IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

PROGRESSIVE FINANCIAL STRATEGIES, LLC, a Delaware limited liability corporation, Plaintiff, v. FOCUS FINANCIAL PARTNERS, LLC, a Delaware limited liability corporation, Defendant.	)	C.A. No. _________ REDACTED PUBLIC VERSION FILED DECEMBER 1, 2009

VERIFIED COMPLAINT FOR BREACH OF CONTRACT AND INSPECTION OF BOOKS AND RECORDS PURSUANT TO 18 DEL. C. § 305 AND FOR DECLARATORY RELIEF

Plaintiff Progressive Financial Strategies, LLC ("Progressive") brings this action against defendant Focus Financial Partners, LLC ("Focus"), seeking inspection of certain books and records of Focus pursuant to both Section 9.01 of the Operating Agreement of Focus Financial Partners, LLC (the "Operating Agreement") and 18 Del. C. § 305. In support of this claim, Progressive alleges as follows:

PARTIES AND JURISDICTION

1. Progressive, a management company that operates StrategicPoint Investment Advisors, is a Delaware limited liability company with its principal place of business in Providence, Rhode Island. StrategicPoint is a Registered Investment Advisor and one of New England's leading investment advisory firms.

2. In 2006, Progressive became a founding partner and member of Focus. While Progressive's status is undisputed, Focus refuses to disclose to Progressive the amount of its ownership interest.

3. Focus is a Delaware limited liability company with its principal place of business in New York, New York. Focus bills itself as "the leading international partnership of independent, fiduciary wealth management firms."

4. This Court has jurisdiction pursuant to, *inter alia*, 6 Del. C. § 18-305(f).

NATURE OF THE ACTION

5. This is an action to compel Focus to honor its obligations under Section 9.01 of the Operating Agreement and Section 305 of the Limited Liability Company Act ("LLC Act") to make certain books and records available to Progressive for inspection. While Progressive's inspection rights under the Operating Agreement do not require any particular purpose, Progressive seeks to inspect those books and records to (i) determine the extent and value of its interest in Focus, (ii) assess possible mismanagement of Focus, and (iii) investigate possible inaccuracies in and/or deviations from the business plan and representations made to it by Focus in connection with the 2006 acquisition. All of these purposes are proper under Delaware law and reasonably related to Progressive's interest in Focus.

6. Focus has repeatedly frustrated Progressive's ability to obtain even the most basic information about the business operations, in direct violation of the Operating Agreement and Section 18-305 of the LLC Act. After telling Progressive (inaccurately) that "only . . . very large shareholders" were entitled to inspect its financial statements, Focus provided only a portion of the information to which Progressive is entitled as a result of its formal demand for access to the books and records of Focus. Moreover, the information provided to Progressive was significantly redacted. By way of example, the

"audited" financial statements were heavily redacted and did not even contain the name of the auditor who "certified" the statements. And Focus told Progressive that it could not bring its attorneys or accountants with it to inspect the limited information being made available for review. These actions compelled Progressive to file this action to obtain the books and records at issue.

FACTUAL BACKGROUND

<u>Focus's Acquisition of Progressive</u>

7. For twenty years, Progressive has provided its clients with high quality, ethical investment advisory services. One component of providing ethical advisory services is to align Progressive's economic interests with those of its clients to the fullest extent possible. Progressive does this by operating predominantly on a fee (as opposed to a commission) basis, with its fee equal to a fraction of the value of the client's portfolio.

8. Before it was approached by Focus, Progressive had been approached by another company, National Financial Partners ("NFP"), about a similar transaction. Progressive declined that request because of various concerns about NFP.

9. Upon information and belief, Focus was formed in or about 2005 to acquire investment advisory firms. In late 2005, Focus approached Progressive about becoming one of Focus's first acquisitions. After assurances by Focus to address the concerns that led Progressive to decline the NFP proposal, Progressive agreed to be acquired by Focus. Focus acquired Progressive in January 2006, pursuant to the terms of a Contribution and Purchase Agreement and several other related agreements. The

consideration for the purchase was a combination of cash (paid at closing and in subsequent earn-outs), Focus membership units, and a management agreement.

10. As a result of the acquisition, Progressive became a member of Focus and a signatory to the Operating Agreement attached hereto as Exhibit A. Section 11.05 of the Operating Agreement provides that it shall be governed by Delaware law.

11. Since January 2006, Focus has continued to purchase other investment advisory firms, and now owns a total of at least 16 such firms.

