Partnership." No such restraint appears in Section 14.14, and Plaintiffs do not even attempt to justify the proposed expansion of the restraint to go from the actual language of the Agreement to encompassing and non-public information "regarding the General Partner and the Partnership." Thus, Plaintiffs' Motion fails for this reason alone.

Moreover, the Court should not grant Plaintiffs' request to muzzle Figlus beyond the strict confines of Section 14.14. Plaintiffs, after all, are asking the Court to preclude Figlus from speaking on an issue that has at least some public interest,

REDACTED

. Even without the public interest aspect, however, Plaintiffs are still demanding a judicial silencing of a citizen's ability to speak freely, far beyond the scope of any contractual obligation he has undertaken.

The obvious problem with the scope of their Motion is that Plaintiffs are asking the Court to enter an Order that prohibits Defendant Figlus from exercising his freedom of speech without even attempting to provide the Court with any Constitutional support or underpinning for such impairment of Figlus' rights. Plaintiffs cannot do so, because such silencing of speech is Constitutionally impermissible, and would constitute a denial of basic principles of the Bill of Rights in both the United States and Delaware Constitutions.

There can be no question that Plaintiffs are seeking a temporary injunction, which constitutes a prior restraint on speech. "Temporary restraining orders and permanent injunctions--i.e., court orders that actually forbid speech activities--are classic examples of prior restraints."[43] A prior restraint is any government action that "authorizes

[43] *Alexander v. United States*, 509 U.S. 544, 550 (1993) (Internal quotation marks

suppression of speech in advance of its expression . . ."[44] It is a judicial order that restricts speech rather than merely punishing it after the fact.

It is well settled that "[p]rior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights,"[45] which the Court has refused to countenance even where there was a risk of national security.[46]

The above principles are enshrined in the United States Constitution, and in the Constitution of Delaware, Article I, §5, which states:

> The free communication of thoughts and opinions is one of the invaluable rights of man. The press shall be free to every citizen who undertakes to examine the official conduct of persons acting in a public capacity; and any citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. ***

The Court cannot, consistent with the Federal and State Constitutional guarantees of free speech, enjoin speech except in the most exceptional circumstances, and certainly not when Plaintiffs are seeking to prevent speech that is not even covered by the very contractual provision upon which they are relying. Moreover, the Court cannot prevent speech where the matter has at least some public interest REDACTED , except as limited to the very specific and exact language of the speaker's contractual obligation.

Because the language of Plaintiffs' proposed order far exceeds the limited scope

---

omitted.).

[44] *Ward v. Rock Against Racism*, 491 U.S. 781, 795, n.5 (1989).

[45] *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976).

[46] *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case), citing *Near v. Minnesota*, 283 U.S. 697 (1931).

of Section 14.14, the Motion is Constitutionally defective.

C. The Motion Seeks To Restrain Disclosures Not Covered By § 14.14

Defendant Figlus' specific request for investigation which he directed to both the USAID and REDACTED was that HCA was granting loans to insiders to purchase their partnership interests in EEGF, but not providing the same benefit to non-insider Limited Partners. Defendant Figlus viewed this as troublesome and inappropriate, as set forth at pp. 10-12, *supra*.

The key documents related to that issue are not within the scope of the prohibitions of Section 14.14. These documents are the Security Agreement and the attached promissory notes.[47] These documents do not fall within the restraint on disclosure, because they neither disclose "information furnished by the General Partner," nor were they "received by such Limited Partner pursuant to this Agreement." In fact, these documents were provided to Defendant Figlus by Jaresko individually, who required Defendant Figlus' signature so that Jaresko could obtain a personal loan REDACTED to maintain the their personal partnership interest. There is no indication that the Security Agreement and promissory notes were obtained from the General Partner, and Plaintiffs have not even attempted to demonstrate that these documents fall within the provision "information furnished by the General Partner."

Further, the Security Agreement and the attached promissory notes were not "received by such Limited Partner pursuant to this Agreement." In fact, Plaintiffs have

[47] Plaintiff Ex. A, Tab 46.

not even attempted to demonstrate that any provision of the Partnership Agreement related to, much less compelled, the Security Agreement and promissory notes. Not only are these documents not "received by such Limited Partner pursuant to this Agreement," but they were of interest, because they were individual transactions amongst insiders and not available to other limited partners under the Partnership Agreement.

