



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMERGING EUROPE GROWTH FUND,
L.P., and HORIZON CAPITAL GP LLC, a
Delaware limited liability company,

Plaintiffs,

v.

IHOR FIGLUS,

Defendant.

C.A. No. 7936-VCP

REDACTED PUBLIC VERSION--
FILED DECEMBER 19, 2012

**PLAINTIFFS' OPENING BRIEF IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Through this motion, 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 to prevent defendant Ihor Figlus ("Figlus" or "Defendant"), a Limited Partner, from further disclosing non-public information in violation of a confidentiality provision (the "Confidentiality Provision") contained in the operative Partnership agreement (the "Partnership Agreement").¹ As discussed below, the preliminary injunction standard is easily met.

First, Plaintiffs have a reasonable probability of success on the merits. Figlus and his former wife, Natalie A. Jaresko ("Jaresko"), jointly invested as Limited Partners in the Partnership. In connection with that investment, Figlus voluntarily executed a subscription agreement (the "Subscription Agreement"), which bound him to the Partnership Agreement terms, and granted the General Partner a power of attorney to execute the Partnership Agreement on his behalf. That Partnership Agreement contains a Confidentiality Provision, which prevents Limited Partners from disclosing non-public information relating to the General Partner or the Partnership. During his deposition,

¹ A true and correct copy of the Partnership Agreement is attached as Exhibit A, Tab 5 to the Affidavit of Kevin M. Gallagher, Esq., filed herewith (the "Gallagher Affidavit"). All citations to "Ex. ____" refer to exhibits attached to the Gallagher Affidavit, and citations to "Figlus Dep. at ____" refer to Defendant's deposition testimony, also filed herewith. Unless otherwise defined, capitalized terms have the meanings set forth in the verified complaint (the "Complaint") and, unless otherwise noted, emphasis is added.

Figlus essentially admitted that the information and documents at issue in this action fall within the Confidentiality Provision. While Figlus will undoubtedly dispute the foregoing assertion, he cannot fairly dispute that the Plaintiffs have demonstrated a reasonable probability of success on the underlying merits.

Second, Plaintiffs have established irreparable harm. At the time of his investment, Figlus contractually stipulated that a breach of the Confidentiality Provision would result in irreparable harm, and that Plaintiffs would be entitled to an injunction and specific performance. Even without that contractual stipulation, the improper use and disclosure of information that is subject to a confidentiality agreement constitutes irreparable harm under Delaware law.

Third, the balance of the equities weighs in favor of Plaintiffs. Through this action, Plaintiffs seek to enforce their bargained-for contractual rights. In contrast, Figlus seeks to avoid contractual obligations he voluntarily undertook. The excuses and justifications offered by Figlus, to date, do not pass muster. While Figlus would have this Court believe that his breach of the Confidentiality Provision was "whistle-blowing" motivated by a desire to protect a purported "agency of the government of the United States," the discovery record demonstrates that the breach was actually an attempt by Figlus to harm his ex-wife, who is a co-founder of the General Partner and the chief executive officer of the Partnership. Simply put, the equities do not permit Figlus to violate the Partnership Agreement to use Plaintiffs' non-public information as a weapon in his divorce dispute (or for revenge). Accordingly, Plaintiffs respectfully submit that

this Court should convert the existing temporary restraining order into a preliminary injunction.

In addition, Plaintiffs respectfully seek an order directing Figlus to reimburse Plaintiffs for their "legal and other expenses ... *as they are incurred* in connection with" this action, as Figlus is contractually bound to do under the Subscription Agreement. By refusing to pay Plaintiffs' legal costs "as they are incurred" Figlus is depriving Plaintiffs of the benefit of their contractual bargain (*e.g.*, ignoring the advancement component and converting his obligation into a pure indemnification provision). An after-the-fact remedy, will not make Plaintiffs whole.

NATURE AND STAGE OF THE PROCEEDINGS

On October 10, 2012, Plaintiffs filed their Complaint, which seeks, among other things, (i) injunctive relief prohibiting Defendant from disclosing Plaintiffs' non-public information to third parties, including, but not limited to, REDACTED (ii) an award of damages resulting from Figlus' breach of the Partnership Agreement, and (iii) indemnification pursuant to the terms of the Subscription Agreement.² At that time, Plaintiffs also filed a motion to expedite and motion for a temporary restraining order.³

On October 16, 2012, the Court granted both motions during a telephonic hearing and, subsequently, issued a temporary restraining order dated October 19, 2012.⁴

On October 23, 2012,⁵ Defendant answered the Complaint.

