



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

**EMERGING EUROPE GROWTH FUND, L.P.,)
and HORIZON CAPITAL GP LLC,)**

Plaintiffs,)

v.)

IHOR FIGLUS,)

Defendant)

C.A. No. 7936-VCP

**DEFENDANT'S ANSWERING BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Dated: December 17, 2012

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PRELIMINARY STATEMENT

Plaintiffs Emerging Europe Growth Fund, L.P. (the “Partnership” or “EEGF”) and Horizon Capital GP LLC (the “General Partner”; collectively, “Plaintiffs”) seek a preliminary injunction and assessment of attorney fees against Defendant Ihor Figlus (“Figlus” or “Defendant”).

A preliminary injunction is unnecessary, because there is no likelihood that Defendant will further disseminate any information properly protectable by the Partnership Agreement.

Further, even if an injunction is necessary and appropriate, Plaintiffs’ proposed injunction is vastly overbroad. Specifically, the Partnership Agreement, Section 14.14, prohibits disclosure only of information that is:

- (i) non-public;
- (ii) provided by the Horizon Capital GP, LLC (the General Partner); and
- (ii) is received pursuant to the Partnership Agreement.

Yet, Plaintiffs’ Motion extends far beyond the information arguably within the scope of Section 14.14, and seeks to restrain information obtained from others and Figlus’ own private information. Moreover, Plaintiffs seek prior judicial restraint that exceeds any contractual obligation or other basis recognized by the courts for restraining one’s freedom of speech.

Although Defendant has no further intention to disclose information that is within Section 14.14, it is additionally noted that the General Partner had provided certain of the documents with knowledge that it would or could become public, and thus waived the

restrictions.

With respect to Plaintiffs' request for immediate assessment of attorney fees, the plain language of Section 8 of the Subscription Agreement does not permit coverage of this action. To the extent that there can be any suggested ambiguity or opportunity to construe Section 8, the principles of *Contra Proferentum* require that Section 8 be construed against the Plaintiffs as the sole drafters of the indemnity provision.

The claim for attorney fees, however, exposes the underlying purpose of the Plaintiffs' pursuit of this action. Plaintiffs' President and Chief Executive Officer, Natalie A. Jaresko ("Jaresko"), is involved in a marital and custody dispute with Defendant. Regrettably, but apparently, this action is a ploy in the ongoing marital/custody dispute, whereby Plaintiffs are seeking to effectively bankrupt Defendant and obtain a financial judgment that would allow Jaresko to seize Defendant's financial interest in the Partnership.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs filed their Complaint on October 10, 2012,¹ and concurrently moved to expedite and for a temporary restraining order.² On October 16, 2012, the Court granted both motions during a telephonic hearing and, subsequently, issued a temporary restraining order dated October 19, 2012.³

A hearing on Plaintiffs' motion for a preliminary injunction ("Motion") is

¹ Trans. ID 46878969.

² Trans. ID 46878969.

³ Trans. ID 47163533.

scheduled for Friday December 21, 2012 at 10:00 a.m. The Motion seeks not only a preliminary injunction, but includes a demand for an order that Defendant advance Plaintiffs' attorney fees and expenses in their suit against him. Plaintiffs filed their opening brief and supporting papers in support of their Motion on December 12, 2012.

This is Defendant's Answering Brief in opposition to Plaintiffs' Motion for a preliminary injunction and for the order that he pay Plaintiffs for the lawsuit against him.⁴

STATEMENT OF FACTS

I. Horizon Capital Background

It is helpful to understand the various entities operating under the Horizon Capital ("HC") name, and the relationship of Figlus and Jaresko to those entities, in addressing the issues involved in the Motion.

In about 1994, the United States Congress established Western NIS Enterprise Fund ("WNISEF"), and funded it through the United States Agency for International Development (USAID).⁵ This is an Enterprise Fund under the Support For East European Democracy (SEED) Act Of 1989, as amended. The purpose of these Funds is to invest U.S.