Similarly, Defendant Figlus provided to REDACTED a chart showing what he had discerned as the structure of the Horizon Capital group, or what Plaintiffs now say was "based upon Figlus' speculation."[48] The chart does not meet the requirements of Section 14.14, but, yet, Plaintiffs' Motion would prohibit Defendant Figlus from disclosing this information also, because it falls literally within the scope of the Motion to restrain.

Plaintiffs have not attempted to demonstrate that the requirements of Section 14.14 have been met, and, therefore, the Motion must fail as a whole.

D. Rule of *Contra Proferentum* Precludes Plaintiffs' Expansion

To the extent that there can be any ambiguity as to the scope of the non-disclosure obligations of Section 14.14, the principles of *contra proferentum* apply here to require that any ambiguities in the language be resolved against the Plaintiffs.[49] The Partnership Agreement was not negotiated, but is a document drafted by Plaintiffs and executed by

---

[48] Op. Br. at 16

[49] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1222 n. 9 (Del. 1999); *Estate of Osborn v. Kemp*, 2009 Del. Ch. LEXIS 149, 28-29 (Del. Ch. 2009) ("Delaware courts apply the general principle of *contra proferentum*, which holds that ambiguous terms should be construed against their drafter. Because there is no dispute Kemp drafted the Contract, I will construe the ambiguous price term in the Contract against him.")

Plaintiffs under a power of attorney. [50] "[W]hen a court is asked to construe a limited partnership agreement drafted solely by the corporate general partner, it will resolve all ambiguities against the general partner as drafter and in favor of the reasonable expectations of the public investors."[51]

Therefore, to the extent that there can be any question of the precise meaning of the language of Section 14.14, all ambiguities and inferences must be resolved in favor of Figlus.

E. The General Partner Waived The Protections

The operative provision states that any prohibition can be waived by the General Partner – "Any obligation of a Limited Partner pursuant to this Section 14.14 may be waived by the General Partner in its discretion."[52] As detailed in the Statement of Facts, Koszarny had provided certain information with a specific restriction of confidentiality, while providing other documents to Figlus and his counsel without any confidentiality restriction.

The fact that Koszarny provided the information to Figlus' counsel without any request for confidentiality is significant, because Koszarny must have known that such documents were likely to become public in the course of upcoming divorce proceedings.

---

[50] *SI Mgmt. L.P. v. Charlebois*, 707 A.2d 37, 43 (Del. 1998) ("it appears that the General Partner solicited and signed on 1,850 investors to the Agreement that those investors had no hand in drafting. Based on that premise, the principle of *contra proferentum* applies. Accordingly, ambiguous terms in the Agreement should be construed against the General Partner as the entity solely responsible for the articulation of those terms.")

[51] *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309-310 (Del. Ch. 2002).

[52] Plaintiff Ex. A Tab 5, § 14.14(e).

Thus, by providing those documents without any claim or request for confidentiality in light of their anticipated use in the divorce proceedings constituted an inferred waiver of the prohibitions of Section 14.14 as to those documents.

Plaintiffs' proposed order of injunction extends to documents for which the General Partner has Section 14.14. Plaintiffs' request should be denied for this reason also.

F. Irreparable Harm and Balance of the Equities

It is recognized that Section 14.14 provides that its breach represents irreparable harm justifying an injunction to prevent breach. Even though such harm is contractually presumed, Plaintiffs must still demonstrate that the balance of the equities tips in favor of issuance of the requested relief.

Injunctive relief is not necessary here, because there is no likelihood that Defendant Figlus will violate Section 14.14 in the future.[53] Defendant Figlus acted without consulting the Partnership Agreement or counsel.[54] Lenna Koszarny sent Defendant and his counsel the documents for use in the divorce proceedings, without raising any obligation to maintain those particular documents in confidence.

Figlus testified at his deposition in response to Plaintiffs' questions that he has now been educated and is aware of the issues as he had not been before. He testified as follows:

---

[53] *U-H Acquisition Co. v. Barbo*, 1994 Del. Ch. LEXIS 9 (Del. Ch. 1994) ("An injunction should never issue, however, unless it is necessary for the protection of the movant's rights.")

[54] Figlus Dep. at 181.