A hearing on Plaintiffs' motion for a preliminary injunction (the "PI Motion") is scheduled for December 21, 2012, and this is Plaintiffs' opening brief in support of their PI Motion.

² Trans. ID 46878969.

³ Trans. ID 46878969.

⁴ Trans. ID 47163533.

⁵ See Trans. ID 47292497; Trans. ID 47812632.

STATEMENT OF FACTS

I. FIGLUS AND HIS EX-WIFE JOINTLY INVEST IN THE PARTNERSHIP.

In February 2006, Figlus executed the Subscription Agreement and committed REDACTED (as of that time) in exchange for Limited Partnership interests on the terms and conditions set forth in the Subscription Agreement and the Partnership Agreement.⁶ The Limited Partnership interests are jointly held by Figlus and his ex-wife, Jaresko, who is a co-founder of the General Partner and the chief executive officer of the Partnership.⁷

The Subscription Agreement contains multiple representations and warranties by Figlus, including that he had "been furnished with, and ha[d] carefully read, the ...

⁶ Ex. A, Tab 1 at Figlus 006215 (Subscription Agreement) ("1. The subscriber named on the signature page to this Subscription Agreement (the "Subscriber") hereby applies to become a limited partner of ... the "Partnership"[], *on the terms and conditions set forth in this Subscription Agreement and in the Amended and Restated Agreement of Limited Partnership of the Partnership, as the same may be amended and/or restated from time to time (the "Partnership Agreement")*, a copy of which has been furnished to the Subscriber."), Figlus 006216-17 ("7. The Subscriber hereby represents and warrants to, and agrees with, the General Partner and the Partnership that the following statements are true as of the date hereof and will be true and correct as of the Closing Date applicable to the Subscriber: ... (g) ... this Subscription Agreement constitutes, and *the Partnership Agreement* when executed and delivered *will constitute, a valid and binding agreement of the Subscriber, enforceable against the Subscriber in accordance with its terms.*"); Figlus Dep. at 6-7 (admitting Figlus signed the Subscription Agreement), 14 (admitting that by signing the Subscription Agreement, Figlus was agreeing to its terms).

⁷ Figlus Dep. at 21 (stating Jaresko was a founder), 198 ("Q. You have a joint interest in the LP's, right? A. Yes. Q. You and Natalie? A. Yes.").

Partnership Agreement."⁸ Notwithstanding the foregoing, Figlus now claims that he did not read the Partnership Agreement before he executed the Subscription Agreement (or at any time prior to his deposition on December 6, 2012).⁹ Figlus also now claims that he did not even read the Subscription Agreement before he executed it.¹⁰ Nevertheless, by executing the Subscription Agreement signature page and returning it to the Partnership, Figlus agreed to be bound the terms of the Subscription Agreement and the Partnership Agreement¹¹ – a fact he reluctantly admitted at deposition.¹²

⁸ Ex. A, Tab 1 at Figlus 006217.

⁹ Figlus Dep. at 10, 12, 15, 20-21, 22, 130, 180-181, 213, 214, 217-218, 240, 296 ("Q. Final question and then we'll take a break and I'm pretty sure I have no further questions. *Have you read the partnership agreement? A. Have I read it? No. Q. As of today? A. No.*").

¹⁰ Figlus Dep. at 10, 12, 15, 29, and 31.

¹¹ Ex. A, Tab 1 at Figlus 006223 ("By executing the signature page to this Subscription Agreement, the Subscriber [*i.e.*, Figlus] agrees to be bound by the foregoing."); *see also* Figlus Dep. at 8 ("I just signed the signature pages and had them faxed back to her office."); 24 (admitting Figlus voluntarily executed the Subscription Agreement and that no one forced him to sign the agreement).