⁴ Certain documents cited in this brief have already been made of record as attachments to the Affidavit of Kevin M. Gallagher, Esq., filed with Plaintiffs' Opening Brief (the "Gallagher Affidavit"). To avoid duplication and confusion, Defendant refers to the same Exhibits. All citations to "Plaintiff Ex. ____" refer to exhibits attached to the Gallagher Affidavit, and citations to "Figlus Dep. at ____" refer to Defendant's deposition testimony, also filed Plaintiffs. Other documents cited here are attached to the Affidavit of Defendant Figlus, and are referred to as "Defendant Ex. ____."

⁵ See <http://www.state.gov/p/eur/rls/rpt/63183.htm>, last visited December 16, 2012.

Government funds to support the private sector and nascent market economies.⁶ “USAID ... has responsibility for managing all Enterprise Fund activities with oversight from the State Department's Office of the Coordinator of U.S. Assistance for Europe and Eurasia.”⁷

USAID appointed Jaresko as WNISEF's President and Chief Executive Officer; Mark A. Iwashko as Executive Vice-President and Chief Investment Officer; and Lenna Koszarny as Chief Financial Officer. In about 2005, Horizon Capital Associates, LLC (“HCA”) was formed as a Delaware LLC, with the same three individuals being the officers and equity owners of HCA. Upon its formation, HCA became the manager for WNISEF.⁸ The current WNISEF Annual Report states that all three individuals still hold their positions with HCA. Jaresko and another HCA co-founder, Jeffrey C. Neal (“Neal”), also are members of the WNISEF Board of Directors.⁹

Further, in 2005, Plaintiffs Emerging Europe Growth Fund, L.P. (“EEGF”) and Horizon Capital GP, LLC (“General Partner”) were formed as Delaware entities.¹⁰ In 2006, WNISEF became the cornerstone limited partner in EEGF, investing United States Government money in the effort.¹¹ EEGF also included other limited partners, eventually

⁶ *Id.*

⁷ *Id.*

⁸ Defendant Ex. 1, WNISEF 2007 Annual Report, at 2.

⁹ Defendant Ex. 2, WNISEF 2011 Annual Report at 33.

¹⁰ Defendant Ex. 5.

¹¹ Defendant Ex. 1, WNISEF 2007 Annual Report, at 2.

including

REDACTED

As far as can be determined, WNISEF, HCA, EEGF and the General Partner are managed by the same group of insiders, Jaresko, Iwashko, Koszarny, and Neal.¹²

II. Figlus and Jaresko Background, and Becoming Limited Partners

Defendant Figlus married Jaresko in Illinois in 1989. They are the parents of two girls, REDACTED. The two moved to Ukraine for the period of 1992-2000 and again 2004. After 21 years of marriage, Jaresko initiated divorce and custody proceedings in Ukraine 2010. There are currently proceedings in both Ukraine and in the United States.

Prior to the marital discord, in February 2006, Jaresko asked her husband, Figlus, to co-sign the EEGF Subscription Agreement, whereby Jaresko and Figlus, as husband and wife, would become limited partners in EEGF. Jaresko was one of the promoters of EEGF, and had been responsible for the instrument and associated documents.¹³ Figlus relied entirely on his wife's advice and instructions in executing the writings.¹⁴

III. Jaresko's Problematic Promissory Notes

Figlus and Jaresko made the initial contribution to EEGF, which included funds obtained from Figlus' mother and a friend.

¹² Defendant Exs. 2 and 4.

¹³ Figlus testified in his deposition:

My wife was involved heavily in this fund. This was our future. She asked me to sign the documents and I did. I believed everything she was doing, you know, was proper.

Figlus Dep. at 218.

¹⁴ *Id.*

Thereafter, Figlus paid little attention to the Partnership contributions, because the entity was being run by Jaresko, and Figlus relied on her with respect to anything having to do with the partnership and the family finances. Also, in 2007, Figlus and Jaresko began building a home for the family. Figlus later learned that Jaresko began borrowing money from HCA REDACTED, but again relied on his spouse, and did not pay attention to the actual financial transactions.