> Q [Mr. Rollo]. Had you read that and the other components of those documents, would you agree that we may not be here today because you would have complied with your obligations?
>
> MR. PAZUNIAK: Objection.
>
> THE WITNESS: You know, I think I would have had a better understanding and I thought these entities were governed by some public institutions, but otherwise I think that my opinion of what I call the improprieties would not be any different.
>
> Q. I was trying to ask a slightly different question. Had you known what your contractual obligations were, you wouldn't have knowingly breached them. If you believed you behaved in a manner that was consistent with them, you would have done that, I am submitting to you. So the fact that you didn't read some of the materials, would you agree with me that that is one of the reasons we are here today?
>
> MR. PAZUNIAK: Objection.
>
> THE WITNESS: Yes, one of the reasons.[55]

In light of the specific facts of this case, and particularly the facts that Figlus proceeded without knowledge or legal advice, and the situation is now irreversibly changed, the following analysis should apply here:

> A preliminary injunction will issue when the Court of Chancery is convinced that, without it, serious injury of a nature calling for equitable relief will probably be suffered by the plaintiffs before final judgment can be entered. Relief will not be granted merely to allay the fears or apprehension of the plaintiff where there is no showing or reasonable ground for believing that the defendant is about to commit the wrongs complained of or where it appears that he is without the opportunity or the intention of so doing. ... The present absence of an imminent threat as shown on the record also means a preliminary injunction is not necessary to prevent irreparable harm. The status quo does not require judicial intervention.[56]

Because there is no indication that Defendant Figlus will again attempt to disclose

---

[55] Figlus Dep. at 319-20.

[56] *State v. Delaware State Educational Asso.*, 326 A.2d 868, 876 (Del. Ch. 1974).

documents within the scope of Section 14, there is simply no need for an injunction. Its only purpose will be to serve as an exhibit in the continuing proceedings between Figlus and Jaresko.

II. PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES

Plaintiffs argue Section 8 of the Subscription Agreement allows the Court to award attorney fees to Plaintiffs. Plaintiffs plainly overreach and Plaintiffs' argument directly contradicts the Subscription Agreement.

A. The Indemnification Provision Is Plainly Inapplicable

The provision of the Subscription Agreement upon which Plaintiffs rely says:

> 8. The Subscriber will, to the fullest extent permitted by applicable law, indemnify each Indemnified Party and the Partnership against any losses, claims, damages or liabilities to which any of them may become subject in any capacity in any action, proceeding or investigation *arising out of or based upon any false representation or warranty, or breach or failure by the Subscriber to comply with any covenant or agreement made by the Subscriber herein, or in any other document furnished to the General Partner or the Partnership by the Subscriber in connection with the offering of the Interests*.

This provision is plainly geared to situations where a subscriber makes false representations of his suitability or similar facts. The language of this provision has no application to this action. First, the operative provision manifestly limits its application to "losses, claims, damages or liabilities." This language does not apply to attorney fees that the Partnership voluntarily decided to incur.

Second, even if the language "losses, claims, damages or liabilities" were interpreted to include attorney fees sough here, the losses or liabilities must be "arising

out of or based upon any false representation or warranty, or breach or failure by the Subscriber to comply with any covenant or agreement made by the Subscriber herein, or in any other document furnished to the General Partner or the Partnership by the Subscriber in connection with the offering of the Interests." None of these operating events occurred here.

(i) This action asserts that Figlus breached Section 14.14 of the Partnership Agreement. Indeed, Plaintiffs' claim irreparable harm solely on the basis that Section 14.14 contractually provides for that. This action did not "arise from" and is not "based upon" any "false representation or warranty, or breach or failure by the Subscriber to comply with any covenant or agreement made by the Subscriber [in the Subscription Agreement]." Plaintiffs argue that this provision is met because Defendant Figlus allegedly falsely stated that he had read the Partnership Agreement by signing the Subscription Agreement in February 2006. Whether Figlus did or did not had a copy of the Partnership Agreement in February 2006 when he signed the Subscription Agreement, Plaintiffs' claim is nothing more than a request that the Court interpret Section 8 to the point of being ridiculous. Thus, Plaintiffs ask that the Court accept the speculation that had Figlus read the Partnership Agreement in February 2006, he would have recalled the precise wording of Section 14.14, would have understood in February 2006 the legal language of that provision and recalled that understanding more than six years later, and would not have provided documents to the newspaper reporter (apparently including documents that are not within the scope of Section 14.14 such as the Subscription Agreement, promissory notes and his personal charts.) To say that this

series of speculations and hypotheticals requiring finding that people remember thing precisely more than six years later, is a preposterous interpretation of "arising from or based on."