Progressive Becomes Concerned About Focus

12. At no time during the first three-and-a-half years after Focus acquired Progressive did Progressive make any request for information from Focus.

13. By mid-2009, however, Progressive became increasingly concerned about several aspects of the management and operations of Focus. First, because Focus refused to provide any meaningful information regarding its continuing acquisitions, Progressive was unable to determine the extent or value of its ownership interest. Moreover, Focus refused to disclose to Progressive the amount of its own ownership interest. The Schedule K-1s provided by Focus listed Progressive's share of the profit, loss and capital as "various." A true and correct copy of Progressive's most recent Schedule K-1 is attached hereto as Exhibit B.

14. The refusal by Focus to identify the amount of Progressive's ownership interest was a clear breach of Section 9.02(b) of the Operating Agreement, which obligates Focus to furnish the members with Schedule K-1s that include "a statement

showing each Member's share of Company income, gain or loss, expense and credits for the applicable Company fiscal year."

15. At the same time, Progressive was concerned about the financial terms of various acquisitions by Focus. When Focus acquired Progressive, Focus represented that it would value all potential acquisitions at [redacted] times earnings before owner's compensation ("EBOC") and would [redacted]. Progressive has been advised by certain other members, however, that in one or more acquisitions, Focus was not adhering to those acquisition parameters and was paying more than [redacted] times EBOC. Additionally, Focus represented to Progressive in 2005 that guidelines limited the percentage of cash consideration that it would pay in transactions. However, other Focus members have advised Progressive that these guidelines had not been adhered to in one or more transactions.

16. Progressive did understand, however, that the recent transactions involved the acquisition of several investment advisory companies that generated a substantial portion of their revenue from commissions, as opposed to fees. While such transactions can generate increased revenue in the short-term, they are viewed within the industry as creating a less stable and less valuable company. This is evidenced by the fact that commission-based entities are valued at a lower multiple than fee-based entities.

17. The heavy reliance upon commission-based brokerages was one of the reasons that Progressive declined the advance from NFP. When Focus approached Progressive about a potential acquisition, it assured Progressive that its business model was built upon fee-based investment advisors.

18. Progressive was concerned that Focus's actions in deviation from its representations were sacrificing the long-term stability of Focus in exchange for a near-term increase in revenue. In previous discussions, certain members of Focus's management told a representative of Progressive that it was in management's individual interest to take Focus public in order to maximize their personal profit. While the departure from the acquisition parameters and the acquisition of commission-based brokerages could facilitate the initial public offering that is so important to the management of Focus, there is significant risk these departures would harm Progressive and its members in the long-term.

19. For this reason, and to protect the interests of its employees and shareholders, Progressive – through its President, David Brochu – contacted Focus to request copies of various audited and unaudited financial statements.

20. The following day, the CEO of Focus responded to Mr. Brochu's request by email. Seeking to deter any inquiry, the CEO stated that the Operating Agreement "provides for access to financials only for very large shareholders." This statement was inaccurate. Under Section 9.01 of the Operation Agreement (Exhibit A, hereto):

> [e]ach Member shall have free access during normal business hours to discuss the operations and business of the Company with the Officers of the Company, and to inspect, audit or make copies of all books, records and other information relative to the operations and business of the Company at its own expense, subject to reasonable confidentiality agreements that the Board of Managers may impose.

Although the general counsel of Focus was copied on the email, she did not correct this misstatement of Progressive's rights under the Operating Agreement. The CEO then offered to provide only copies of audited financial statements.

21. Over the next few weeks, Focus and Progressive exchanged multiple emails regarding the request by Progressive for access to information from Progressive. When those communications failed to result in the provision of the requested information by Focus, Progressive took formal action.

The Demand Letter

22. On October 10, 2009, Progressive sent Focus a written demand letter requesting access to certain books and records of Focus (the "October 10 Demand Letter"). A true and correct copy of the October 10 Demand Letter is attached hereto as Exhibit C.

23. The October 10 Demand Letter explained the proper purposes for the request (which, while relevant under Section 18-305 of the LLC Act, are irrelevant under Section 9.01 of the Operating Agreement). Specifically, the October 10 Demand Letter explained that:

> [t]his demand is made in good faith and for a proper purpose. The purpose is to complete a financial review of the company's records so that Progressive and Mr. Brochu can determine the nature of Progressive's interest in Focus, whether such membership interest has been improperly diluted by issuances of Units, and whether Units have been issued to increase revenue without regard to the impact such issuances will have on the Members as a whole. As you know, Mr. Brochu has become increasingly concerned about the direction taken by Focus since the acquisition of [Progressive] from the business plan originally represented to him by Focus, including the shift from asset management to brokerage, the failure of Focus to integrate platforms among operating units, and the absence of cost savings and synergies among operating units. The information requested is directly related to the aforesaid purpose . . .