In early 2010, after Jaresko separated from Figlus, she presented Figlus with, and requested that he execute, a "Security Agreement," pledging the couple's partnership interest to the repayment of the loans from HCA.¹⁵ This was Figlus first realization of the amount of loans that Jaresko had taken, and that the partnership interest was being funded through this means. Figlus did not know what to do and wrote to his friend, stating

[M]y wife has told me she wants a divorce and we are currently separated...

She has asked me to sign this [Security Agreement] as a requirement by her partners in the investment company. The company is currently managing two private funds and she and I are joint owners of shares in those funds (the funding and distribution notices are made out in both our names). She has asked me to sign this document, but, although she told me previously that it was to insure that our real assets here were pledged in support of the loans she made, there is no mention of that. As such, I'm not really clear about the potential ramifications of this document if I do sign it.

I would also mention that, although the partners at HCA get along famously, they are pretty thorough in their documentation. So, it is also curious that I am being presented with this now, seeing as the borrowing

¹⁵ Plaintiff Ex. A Tab 46.

began 1-1/2 years ago.¹⁶

Sensing that Figlus was reluctant to execute the Security Agreement, given his unfamiliarity with the situation and in the throes of the divorce, Jaresko asked another of the HCA insiders, Lenna Koszarny, as officer of HCA, to write to Figlus:

1). Can you confirm for [Figlus] please that tis {sic} is a pro forma document of the firm? You have both signed identically worded, identical documents also collateralizing your loans from HCA with your LP interests?

2). Lenna, can you please confirm you need these documents for auditors and lawyers to document properly that which we've done to date? And that you need the document today, given all others are signed and submitted?

3). Can you please confirm that HCA is not asking for other collateral, ie house, apartment, etc and just the LP interest?

Ihor, can you please sign the document as asked?¹⁷

In response, Koszarny wrote to Figlus:

I confirm that the Security Agreement for each of us is the same pro-forma agreement and that the only material difference between the 3 documents is the amounts that have been drawn down.

Mark and I have signed our agreements formally pledging our EEGF interest against loans drawn down. We are now only waiting for Natalie/Ihor's agreement prior to submitting all 3 agreements to our tax advisors. ****

On a separate note, these loans were provided, immediately upon request and in good faith based on the understanding from the very beginning that loans would be collateralized by each parties' interest in EEGF. No other collateral was requested or required, just the EEGF LP interest.

Horizon Capital has been extremely cooperative and understanding

¹⁶ Plaintiff Ex. A Tab 29.

¹⁷ Def. Ex. 6 at 00026.

about providing monies as required, we ask that commitments made be honored and formal documentation be signed as soon as possible.¹⁸

Figlus then signed the Security Agreement as instructed and returned to HCA.¹⁹ This was the first time that Figlus recognized the loan situation, and how his and Jaresko's Partnership stake were being funded, and that this was the established practice with the insiders. By late 2011, Jaresko had borrowed approximately REDACTED from HCA to both fund the partnership interest REDACTED.²⁰ The loans were collateralized only by the EEFG partnership interest.

The Security Agreement and the promissory notes transactions were between Jaresko and Figlus individually, and HCA, which is neither the Partnership nor the General Partner, and it involved a personal transaction by which loans were received for personal purposes. The only involvement of the Partnership was that Jaresko's and Figlus' partnership interest was being used as collateral for the private loans. These documents are not and could not fall within the scope of Section 14.14 of the Partnership Agreement.

IV. Figlus Obtains Partnership Documents For Divorce Proceedings

In later 2010, the divorce proceedings between Figlus and Jaresko continued. Figlus was not obtaining sufficient information about Jaresko's financial or business interests from Jaresko, and so on January 30, 2011, Figlus contacted Koszarny to obtain

¹⁸ Def. Ex. 6 at 00025-26.