¹² Figlus Dep. at 23-27 (claiming Figlus was not bound by Section 7(g) of the Subscription Agreement, which agreed to be bound by the Partnership Agreement); 30-32 (claiming Figlus was not bound by Section 14 of the Subscription Agreement, which granted the General Partner a proxy to execute the Partnership Agreement on behalf of Figlus); 32-33 (admitting Figlus was bound by both Sections 7(g) and 14 of the Subscription Agreement); *see also id.* at 32 ("Q. Just so I understand and the record is clear, if I, as an individual, who is about to sign a contract simply close my eyes and don't read it but sign it, I have the ability to later say nothing in that document binds me, is that your understanding, sir? ...A. No, I guess not. Q. That's not your understanding? A. I guess you are bound by it.").

On September 29, 2006, Figlus and Jaresko committed an additional REDACTED to the Partnership (in exchange for additional Partnership interests). In connection with that follow-on investment, Figlus executed another signature page for the Subscription Agreement and an "Investor Suitability Certificate."¹³ The latter document is one page and contains two certifications (conspicuously located one inch above Figlus' signature):

1. The *representations and warranties* of the Investor set forth in the Subscription Agreement *continue to be true and correct in all respects* as of the date hereof.
2. The Investor understands that the Fund is relying on this Certificate ... and ... the accuracy of the representations and warranties of the Investor in the Subscription Agreement.¹⁴

Figlus admits reading the first certification before signing, but claims that he simply "didn't pay attention to it."¹⁵ As for the second certification, Figlus claims he did not read it.¹⁶ Nevertheless, by executing and returning the documents to the Partnership, Figlus again agreed to be bound the terms of the Subscription Agreement and the Partnership Agreement (whether or not he took the time to read those documents).

¹³ Ex. A, Tab 1 at Figlus 006234, 006235; Figlus Dep. at 7, 19 (confirming his signature).

¹⁴ Ex. A, Tab 1 at Figlus 006234.

¹⁵ Figlus Dep. at 18-19.

¹⁶ *Id.*

Section 8 of the Subscription Agreement obligates Figlus to indemnify the Plaintiffs for any losses resulting from his breach of the Subscription Agreement and certain other documents.¹⁷ Specifically, it states:

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***. The Subscriber *will reimburse each Indemnified Party and the Partnership for legal and other expenses* (including the cost of any investigation and preparation) ***as they are incurred in connection with any such action***, proceeding or investigation (whether incurred between any Indemnified Party or the Partnership and the Subscriber, or between any Indemnified Party or the Partnership and any third party). The reimbursement and indemnity obligations of the Subscriber under this Section 8 will survive the Closing Date applicable to the Subscriber (or, if this Subscription Agreement is terminated pursuant to Section 5, such termination) and will be in addition to any liability which the Subscriber may otherwise have (including, without limitation, liabilities under the Partnership Agreement)....¹⁸

¹⁷ The Partnership Agreement was executed and delivered to the Partnership by Figlus, through a proxy (*i.e.*, the General Partner), in connection with his investment. Thus, the Partnership Agreement constitutes "a document furnished to the Partnership by [Figlus] in connection with the offering of Interests" to him.

¹⁸ The General Partner falls within the term "Indemnified Party," as defined in the Partnership Agreement. *See* Ex. A, Tab 5 § 4.7(a) (Partnership Agreement). The Subscription

Ultimately, the Partnership Agreement was executed by the General Partner and delivered to the Partnership on behalf of Figlus pursuant to an irrevocable proxy "to make, execute, sign and file the Partnership Agreement" on behalf of the Limited Partners.¹⁹ Figlus admits that he did not, at any time, attempt to revoke the foregoing irrevocable proxy.²⁰

II. INVESTORS ARE BOUND BY A CONFIDENTIALITY PROVISION.

The Confidentiality Provision is contained in Section 14.14 of the Partnership Agreement, which states:

1.

REDACTED

Agreement incorporates the Partnership Agreement definitions by reference. *See* Ex. A, Tab 1 ¶ 1 (Subscription Agreement).

¹⁹ *See* Ex. A, Tab 1 at Figlus 006223 (Subscription Agreement) ("14. The Subscriber hereby constitutes and appoints the General Partner as its true and lawful representative and attorney-in-fact ... to make, execute, sign and file the Partnership Agreement...."); Ex. A, Tab 5 (Figlus 006357) (Partnership Agreement) (executed by the General Partner on behalf of the limited partners "pursuant to a power of attorney executed in favor of, and delivered to, the General Partner").