24. All of these purposes are proper purposes that are reasonably related to Progressive's status as a member of Focus for the inspection of the items identified in the October 10 Demand Letter.

Focus Refuses to Honor Progressive's Right to Information

25. In its October 16, 2009 response to the October 10 Demand Letter, Focus (through its outside counsel) refused substantially all of the requests by Progressive. A true and correct copy of the October 16 Response is attached hereto as Exhibit D.

26. By way of example, Progressive sought to inspect "the general ledger, records of cash, accounts receivable and accounts payable, funded debt and other liabilities, pending and threatened litigation, and allocation of income by function or unit." All of this information is within the scope of Progressive's rights under both Section 9.01 of the Operating Agreement to review "all books, records and other information relative to the operations and business of the Company" and Section 18-305 of the LLC Act. In response, Focus offered to provide only "interim financial statements for 2009" and "audited financial statements for 2008 and 2007." And even that information was heavily redacted when produced by Focus. A true and correct copy of the Consolidated Financial Statement for the years ended December 31, 2008 and 2007 provided by Progressive is attached hereto as Exhibit E.

27. While Focus's concentration upon the acquisition and operation of investment advisory firms makes the terms of its acquisitions critical to the evaluation of its condition, the financial statements provided by Focus redact *all* information about *every* acquisition. It is therefore impossible for any member to evaluate the acquisition

decisions being made by Focus or to know how those acquisitions affect the extent of its ownership interest, the value of its interest, or the long-term stability of Focus. Moreover, the name of the auditor who "certified" the financial statements provided by Focus is redacted from the copy provided to Progressive.

28. The redaction of such information is a breach of Section 9.02(a) of the Operating Agreement, which requires Focus to furnish the members with audited financial statements "in reasonable detail and accompanied by an unqualified report of the company's public accounting firm as to such financial statements representing fairly the financial position of the Company." While Progressive recognizes that Section 3.04(a) of Operating Agreement provides that Focus need not provide the class and number of Units owned by any other member, that provision can be addressed through targeted redactions. Progressive is not concerned about and is not seeking that information, and Section 3.04 does not provide a basis for withholding all information regarding every transaction. Indeed, the wholesale redaction is inconsistent with Progressive's right under Section 9.01 of the Operating Agreement. When Progressive proposed to Focus that it take steps to protect any identifying information, Focus refused to do so.

29. With respect to other requests, Focus only agreed to provide certain information upon execution of the "customary confidentiality agreement" attached to the October 16 Response. While Section 9.01 of the Operating Agreement permits Focus to condition review upon "reasonable confidentiality agreements," the "customary confidentiality agreement" provided by Focus was unreasonable. First, the "customary

confidentiality agreement" sought to undermine this Court's exclusive jurisdiction over disputes regarding access to books and records by including a consent to jurisdiction in New York for any dispute related to the confidentiality agreement. Second, the "customary confidentiality agreement" sought to preclude Progressive from using any information in connection with its investigation of any potential claim or dispute with Focus by purporting to limit the use of such information to a "financial review" of Focus. The request for these restrictions gives rise to further legitimate concern by Progressive regarding the management of Focus.[1]

30. Focus also ignored certain requests altogether. For example, Progressive sought "all reports, opinions and other materials relied on" by the managers, "including . . . copies of all fairness opinions obtained by Focus in connection with all issuances of Units by Focus since January 6, 2009." Focus disregarded this request.

31. When Focus did provide information, it often failed to comply with its obligations under the Operating Agreement and Section 18-305 of the LLC Act. For example, while Progressive sought the names and addresses of each member, Focus provided only their name and home state. Section 18-305(a)(3) of the LLC Act, however, requires Focus to provide a business, residence or mailing address for each member. Similarly, Section 3.04(a) entitles Progressive to "the name and address of each

[1] After Progressive submitted its demand, Section 9.01 of the Operating Agreement was amended. While the amendment did not change the scope of inspection rights in any material respect, it eliminated the portion granting management the right to require "reasonable confidentiality agreements." Progressive recognizes, however, that its demand must be evaluated under the Operating Agreement in effect at the time of the demand.

other Member." A true and correct copy of the November 6 letter in which Focus provided this information is attached hereto as Exhibit F.