¹⁹ *Id.*

²⁰ Plaintiff Ex. A Tab 46 and Def. Ex. 6.

information for property settlement with Jaresko.²¹ Figlus both requested documents from HCA, which had provided the loan funding, and EEGF Partnership reports. Figlus' email disclosed to Koszarny that the requests were copied to his attorneys handling the divorce proceeding, "Caroline Langley <langley@familylawint.com>" and "booker@familylawint.com."²² Koszarny did not object to Figlus copying his family law counsel.²³

Koszarny did not immediately respond, and a few days later Figlus sent a second note to Koszarny, again copying his outside family law counsel, but also this time copying a Human Resources person at HCA, Tetyana Bega.²⁴

Koszarny immediately responded to Figlus' copying of the email to Ms. Bega, by a note to Figlus and his attorney, stating that:

please ensure that you direct any requests for information only to me. The information requested is sensitive and only Founding Partners have access to certain information. As such, I would appreciate if you could avoid contacting or e-mailing Tetyana Bega or any other Horizon Capital employee going forward and maintain one point of contact, via me, in relation to any queries that you have.²⁵

Koszarny's only request was that Figlus keep the divorce proceedings and related information away from the HCA staff. She did not ask for any other confidentiality in this email, and specifically did not request any confidentiality as to the HCA and

²¹ Plaintiff Ex. A Tab 45 at 006435.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Plaintiff Ex. A Tab 45 at 006434.

Partnership documents, even though they were being copied to his counsel in the divorce proceedings with the obvious intent of being used in such proceedings.²⁶ In all events, Figlus confirmed he would keep the matter confidential as against Ms. Bega and other staff.²⁷

Koszarny then sent the HCA and the EEGF materials to Figlus and his counsel in the divorce proceedings, without any request for confidentiality or reference to any confidentiality obligations under the Partnership Agreement.²⁸

Interestingly, later in September 2011, Figlus asked for some additional partnership reports, and again copied his counsel involved in the divorce.²⁹ This time, Koszarny provided the documents, but refused to send them to the attorneys, stating that: “As this is confidential information, I will forward these e-mails to your attention only.”³⁰ Even though the same document had contained the trail of emails from her original production of documents in February 2011, Koszarny did not suggest that the same confidentiality obligations applied to the documents previously provided to Figlus and his counsel.

V. Figlus Seeks An Investigation

In the meantime, Figlus became increasingly concerned about the partnership and the loans that had been and continued to be given to the insiders to pay for their partnership interests, while excluding other limited partners. Although Figlus was not sophisticated

²⁶ *Id.*; Figlus Dep. at 299-300.

²⁷ *Id.*; Figlus Dep. at 300-01.

²⁸ Plaintiff Ex. A Tab 45 at 006433.

²⁹ Plaintiff Ex. A Tab 70 at 006413-14.

³⁰ Plaintiff Ex. A Tab 70 at 006413

in these matters, he considered that it was inappropriate that HCA was giving loans to insiders to fund their partnership interests, but to no other partners. He was also having difficulties obtaining information from Koszarny and Jaresko.

At that point, Figlus had no source of income, and was tied-up in a divorce and custody battle.³¹ He did not have the resources to involve corporate counsel to investigate.³² He talked to an individual at U.S. Agency for International Development (USAID) in Washington D.C., because the agency was effectively involved as a limited partner because of the agency's funding and supervision over WNISEF, but the agency employee did not appear interested in pursuing the question.³³ Conveniently, an acquaintance, a reporter from REDACTED, contacted Figlus on a different issue. After some unrelated conversations, Figlus thought of having REDACTED investigate what he viewed as the questionable conduct of HCA, which was managing EEGF, providing loans to insiders to fund their Partnership investments, but not other limited partners.

He stated that he sought an investigation, because he "believed the activities were improper," However, Figlus "did not have the background or resources to fully investigate the apparent improprieties, and believed that a journalistic investigation, which has access to greater resources and would be impartial, was better suited to conduct the investigation."³⁴

³¹ Figlus Dep. at 311.

³² Figlus Dep. at 310-11.