Indeed, it is only necessary to the Verified Complaint in this case.[57] That Complaint, which is the basis for this action, says that "the Partnership seeks injunctive relief and a damages award against one of its limited partners, defendant Figlus, arising from his wrongful disclosure of nonpublic Partnership information to a reporter at the REDACTED in violation of his obligations under the terms of the operative Partnership agreement (the "Partnership Agreement")." The Complaint then goes on to detail the breach of the Partnership Agreement, and states the cause of action as "Figlus Has Breached The Confidentiality Provision." Plaintiffs never mentions any breach of the Subscription Agreement. To the contrary, Plaintiffs assert that the action arises and is based on the breach of the partnership Agreement, and that Section 8 merely provides for attorney fees for that Partnership Agreement breach:

> 12. Under the Subscription Agreement, Figlus (i.e., a "Subscriber") is obligated to indemnify the General Partner and the Partnership for any losses, including attorneys' fees and costs, arising from his breaches of the Partnership Agreement. ***
>
> 26. Figlus is bound by paragraph 8 of the Subscription Agreement, which obligates him to indemnify the General Partner and the Partnership for any losses, including attorneys' fees and costs, arising from his breaches of the Partnership Agreement, and to reimburse the General Partner and the Partnership for any attorneys' fees and costs as they are incurred.

Thus, even in pleading Section 8, Plaintiffs cited only the breach of the

[57] Transaction ID 46878969.

Partnership Agreement and not any breach of the Subscription Agreement. The action and any alleged losses by Plaintiffs arise from and are based on alleged breach of the Partnership Agreement by Figlus' dissemination of information in 2012, which and they are unrelated to whether Figlus had read the Agreement more than six years earlier in February 2006.

Recognizing the fatal problem with their position, Plaintiffs cite Figlus' deposition testimony.[58] Plaintiffs' quotations, however, are sorely incomplete, and the full testimony makes clear that neither the question nor the answer had anything to do with any failure to read the Partnership Agreement in February 2006. [59]

Regardless of how broadly or narrowly interpreted, the term "arising out of or based upon any false representation" demands more than the preposterous assumption and speculations, that notwithstanding the contrary pleading of the Complaint, this action is, in fact, based on Figlus breach in February 2006 of reading the Partnership Agreement, and not on the breach of the partnership Agreement which is the current pleading.

(ii) Plaintiffs next argue that Section 8 comes into play, because "Figlus failed to acknowledge (or comply) with his contractual obligations under the Subscription Agreement."[60] The argument plainly distorts the language of Section 8. The actual language of Section 8 is "breach or failure by the Subscriber to comply with any

---

[58] Op. Br. at 31.

[59] Figlus Dep. at 319-20.

[60] Op. Br. at 31

covenant or agreement made by the Subscriber [in the Subscription Agreement]." The word "acknowledge" appears elsewhere in the Subscription Agreement.[61] However, neither the word "acknowledge" nor the phrase "his contractual obligations" appear in Section 8. Instead, Section 8 permits indemnification claims only if Figlus had breached or failed to comply with any covenant or agreement made in the Subscription Agreement. The attorney fee claim here does not arise and is not based upon any breach or failure to comply with any covenant or agreement made in the Subscription Agreement.

Plaintiffs' need to rewrite the language of Section 8 underscores the bankruptcy of their claim. By changing the language to read that indemnification applies whenever a subscriber fails to "acknowledge contractual obligations," Plaintiffs lay the framework for arguing, as they do, that a legal defense to a claim constitutes a breach of failure to comply with the subscriber's covenant or agreement in the Subscription Agreement. That is not the language or intent of the Section 8. Nothing can be more indicative of the plain inapplicability of Section 8 than Plaintiffs' argument that Plaintiffs are entitled to be indemnified for their attorney fees because Defendant defends against the claim on the basis that it does not apply here.[62]

(iii) Finally, Plaintiffs argue that Section 8 applies, because the Partnership Agreement is "a document furnished to the … Partnership by the Subscriber in connection with the offering," and its alleged breach invokes the indemnification of Section 8.

---

[61] See Plaintiff Ex. A Tab 1 at Sections 2(b), 3, 4, 7, and 10.

[62] Op. Br. at 31.