²⁰ Figlus Dep. at 37, 38, 94. *See also* Ex. A, Tab 1 at Figlus 006215 (Subscription Agreement) ("2... The *Subscriber* understands that it *is not entitled to* cancel, terminate or *revoke* the subscription or *any agreements of the Subscriber hereunder.*").

REDACTED

That is, as a Limited Partner, Figlus is prohibited from disclosing any non-public information furnished to him by the General Partner regarding the General Partner or the Partnership. At deposition, Figlus conceded that "non-public" is a broad term (*e.g.*, it is not limited to "confidential" information):

Q. ... What do you understand the term non-public to mean?

A. It's not published.

Q. So if it is not publicly available, it is non-public?

A. Right. If I wanted to find it on the internet, I wouldn't find it there.²²

As discussed below, none of the information at issue in this action is "published" or available on the internet.

²¹ Ex. A, Tab 5 § 14.14 (Partnership Agreement).

²² Figlus Dep. at 79.

III. FIGLUS BREACHED THE CONFIDENTIALITY PROVISION.

From 2006 through early 2010, Figlus and Jaresko jointly shared the benefits of being Limited Partners of the Partnership. Around May 2010, however, Jaresko informed Figlus that she wanted a divorce and they separated.²³ Thereafter, Figlus began asking the General Partner to provide him with "all documentation pertaining to the shares Natalie and [Figlus] own in the funds managed by HCA, including reports" and, in addition, "all documents pertaining to the loans taken from HCA by Natalie on our behalf."²⁴

REDACTED

²³ See Ex. A, Tab 29 at Figlus 004885 ("[M]y wife has told me she wants a divorce and we are currently separated."); *see also* Figlus Dep. at 52.

²⁴ Ex. A, Tabs 45-50 at Figlus 006435.

²⁵ See Ex. A, Tabs 85-88.

²⁶ Ex. Ex. A, Tab 21 (December 2008 email to Figlus discussing loans); Figlus Dep. at 92. *See also* Ex. A, Tab 26 (December 2009 email to Figlus discussing loans).

²⁷ Figlus Dep. at 52-53, 55

REDACTED

Lenna Koszarny, the General Partner's CFO ("Koszarny"), responded to Figlus' request on February 3, 2011, and informed Figlus that "[t]he information requested is sensitive and only Founding Partners have access to certain information."³⁰ Figlus responded later that day and confirmed that he understood Koszarny's request for confidentiality.³¹

On February 10, 2011, Koszarny provided Figlus with: (1) the Security Agreement; (2) the Partnership Agreement, including Amendment No. 1; (3) the Subscription Agreement; (4) the Capital Account; and (5) the most-recent Quarterly Report for the Partnership. Each of the foregoing documents was, and remains, non-public information regarding the General Partner and the Partnership.³² To belabor the

²⁸ Figlus Dep. at 52, 57-58.

²⁹ Figlus Dep. at 53, 56-57, 62, 63 ("Q.... The first time you ever suggested that the [HCA] loans were inappropriate was a month or two after your wife moved out? ... A. Yes."), 118-119.

³⁰ Ex. A, Tabs 45-50 at Figlus 006434; *see also* Ex. B ¶ 9 (identifying Lenna Koszarny as "Founding Partner and Chief Financial Officer, Horizon Capital GP, LLC").

³¹ Ex. A, Tabs 45-50 at Figlus 006434.

³² Figlus Dep. at 75 ("Q: Do you agree with me that those documents were not publicly available at that time? A: Yes."); *id.* ("Q: These documents, at least, the ones that were given to you by Lenna, were non-public; right? A: Right.").

obvious, Figlus was provided the documents because he was a Limited Partner – *i.e.*, they were provided pursuant to the Partnership Agreement.