³³ Figlus Dep. at 120.

³⁴ Figlus Dep. at 270-71.

In his deposition, Figlus further explained why he raised the issue with the newspaper reporter:

Q [Mr. Rollo]. Why were you discussing that issue with ^{REDACTED}?

A. I started becoming concerned that there was things going on that weren't appropriate ... and I think it's kind of evident from some of the other things that I've written that I didn't -- first of all, I didn't have the knowledge to understand whether or not they were appropriate. I had limited resources in terms of being able to try to find out, you know, and so it was --- you know, when you're looking at something kind of like in the situation I was in where, you know, I don't have an objective perspective. ***

So I didn't have an objective perspective and I thought talking to someone who was a reporter, you know, if he -- you know, if he has a better perspective on it, if he sees it objectively and how does this appear to an outside person.³⁵

In response to the reporter's request for information, Figlus provided, *inter alia*, the promissory notes that he obtained when Jaresko asked him to execute the Security Agreement, and a flow chart that Defendant created trying to recreate the various entities of the Horizon Capital group, based on public information.³⁶

VI. Plaintiffs' "Cease And Desist Letter" And Filing Of Suit

On October 5, 2012, Koszarny, on behalf of the General Partner sent Figlus a "cease and desist letter."³⁷ Three days later, on October 8, 2012, Koszarny requested that Figlus "return all copies of any non-public information in your possession, custody and control concerning the Horizon Parties that was provided to you, directly or indirectly, by the

³⁵ Figlus Dep. at 115-16.

³⁶ Plaintiff Ex. B at 14.

³⁷ Plaintiff Ex. D.

General Partner or the Partnership....”³⁸

This suit was filed on the morning of October 10, 2012, with a Summons and Complaint being sent to Figlus at the time.

Figlus finally was able to contact counsel on October 12, 2012. After that, Figlus has not further disclosed Partnership-related information to any third-parties. On October 19, 2012, this Court entered a Temporary Restraining Order.³⁹

³⁸ Plaintiff Ex. E.

³⁹ Trans ID. 47163533.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. General Standard

The rule governing preliminary injunctions is as follows:

“This Court has broad discretion in granting or denying a preliminary injunction.” “A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief.” “The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned.” However, “there is no steadfast formula for the relative weight each deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another.”⁴⁰

B. Constitutional Overbreadth of Plaintiffs’ Request

In their Proposed Order, Plaintiffs demand an injunction that:

Defendant and his agents ... are hereby preliminarily enjoined from disclosing any nonpublic (or confidential) information regarding the General Partner and the Partnership.

The request to preclude Defendant Figlus from disclosing any information “regarding the General Partner and the Partnership” is vastly overbroad.

The operative provision of the Partnership Agreement, on which this action is based, says that Limited Partners may not

⁴⁰ *In re Micromet, Inc. S’holders Litig.*, 2012 Del. Ch. LEXIS 41, 13-14 (Del. Ch. 2012), quoting *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972); *Nutzz.com, LLC v. Verture, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. 2005); *Mun. Police Emples. Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007); and *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. 2004).

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Thus, Section 14.14 of the Partnership Agreement protects only information that is:

- (iii) non-public;
- (ii) provided by the Horizon Capital GP, LLC (the General Partner); and
- (iv) is received pursuant to the Partnership Agreement.

Further, even with respect to information otherwise within the scope of the prohibition of disclosure, the Agreement exempts certain disclosures.⁴²

Plaintiffs' Motion extends far beyond the information arguably within the scope of Section 14.14. Without even considering the exceptions noted previously, the plain language of Section 14.14 limits its restraint to only information that is provided by the General Partner, and only if received pursuant to the Partnership Agreement. Despite this clear language of Section 14,14, Plaintiffs, nevertheless, are asking the Court to prohibit Defendant from saying anything that is non-public "regarding the General Partner and the

⁴¹ P. Ex. A Tab 5, § 14.14.

⁴² *Id.*, stating, *inter alia*:

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