.

One thing is clear from this story: Had Mr. Zwirn or Mr. Dubin told Jeffrey Epstein that he wasn't getting \$80 million back in November 2006, Mr. Epstein would have continued with his demand ~~for~~ ed all his money then, and we would only be fighting over a written a \$133 million that met the 120-day notice requirement. Thus, the Fund only has a notice defense because either Mr. Zwirn or Mr. Dubin—both of whom are agents of the Fund—~~was not straight with Mr. Epstein~~ misled mr Epstein into believing that his reduced demand would be met.

In addition to not being straight with Mr. Epstein about his withdrawal rights, the Fund—and Mr. Zwirn—was not straight with Mr. Epstein about the nature and scope of the problems that surrounded Perry Gruss's firing. The evidence will be that Zwirn downplayed his own knowledge of the acts, the knowledge of other members of management, and even the true nature of the problems. Had the Fund and Zwirn been honest with Epstein, FTC would have never have reduced his demand ~~demanded all its money back~~.

Even if the Fund Is Right

Even in the unlikely event that Your Honor concludes the Fund is right about the tranche-by-tranche interpretation, FTC has a valid claim. It now seems obvious that the Fund owed FTC \$45 million. Money that should have been paid back in 2007. The failure to pay this money is inexcusable. If there were a case where prejudgment interest was warranted, the claim for \$45 million is it. Since I have mentioned interest, let me note that the Fund's Brief is highly misleading when it says that an award of prejudgment interest on a contract claim is discretionary under Delaware law. The law is crystal clear that it is a matter of right. The \$45 million plus prejudgment interest comes to about \$60 million.

Another feature of this claim is that the Zwirn entity that served as the Fund's GP is clearly liable for this claim. It is black-letter law that a General Partner is liable for the Fund's liabilities, including contract liabilities. The GP can't hide behind the exculpation because the failure to honor the contract was clearly in bad faith, as even the Fund does not

seriously dispute the liability. Now, Mr. Siffert says that entity has no money. We will deal with collecting later.

But even if the Fund is right on the contract, FTC has a claim for more than \$45 million. The evidence will show that the Fund knew about the problems with Gruss much earlier in 2006. Had the Fund merely disclosed the problems earlier in 2006, then FTC could and would have withdrawn most if not all of its money. In fact, if the Fund had merely disclosed before September 1, FTC could have withdrawn an additional \$53 million.

Order of Priority

Assuming Your Honor finds in favor of FTC, the Fund claims that Your Honor should determine what priority FTC's claim should get among the Fund's other creditors. This issue is obviously inappropriate for this arbitration. To begin with, the issue of where FTC's claim fits in the order of priority is a dispute among the Fund's creditors. None of whom other than FTC are present. Second, the statute that the Fund is citing, Section 18-804(a) of the Delaware LLC Act governs the priority of distribution for a limited liability company that has been dissolved and is in the subsequent process of winding down. Fortress says that it is winding up the Fund, and in the vernacular, maybe that's true. But Section 18-801(a) of the LLC Act provides very technical definition of what events trigger a "dissolution and winding up" under Delaware law. These events include things like the sole Managing Member stopped being the sole Managing Member; the Managing Member elected to dissolve the Company; a vote of 2/3 of the members; a situation where suddenly there are no members; or a judicial dissolution. None of those

events have occurred. So, what priority FTC's claim would get under 18-804 is entirely premature.

Nevertheless, the Fund repeatedly echoes the them that any money awarded FTC will reduce the money that other investors recover. That may be true, but it is totally irrelevant. The Fund says that it would be unfair for FTC to get its money out when other investors are going to taking a big bath. FTC is only in this position because of the Fund's failure to honor its contract back in 2007. Had the Fund honored the contract, FTC would be in the same position as many investors who got money out during 2007. No one is saying that they must give the money back or there was anything unfair about it. They exercised their rights and made a smart decision.

Unlike the overwhelming majority of investors who are stuck in the Fund still, FTC was smart enough to try to get out of the Fund in late 2006. The other investors were enamored of the Fund's returns and wanted to keep their chips on the table. When you gamble, of course, you can lose. FTC made—what turns out to have been the right choice

in hindsight—to get out. There is nothing unfair about FTC obtaining the benefit of its wise decision.

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