On September 2, 2011, Figlus made a second request "to receive directly any and all communications normally sent to investors in EEGF, which, as you confirm, I am."³³

On September 26, 2011, Koszarny, acting in her capacity as CFO of the General Partner, agreed to furnish additional non-public information relating to the Partnership and the General Partner, including the December 31, 2010 audited financial statements and three separate capital accounts and quarterly reports.³⁴ In her cover email, Koszarny, once more, reminded Figlus that the documents he requested constituted "confidential information."³⁵ Figlus' attorneys were copied on the correspondence.³⁶

During this time, as Figlus was requesting non-public information from the General Partner, Figlus was having meetings with REDACTED

³⁷ Also, in terms of the divorce, Figlus and Jaresko were having significant disputes.³⁸

³³ Ex. A, Tab 70 at Figlus 006413.

³⁴ *Id.*; *see also* Figlus Dep. at 75-76 (confirming that Ms. Koszarny is the General Partner's CFO and she is one of the individuals that would send Figlus information on behalf of the Partnership).

³⁵ Ex. A, Tab 70 at Figlus 006413; Figlus Dep. at 111.

³⁶ Figlus Dep. at 109.

³⁷ *Id.* at 95-97.

³⁸ *See, e.g.*, Ex. A, Tab 135 at Figlus 000230; Ex. A, Tab 146 at Figlus 000195; Ex. A., Tab 147 at Figlus 001126; Figlus Dep. at 274-76.

On November 9, 2011, Figlus made another request for non-public Partnership information.³⁹ Shortly thereafter, on November 17, 2011, REDACTED emailed Figlus, requested a meeting, and stated that he had "given some thought . . . about the kind of documents that [REDACTED would] like to see."⁴⁰ Although Figlus admits to being in possession of the Partnership Agreement for at least nine months by that point (if not longer), he testified that he had not bothered to read it.⁴¹

On December 15, 2011, Figlus received the Security Agreement and certain promissory notes from Koszarny.⁴² In late 2011, Figlus left Ukraine and returned to the United States until approximately May 2012.⁴³ Figlus, however, continued to have conversations with REDACTED regarding the Partnership.⁴⁴

³⁹ Ex. A, Tabs 85-88 at Figlus 000470.

⁴⁰ Ex. A, Tab 73 at Figlus 002476.

⁴¹ Figlus Dep. at 129-130.

⁴² Ex. A, Tabs 85-88 at Figlus 000470.

⁴³ Figlus Dep. at 151 ("I wasn't in Ukraine for most of that time. I forget the exact date that I left, but I left there some time, I believe, in December [2011], and I didn't return until May of 2012.").

⁴⁴ Figlus Dep. at 151. During this time, the communications between Figlus and REDACTED occurred primarily by Skype. During his deposition, Figlus testified that after this lawsuit was filed he voluntarily "wiped" his computer and destroyed certain relevant data (*e.g.*, his Skype logs). Figlus Dep. at 151-154, 308-310. While Figlus claims that the data loss was inadvertent, that is likely an issue to be addressed at a later day.

Upon his return to Ukraine in May 2012, Figlus met with REDACTED to discuss, among other things, the Partnership.⁴⁵ On May 24, 2012, REDACTED asked Figlus for "a copy of the legal documents that set up Horizon or the investment funds."⁴⁶ Figlus promptly responded and informed REDACTED that "[a]s an investor in EEGF, I have a copy of that document" – referring to the Partnership Agreement.⁴⁷ Figlus provided REDACTED with a copy of the Partnership Agreement on July 13, 2012.⁴⁸ Figlus, however, claims that he did not read the Partnership Agreement before providing it to REDACTED, nor did he make any effort to determine whether or not the Partnership Agreement contained a confidentiality provision.⁴⁹ Approximately one month later, while investigating a potential story regarding the Partnership (based on non-public information provided by Figlus) REDACTED requested an organizational chart from Figlus that "could possibly be included in the story to aid readers to understand what transpired at the firm."⁵⁰

On September 25, 2012, REDACTED informed Figlus that he contacted individuals with REDACTED and the

⁴⁵ Figlus Dep. at 151-159.

⁴⁶ Ex. A, Tab 121 at Figlus 000250.

⁴⁷ *Id.*; see also Figlus Dep. at 175 ("I probably would have been referring to the partnership agreement.").

⁴⁸ Ex. A, Tabs 133-134 at Figlus 001134; see also Figlus Dep. at 151-152.

⁴⁹ Figlus Dep. at 180-181.

⁵⁰ Ex. Ex. A, Tab 150 at Figlus 000191; see also Figlus Dep. at 185-186.