The specific provision, however, provides for indemnification only if the Partnership sustained a loss arising out of or based upon the subscriber's breach or failure to comply with any covenant or agreement made "in any other document *furnished to* the General Partner or the Partnership by the Subscriber." Defendant Figlus did not "furnish" the Partnership Agreement to the General Partner. To the contrary, the Subscription Agreement clearly states that "a copy of [the Partnership Agreement] has been furnished to the Subscriber" – the exact opposite of the event contemplated by Section 8. If the Subscription Agreement itself acknowledges that the Partnership Agreement was provided to Figlus, it is impossible to read Section 8 of that same Agreement to say that the exact opposite is true – that the subscriber provided the Partnership Agreement to the Partnership.

Even if Plaintiffs could overcome this fatal defect, Figlus still never "furnished" the Partnership Agreement to the General Partner or the Partnership. Plaintiffs argue that "the Partnership Agreement was executed and delivered to the Partnership by Figlus, through a proxy (the General Partner)."[63] That is simply incorrect. Figlus never furnished the Partnership Agreement. In accordance with § 14 of the Subscription Agreement, Figlus constituted and appointed the General Partner as his "true and lawful representative and attorney-in-fact."[64] The grant to the General Partner of the power of attorney to execute documents is not the "furnishing" of a document "to the General Partner."

---

[63] Op. Br. at 32.

[64] P. Ex. A Tab 1, at page 9 § 14.

Moreover, the above provision applies only "*in connection with the offering of the Interests*," which the Subscription Agreement defines as "the offering of limited partnership interests."[65] The alleged breach of the Partnership Agreement is unrelated to the "offering of the Interests." Indeed, the current version of the Partnership Agreement upon which Plaintiffs rely upon in their Complaint did not yet exist at the time of "the offering of the Interests."

In short, Plaintiffs are rewriting the provisions of Section 8 to create a non-existent obligation for Figlus to pay Jaresko's lawyers to sue him.

B. Rule of *Contra Proferentum* Precludes Plaintiffs' Expansion

As was the case with the Partnership Agreement, the Subscription Agreement and § 8 in particular, were not a bilateral negotiated agreement, but a document drafted by Plaintiffs and presented to Defendant Figlus. Therefore, the principles of *contra proferentum* apply here to require that any ambiguities in the language be resolved against the Plaintiffs on the basis of the law previously set forth.

Defendant's analysis of Plaintiffs' claim for attorney fees demonstrates that Section 8 does not apply as a matter of plain language. However, even if there was any reasonable ambiguity as to the meaning or interpretation of Section 8, the principle of *contra proferentum* require that Section 8 be construed against Plaintiffs, as drafters, and in favor of Defendant who had no part in the writing of the language. Plaintiffs' attempted rewrites of Section 8 in their favor are simply impermissible.

[65] P. Ex. A Tab 1, at page 1 of Subscription Agreement, at 006215.

C. Plaintiffs Have Created Their Own Loss

Section 8 does not apply here for the reasons stated above. Nevertheless, even if Section 8 were somehow held to afford attorney fees to Plaintiffs, Plaintiffs fiduciary obligations to Figlus and the implied contractual covenant of good faith and fair dealing of the Partnership Agreement mandate that Plaintiffs not misuse the provision to effectively take away Figlus' partnership interest.[66]

Defendant's counsel had advised Plaintiffs at the outset of this case that Defendant was willing to resolve the case, and strictly comply with the provisions of the Section 14.14 of the Partnership Agreement. The offer to resolve the case was refused. Thus, the attorney fees being generated by Plaintiffs are self-imposed. Plaintiffs do not need to pursue this action for an injunction to obtain the relief they purport to seek.

As Plaintiffs know, Defendant Figlus has no source of income, and cannot afford his own defense, much less the cost of the indemnification were it to be applicable.[67] Therefore, the natural consequence of forcing Figlus to defend the action and bear Plaintiffs' attorney fees is to ultimately dispossess Defendant of his interest in the Partnership.

CONCLUSION

Based on the foregoing analysis of fact and law, Defendant Figlus respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction and for an

---

[66] 6 Del.C. § 17-1101(d) ("the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.").

[67] Figlus Dep. at 311.

order awarding attorneys' fees pursuant to Paragraph 8 of the Subscription Agreement.

Dated: December 17, 2012

/s/ George Pazuniak
George Pazuniak (#478)
Pazuniak Law Office LLC
1201 North Orange Street
7th Floor, Suite 7114
Wilmington, Delaware 19801-1186
(302) 478-4230
gp@del-iplaw.com

Attorneys for Defendant Ihor Figlus