32. Focus also claimed to lack certain information requested by Progressive. Specifically, in response to a request for all tax returns filed by Focus (the disclosure of which is provided for by both Section 9.01 of the Operating Agreement and Section 18-305(a)(2) of the LLC Act), Focus claimed that it did not file any such returns. The financial statement provided by Focus, however, states that "[t]he Company files income tax returns in the U.S. federal jurisdictions as well as various state jurisdictions and the United Kingdom."

33. Focus further stated that it would make limited documents available for inspection at its office. Focus advised Progressive, however, that it would not permit either Progressive's counsel or its accountant to accompany Progressive during any such inspection.

34. The refusal by Focus to provide information to which Progressive is entitled and the restrictions that Focus sought to impose upon Progressive's review are improper attempts to conceal the financial condition and potential mismanagement of Focus. These actions constitute a breach of Focus's obligations and Progressive's rights under the Operating Agreement and Delaware law.

Count I
Breach of Contract

35. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

36. The Operating Agreement is a valid, enforceable contract.

37. Progressive has fully performed its obligations under the Operating Agreement.

38. The refusal of Focus to provide the information sought by Progressive in its October 10 Demand Letter constitutes a breach of the Operating Agreement.

39. Progressive has been injured by Focus's breach of the Operating Agreement and has no adequate remedy at law.

Count II
6 Del. C. § 18-305

40. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

41. Progressive is a member of Focus.

42. Progressive has complied with the requirements of Section 305 of the LLC Act with respect to the form and manner of making a demand for inspection and copying of the books and records of Focus.

43. Progressive's purposes for requesting the demanded materials are proper purposes reasonably related to its interest as a member of Focus.

44. Focus has refused to provide substantially all of the information requested in the October 10 Demand Letter, in breach of its obligations under Section 305 of the LLC Act.

45. For the foregoing reasons, Progressive is entitled to inspect and make copies of the demanded books and records that Focus refused to provide.

46. Progressive has no adequate remedy at law.

Count III
Declaratory Judgment

47. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

48. Focus has advised Progressive that it will not permit Progressive's counsel or accountants to accompany it while inspecting any books and records of Focus. Focus has also advised Progressive that it may only use information provided by it for purposes of conducting a "financial review" of Focus. Progressive believes that these restrictions are contrary to its rights under the Operating Agreement and the LLC Act.

49. The ability of Progressive's lawyers and accountants to accompany it and review the results of any inspection presents a concrete and live controversy among the parties that is fit for judicial resolution.

50. Progressive therefore seeks a declaration that (a) its lawyers and accountants may accompany it while it inspects the books and records of Focus, and (b) it may share any information provided by Focus with its counsel for purposes of evaluating whether Focus has complied with its legal obligations.

Count IV
Declaratory Judgment

51. Plaintiff repeats and realleges the allegations set forth above as if fully set forth herein.

52. Focus has taken the position that Section 3.04(a) of the Operating Agreement relieves it of any duty to provide any information regarding the terms of any of its acquisitions. While Progressive recognizes that Section 3.04(a) precludes it from

ascertaining "the class and number of Units" owned by other members (and is agreeable to the implementation of safeguards to protect that information), it believes that withholding altogether all information regarding every acquisition is a violation of its rights under Section 9.01 "to inspect, audit or make copies of all books, records and other information relative to the operations and business of the Company."

53. The extent to which Focus may withhold altogether information regarding other acquisitions presents a concrete and live controversy among the parties that is fit for judicial resolution.

54. Progressive therefore seeks a declaration that Focus (a) may not withhold altogether information regarding its acquisitions, and (b) must provide information regarding its acquisitions to Progressive (subject to appropriate safeguards to protect "the class and number of Units" owned by other members).

Prayer for Relief

WHEREFORE, Progressive respectfully requests that the Court enter an Order:

a. Summarily directing Focus to provide to Progressive and/or permit Progressive to inspect and make copies of the books and records as requested in the October 10 Demand Letter;

b. Declaring that (i) Progressive's lawyers and accountants may accompany it while it inspects the books and records of Focus, (ii) Progressive may share any information provided by Focus with its counsel for purposes of evaluating whether Focus has complied with its legal obligations, (iii) Focus may not withhold altogether information regarding its acquisitions, and (iv) Focus must provide information regarding its acquisitions to Progressive (subject to appropriate safeguards to protect "the class and number of Units" owned by other members);

c. Awarding Progressive its costs, fees and expenses, including reasonable attorneys' fees; and

d. Granting Progressive such other and further relief as the Court deems just and proper.

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